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BOOK REVIEW

HOW FAR WE HAVE TO GO

And We Are Not Saved: The Elusive Quest for Racial Justice. By Derrick Bell. New York: Basic. Pp. 288. \$19.95.

Bryan Fair*

Imagine an America without a legacy of slavery and racism. Imagine an America where no group is subordinate to another; an America where the incorporating principles of equality and equal treatment under the laws actually apply to all Americans. Can you imagine an America where we live in multi-ethnic communities and attend multi-ethnic churches and schools?

This is not the America in which we live, nor is it the America of our past experience. Americans live by race and Americans live by class. Increasingly, our daily affairs are ordered and restricted by race and class. Our homes, workplaces, schools, social clubs and churches all reflect the historical racial injustice which is our common American experience. In our America, most of us are measured by color, rather than character or contribution. But it is not simply White against Black or Black against Latino; it is also poor Black against middle-class Black, and poor White against some other middle-class White ethnic group. In our America, class stratification, along with racism appears to increase by the moment. As a result of America's legacy of slavery and racism, in our America racial and economic injustice are facts of life for ourselves and our posterity.

In his recent book, entitled *And We Are Not Saved*,¹ Derrick Bell, Professor of Law at the Harvard Law School and former Dean at the University of Oregon at Eugene, School of Law, discusses the efforts of various Americans, Black and non-Black, who have sought to achieve racial and economic justice for Black Americans. In addition, Bell critiques the recent efforts of civil rights advocates in light of current Supreme Court rulings.

Professor Bell is more than simply a legal scholar regarding complex racial issues. In this book, he demonstrates his mastery of American history from the colonial period through the Revolutionary and Civil Wars, Reconstruction and Populism, the Civil Rights Movement to the present. His effective use of creative writing to discuss ever-important racial issues is brilliant.

* Mr. Fair is currently a Lecturer in Law at the University of California, Los Angeles, School of Law. J.D. Univ. of Calif. Los Angeles 1985; B.A. Duke University 1982. He is a member of the California Bar. The author has institutionally employed the upper case when using the terms "Whites" and "Blacks." In the author's judgment racial equality requires that we use proper nouns to designate racial groups, including Whites, Blacks, Asian-Americans, Latinos and Native Americans. In light of American history and the subordination of one race by another, it seems important to use such labels consistently.

1. D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 3 (1987). The book's Introduction summarizes the intended scope of the book.

In the tradition of Plato or Socrates, Bell uses tales or fables to identify "enduring truths" of history. Bell employs fiction and fact to posit significant questions for our time. Indeed, the substantial factual references in the book, especially to recent Supreme Court decisions on racial issues, make the book even more useful and important to reading.

Although much has already been written about racial issues, the book is full of provocative ideas regarding why and how social reformers have failed to achieve racial and economic justice through the courts and legislative processes. In some ways, Bell has taken himself and other Civil Rights lawyers to task. He has not spared White policymakers who have consistently found ways to bastardize "reforms" to ensure continued White domination. The book reflects how slavery and racism have affected American political, economic and social history.

Bell says that the purpose of the book is "mainly to provoke discussion [regarding racial equality] that will provide new insights and prompt more effective strategies."² The book far exceeds its ambitious statement of purpose and I highly recommend it to others who share the goal of racial justice and a more humane society.

Bell "creates" as the central character of the book Geneva Crenshaw, a brilliant and successful former Civil Rights attorney. Crenshaw is described as a strong and stern Black woman who has remained focused solely on her Civil Rights work, at the expense of her mental well-being. Crenshaw calls upon her male lawyer friend, who narrates the book, and who along with Crenshaw had worked tirelessly during the desegregation and voting efforts between the 1940's through the 1960's, but who is now a law professor, to interpret ten metaphorical tales or Chronicles that Crenshaw has envisioned.

In each Chronicle, Crenshaw and her male lawyer friend review the vision and then discuss its constitutional implications in light of leading U.S. Supreme Court authorities. The discussions allow both characters to express their strong, and usually conflicting, views on the significance of each Chronicle. Bell, as an author, is thus able to reiterate at least two different perspectives and many arguments regarding the various issues discussed.

In the book's Introduction, Bell acknowledges that much has been said about racial issues; however, he states that historically racial issues have been integral to this country's most important concerns. Bell states that,

Racism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.³

Bell contends that while all manner of civil rights laws and precedents are in place, racial justice still eludes us. He argues that the protection of civil rights laws is diluted by lax enforcement, by the establishment of difficult-to-meet standards of proof, and by the increasing irrelevance of antidiscrimina-

2. *Id.* at 3.

3. *Id.* at 4-5 (quoting Laurence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV., 317, 330 (1987)). Throughout the book Bell recalls the prophetic words of 19th and 20th century social reformers to emphasize that racial injustice is a problem as old as America.

tion laws to race-related disadvantages, which are as likely the result of social class as of color. Bell states finally that the discrepancy between the nation's deeply held beliefs and its daily behavior adds a continuing confusion to racial inequalities that undermine effective action.⁴ These central themes are discussed in some combination in each Chronicle.

CHAPTER 1

The Chronicle of the Constitutional Contradiction opens with Crenshaw journeying back in time to the Constitutional Convention of 1787. The purpose of her journey is to apprise the White men gathered there of what the Nineteenth and Twentieth centuries will hold as a result of their compromise on slavery. Despite her superior knowledge and her eloquent and accurate presentation of subsequent history, the delegates, most of whom were property holders are not persuaded. In their view, property, including slaves had to be protected at all costs in order to form the Union. While Crenshaw is unable to persuade her audience, the implications of her journey are monumental and Bell demonstrates several "enduring truths" through his first tale.

Bell articulates as the basic contradiction in the United States Constitution—slogans of liberty and individual rights *designed* to guarantee that neither a strong government nor the masses would be able to interfere with the property rights of White men, such as those gathered in Philadelphia in 1787. Bell states that the Framers could not have taken themselves seriously or their ideas literally and that they knew very well the likely consequences of slavery, then and now.

By reiterating this fundamental contradiction, Bell reminds us that only racially romantic versions of American history continue to deny that slavery was at the foundation of the American economy. Both Northerners and Southerners held slaves and benefitted from the slave economy. Bell suggests that as we celebrate our Constitution's bicentennial, we should not ignore that the property rights of Englishmen were preserved in that Convention over two hundred years ago by destroying the rights of Africans. One example of this fact is that the original Constitution contained no fewer than ten specific provisions for the purpose of protecting property in slaves.⁵

The message of the first Chronicle is that no one could have prevented the Framers from drafting a Constitution including provisions protecting property in slaves. Bell states that because this country's survival required the economic advantage provided by the slave system, it was essential that slavery be recognized, rationalized, and protected in the country's basic law.⁶

The discussion following the first Chronicle connects the effects of slavery and the current status of American Blacks. Bell tells us that reports and statistics on Black America illustrate all too clearly that the faith of social reformers has been betrayed and that "real freedom" is *not* almost here.⁷ The Chronicles cite several reports which indicate the widening income inequality between Blacks and Whites, the growing numbers of unemployed Blacks, the

4. *Id.* at 5.

5. *Id.* at 34-41.

6. *Id.* at 43.

7. *Id.* at 44-45.

disparity of median net worth between Black and White families,⁸ the disappearance of Black, adult men and the effects of such absence on Black families and the nation.⁹ Bell uses such statistics to reiterate that social reform efforts have fallen far short of eliminating the subordinate status of Black Americans that was made a tenet of our basic law two hundred years ago.

CHAPTER 2

The Chronicle of the Celestial Curia introduces a world court for social reformers which has been convened to determine what action should be taken with respect to America in light of the ineffectiveness of civil rights litigation. Bell states that, not surprisingly, most of the delegates are people of color to reflect the fact that most of the world's population are people of color. The Curia Sisters present two competing proposals: revolutionary protest and mass emigration.¹⁰ Again, Bell as in many parts of the book, realistically assesses similar arguments made throughout history.

To achieve their goal, the Curia Sisters devise a diabolical plan that will eventually lead Blacks to either disruptive protest or exodus. In the plan, a Conservative Crusader is appointed to the United States Supreme Court to wage an endless war against the "liberal" orientation of its decisions. The Crusader will promote policies designed to create even greater hardship for poor Americans. The Crusader will incite radical reform by hardening the hearts of the upper-classes against those whom they exploit. As the condition of the lower classes worsens, it becomes even more apparent that predictions of either a revolutionary race war or mass exodus are eminent.¹¹ Bell does not suggest that Blacks are planning either revolutionary protests or mass exodus. Past efforts at mass emigration have had little success and there is the view among Blacks that we have as much right to the resources of America as any other American. Bell does suggest throughout the book that continued oppression of Blacks will inevitably lead to confrontation.

In the discussion, Bell suggests that it is unlikely that mass revolt or protest will result from recent rulings by the Rehnquist Court. He states that while members of the Court may hold varying views on how to resolve racial issues, they seemed unified in the task of harmonizing those decisions with their determination to preserve and protect the Court as an institution.¹²

Bell states that Supreme Court decisions regarding civil rights and racial issues are generally very conservative and are designed more to diffuse discontent than to bring about meaningful social or economic reform. Bell finally illustrates by numerous examples that unless there is at least a perceived benefit to Whites, civil rights legislation has received very little support.¹³ Recalling the terse criticism in *Brown II* of the Warren Court for its "all deliberate speed" language, Bell quotes Lewis M. Steel:

Never in the history of the Supreme Court had the implementation of a con-

8. *Id.* at 45-47. Bell suggests the gap between the accumulated assets of Whites and Blacks has worsened since 1980 under the Reagan Administration.

9. *Id.* at 52-53.

10. *Id.* at 54-56.

11. *Id.* at 59.

12. *Id.* at 60.

13. *Id.* at 61-69. Bell canvasses Supreme Court cases on voting rights, desegregation, admissions and employment as they relate to Blacks.

stitutional right been so delayed or the creation of it put in such vague terms. The Court thereby made clear that it was a White court which would protect the interests of White America in the maintenance of stable institutions. . . .¹⁴

As for a solution to the backward shift in civil rights laws, Bell suggests that real economic and political power will come from continued efforts to increase the number of Blacks and others who advocate for equal opportunity and an end to racial injustice. Bell says one area where such power can be realized is through increased voting.¹⁵

CHAPTER 3

The Chronicle of the Ultimate Voting Rights Act introduces another character, a Senator, who because of the efforts of Crenshaw has decided to support a new Voting Rights Act and to abandon his reapportionment bill designed, like many, to dilute Black voting power. In Part One of the Senator's new legislation, every person who votes is given a tax rebate or cash to cover voting related travel costs. Bell reminds the reader that voting for many poor or working-class people often means a long trip to the courthouse where such voters are intimidated by unfamiliar procedures or hostile officials.¹⁶ In Part Two of the bill, Black voters are guaranteed to proportional voting representation in numbers equal to their portion of the population.¹⁷

In the discussion following the Chronicle, Crenshaw and Bell discuss the potential political and constitutional problems with each part of the Voting Rights Act, especially Part Two. In one heated exchange, Bell writes:

. . . The use of designated seats to ensure minority-group representation is not an idea the Senator had to steal. . . . But many civil rights advocates agree with the late Justice William O. Douglas that such schemes "have no place in a society that honors the Lincoln tradition. . . [where] the individual is important, not his race, his creed, or his color."

Crenshaw responds:

Though you know the sorry history of Black people and the ballot as well as I do, you persist in your fairy-tale beliefs so removed from reality. . . .¹⁸

What follows is a very perceptive discussion of proportional representation plans and re-districting schemes, and an evaluation of legislative and judicial interpretations of such plans and schemes.¹⁹ In turn, Bell suggests that Blacks should continue to use the ballot against racial injustice. He also castigates those Whites who simply cannot bring themselves to vote for any Black.

CHAPTER 4

The Chronicle of the Sacrificed Black Schoolchildren intimates the significant consequences likely if, during the desegregation period or today, all the

14. *Id.* at 72-73.

15. *Id.* at 88.

16. *Id.* at 86-87.

17. *Id.* at 89-90.

18. *Id.* at 94-97.

19. *Id.* at 102-03. Through this Chronicle, Bell very cleverly proves the saying made popular during the peak of the busing era: It's not the bus, it's us. Black people have never been unaware of the perverse racial hatred toward them. So, when Whites fought against busing their children great distances into unsafe Black neighborhoods, Blacks understood that the bus was not the real problem.

Black schoolchildren had simply disappeared. In the Chronicle there is a financial crisis and ensuing scandal because of the "disappearance" of all the Black schoolchildren of a city.²⁰

The public school superintendent reports to the media that because more than fifty-five percent of public school population had been Black students, and because state funding of schools was based on average daily attendance figures, the school system faced a serious deficit during the current year.²¹

The media is informed that although as a direct result of desegregation funds, monies were to be available for increases in teachers' salaries, teacher aides and in-service training programs. The superintendent reported that without the Black schoolchildren, many newly-hired teachers and all the aides would have to be released. In addition, new school buses, bus drivers and mechanics would not be hired. School construction plans for rehabilitation and new building are scrapped. There is no need for the millions of dollars in new equipment, furniture and school supplies. Moreover, without the Black schoolchildren, expected federal grants are now canceled. The message continued: There were lost state funds; tax rates would have to increase and several million dollars had already been paid in legal fees during the desegregation battle.²² Bell writes:

The message was clear. While the desegregation debate had focused on whether black children would benefit from busing and attendance at racially balanced schools, the figures put beyond dispute the fact that virtually every White person in the city would benefit directly or indirectly from the desegregation plan that most had opposed.

...

Gradually, all in the community came to realize the tragedy's lamentable lesson. In the monumental school desegregation struggle, the intended beneficiaries had been forgotten long before they were lost.²³

The dialogue following the Chronicle reviews the failure of desegregation policies and the irreparable injury the policies have had on Black schoolchildren. In addition, there is reference to the forced closing of Black neighborhood schools, the firing of Black teachers and the demoting and degrading of Black school administrators.²⁴ Bell suggests that as W.E.B. DuBois said in the early years after *Brown*, the self-interest of White policymakers is a valid explanation for the desegregation orders. Bell says that the same school board members who had promoted segregation were allowed by desegregation to create magnet schools and to use desegregation funds to generally improve the educational services and resources of Whites.²⁵

Bell reminds us that few social reformers had the insight of Dr. DuBois who urged and advised that "Blacks need neither segregated schools nor mixed schools. What they need is education."²⁶ Finally, Bell states that our goal to gain educationally effective schools²⁷ will elude us until the time that

20. *Id.* at 105.

21. *Id.* at 105-06.

22. *Id.* at 107.

23. *Id.* at 104-09.

24. *Id.* at 108-09.

25. *Id.* at 118-20 (quoting DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328 (1935)).

26. *Id.* at 118.

27. *Id.* at 121.

there is both equal educational opportunity and equal economic opportunity.²⁸ This Chronicle also illustrates that racism and self-interest among Whites against Blacks are not past history. Bell demonstrates how Whites have disabused the *Brown* decisions and have again created benefits for themselves through laws clearly intended to benefit Blacks.

CHAPTER 5

The Chronicle of the Black Reparations Foundation— responds to the age-old question who will fund social and economic programs to reverse the worsening plight of Blacks and others “living” at or below the poverty line. The fifth Chronicle tests the viability of such an economic solution.

Bell introduces Ben Goldrich, one of the world’s richest men, who decides that he will provide his personal fortune to create the Black Reparations Foundation. The Foundation’s purpose is to bring economic justice to the least fortunate Blacks whose ancestors were refused such justice after the Civil War.²⁹ Bell reminds the reader of the efforts of Thaddeus Stevens and Charles Sumner to break up Southern, Confederate-owned plantations and provide newly-freed Blacks with “Forty Acres and a Mule.”³⁰ While Goldrich is convinced that Stevens’ and Sumner’s goal was right, he believes that government is the wrong vehicle for reparations. Goldrich believes that we live in an era where there is great public support for spending billions for military defense to protect against foreign threats, and equally great opposition to any spending for social programs to guard against domestic disruption. For such reasons, Goldrich decides that the program must be privately funded.³¹

From the twenty-five billion dollar foundation, reparation grants are distributed in monthly payments to Blacks in amounts which equal a percentage of currently earned income. Additional sums were available for remedial schooling, job training, job placement and child care. In response to the Foundation, “one observer noted that, in black communities across the country, ‘optimism is up and blood pressure levels are down.’”³²

The reaction of Whites was not positive and there were many who discouraged Goldrich’s plan. The government launched an investigation into Goldrich’s affairs and looked for legal flaws in the plan. The usual arguments of reverse discrimination emerged and some argued that the Foundation was not entitled to charitable status under the tax laws. Others urged that other economically disadvantaged Americans be included. Goldrich was condemned as a traitor to his class and an enemy to his race; however, he proceeded even more vigorously with his plan.³³

The ensuing discussion reviews the reparations concept historically with respect to Native Americans, Blacks, and Jews who wished to leave Germany

28. *Id.* at 124-25. Reparations are no more than a means of compelling wrongdoers to pay compensation for their misdeeds. While most can probably agree that slavery was wrong, most Americans have a hard time taking the next step and compelling the government, which incorporated slavery in American law, to pay compensation to Blacks. Interestingly, every day in American courts huge compensation awards are ordered.

29. *Id.* at 125-26.

30. *Id.* at 126-27.

31. *Id.* at 128-29.

32. *Id.* at 129-30.

33. *Id.* at 131-33.

after World War II. There is also reference to the experience of Japanese-Americans.³⁴ Bell states that he, as counsel for Goldrich, would argue that the reparations program is not racially discriminatory and that cases, such as *Regents of the Univ. of California v. Bakke*³⁵ and *Bob Jones University v. United States*³⁶ are distinguishable. Bell says Foundation giving has traditionally been allowed broad discretion and to prohibit this Foundation would raise serious due process questions.³⁷ In addition, anticipating various types of petty harassments, Bell suggests that the Foundation might be undermined indirectly.³⁸

CHAPTER 6

The Chronicle of the De Vine Gift relates to the presence of minority faculty members at nationally ranked law schools, and more generally, the idea that the presence of too many minority faculty in some way causes such schools to lose national stature.³⁹

Crenshaw is in her second year on the faculty at a prestigious law school. She is the first Black. She enjoys teaching and writing but is exhausted as she has become the personal counselor and confidante of virtually all the Black students and a number of White students. Her appointment schedule is overbooked. There are classes to prepare and numerous faculty committee meetings. There were the "racial emergencies" which Crenshaw wanted and was requested to be involved with. And, of course, there are research and writing requirements.⁴⁰

Crenshaw is visited by a stranger, De Vine Taylor, who wants to help a Black who is committed to helping other Blacks. Taylor has large sums of money and is prepared to use his national Black business network to locate Blacks and other qualified minorities to join Crenshaw on the law school faculty. With Taylor's behind the scenes help, soon there were six minority faculty members, more than any other major law school. Then came the seventh candidate, a former law review editor, federal appeals court clerk, United States Supreme Court clerk and a lawyer for three years with a major New York law firm.⁴¹

The Dean of the law school visits Crenshaw and proclaims that he does not think the school could hire another minority for a while. The Dean says: This is one of the oldest and finest law schools in the country. It simply would not be the same for our students and the alumni with a *predominantly* minority faculty—as I thought you, an advocate of affirmative action, would understand.⁴²

After reminding the Dean that twenty-five percent is not equivalent to a majority, Crenshaw resigns and receives letters from the seventh candidate

34. 438 U.S. 265 (1978).

35. 461 U.S. 574 (1983).

36. *Id.* at 133-34.

37. *Id.* at 136-37.

38. *Id.* at 140.

39. *Id.* at 140.

40. *Id.* at 141-43.

41. *Id.* at 143 (emphasis added).

42. *Id.* at 146-47.

and Taylor. The power and significance of the letters can only be captured by reading them. Taylor concludes:

As a token minority law teacher, Geneva, you provided an alien institution with a facade of respectability of far more value to them than any aid you gave to either minority students or the cause of black people. You explained your resignation as a protest. But you should realize that removing yourself from that prestigious place was a necessary penance for the inadvertent harm you have done to the race you are sincerely committed to save. I am happy to see that the De Vine Gift has served its intended purpose. I wish you success in your future work.⁴³

The discussion following the Chronicle provides a candid summary of the experiences of many minority faculty and students at major predominantly White law schools. Bell states that beyond the general resistance to new minority faculty, there is an adherence to an artificial measure of competence. One example of this is the preference for law teachers with outstanding grades from law school rather than an outstanding record in law practice.⁴⁴

The discussion continues with an insightful evaluation of how the Supreme Court might resolve a lawsuit by the seventh candidate. Bell suggests that the case is not a clear winner for the plaintiff because "courts have shown an unwillingness to interfere with upper-level hiring decisions in the elite professions, including university teaching."⁴⁵

Bell next suggests that the law school might also argue that its national reputation, ability to attract faculty and students and its alumni support might be adversely affected by the hiring of the seventh candidate and thus its hiring decision was further justified. Bell says that an alert Court might reject such arguments in light of the outstanding quality of minority faculty, such as the seventh candidate.⁴⁶

Bell says that the Chronicle calls into question the real intent and nature of affirmative action plans. If the goal were truly a multi-ethnic faculty, clearly it would not matter that suddenly the faculty was twenty-five percent minority. Bell says that the influx of qualified minority faculty in some manner, threatens White faculty members' traditional illusions of superiority. This, too, would not be the case if more White faculty members were committed to a multi-ethnic faculty and law school community.⁴⁷ If, as one often hears, there are few minority faculty applicants, national universities, such as UCLA, Stanford and Harvard, and associations, such as the American Association of Law Schools must provide leadership to promote increases in the minority applicant pool. For example, such schools and associations could encourage students to pursue teaching by increasing available fellowships.

The discussion closes with the ominous words of the Protestant theologian Reinhold Niebuhr who wrote over fifty years ago that:

[Black people can not expect] complete emancipation from the menial social and economic position into which the White man has forced [them], merely by trusting in the moral sense of the White race.⁴⁸

43. *Id.* at 147-48.

44. *Id.* at 149.

45. *Id.* at pp. 150-51.

46. *Id.* at pp. 156-58.

47. *Id.* at p. 160.

48. *Id.* at pp. 162-77.

Niebuhr suggested that while large numbers of White people would identify with our [the Blacks] cause, the White race in America will not admit Blacks to equal rights unless forced to do so. It is not surprising to me that as a rule many Blacks do not trust Whites. Blacks live daily the nightmare of racial hatred and intolerance. So, when Black leaders emerge espousing Black nationalism, there is a very large and receptive audience that understandably believes the enemy of Blacks is Whites. And, even in the face of good humanitarian deeds by some Whites, Blacks generally have a fundamental distrust of Whites. Blacks must be especially careful to measure Whites individually, since in light of the historical treatment and experience of Blacks there is reason for substantial caution and belief that collectively Whites have not accepted Blacks as an equal race.

CHAPTER 7

In the remaining chapters of the book, Bell continues to discuss other aspects of racial injustice. In the *Chronicle of the Amber Cloud*, Bell illustrates how racial hatred has destroyed human relations in this country and tests the notion that a common crisis is what is needed to once and for all end racial and economic injustice. What emerges from the subsequent critique of the tale is a trend demonstrating the declining importance of the fourteenth amendment's equal protection clause, in light of new difficult-to-meet standards of proof.⁴⁹ Again, White racism and self-interest are the principal themes of this *Chronicle*. Bell suggests that Whites are willing to use Blacks, but are unwilling to share with Blacks.

CHAPTER 8

The *Chronicle of the Twenty-Seventh-Year Syndrome*—Bell discusses the relationship of Black men and Black women in light of slavery and racism. Throughout the book there is sexual tension apparent between Crenshaw and the narrator. This theme is explored through the *Chronicle* as Bell reviews the physical and psychological abuse and humiliation of Blacks through slavery, and the more recent miscegenation laws, and the tension between Black men and Black women dating and intermarrying with Whites.⁵⁰

CHAPTER 9

In the *Chronicle of the Slave Scrolls*, Bell contemplates the reaction of Whites and, presumably, affluent Blacks, to a sudden change in the conduct and competitiveness of Blacks. Bell suggests that if marks of oppression, such as crime, drug addiction and self-hate disappeared, and Blacks became obsessed by self-love and a fierce desire to compete and excel, many Americans who view Black unity and organization as a threat, would be alarmed. The chapter implies that even Blacks' First Amendment protections might be suspended if Black nationalism, or put differently, the decolonization of Black

49. *Id.* at pp. 198-214. This chapter is must reading for those who are curious about the dynamics of relationships between Black men and women. Bell suggests that racial injustice has hampered such relationships in numerous ways, especially by relegating Black men to poverty. Bell also discusses sexism in Black male-female relationships.

50. *Id.* at 215-28.

minds, was to "cause" a national crisis.⁵¹ Implicitly, Bell makes a strong case for teaching Blacks and others about the substantial contributions of Blacks to American life and culture. To date, many universities have downplayed the significance of those contributions and most have refused to departmentalize Afro-American Studies. And, for whatever reasons, many Whites continue to view Black unity and self-determination as a threat. Bell states an unaccepted, yet obvious truth.

[B]lacks cannot purge self-hate without nurturing black pride through teaching designed to show that racism of Whites, rather than deficiencies of blacks, causes our lowly position in this society—a dangerous truth that indicts the nation's leaders, institutions, and long-hallowed beliefs.⁵²

Bell contends that the greatest danger to America's order and social stability is not Communists attacking our shores, but the continuing socio-economic discrimination which is so prevalent throughout this country.⁵³

CHAPTER 10

In the final chapter—the Chronicle of the Black Crime Cure—Bell very skillfully takes the reader full circle and poses the question, "What do Blacks want?" Do we want to take the place of those we call oppressors? Do we not seek more fundamental changes in the distribution of American political and economic power? Bell argues that Blacks must not seek status advantages like those that have held us and others down.

Recalling the importance of religion to Black survival, Bell says that as slaves were able to develop a vision for survival from the Bible, we must be able to take our Constitution and do no less.⁵⁴ Here Bell simply says that while reform is slow, the legislative and judicial processes are potential methods to bring about racial reform. Bell recounts the words of Tom Watson, the late nineteenth century Populist advocate to demonstrate that even in 1988 Whites as well as Blacks are being exploited, deceived and betrayed by those who are in power.

A NEW CREED FOR THE COMMON GOOD

The implicit message of Bell's book is that our Constitution is the cause of and must be the source of solutions to our current crisis. In most of the Chronicles, Bell suggests plausible constitutional arguments to support fundamental social, economic and political reform in America. Interestingly, despite the numerous ideas and strategies reviewed in the book, most of the Chronicles end with a message of frustration or failure. Thus, while Bell has written an excellent book, he expresses substantial doubt that racial justice is within our reach.

Likewise, I am not anticipating significant improvements in the status of Blacks or other poor people in America any time soon. Like others, I do not want to give up all hope, but current affairs suggest that the gaps between Blacks and Whites and rich and poor are widening. In addition, as more people of color emigrate from other countries to the United States in search of

51. *Id.* at 228-29.

52. *Id.* at 230-31.

53. *Id.* at 245-58.

54. *Id.* at 256-57.

“freedom” and “democracy,” it will become even more imperative that racial and economic injustice be eliminated.

To that end, it will take significantly more than cosmetic changes in our Constitution or the legislative process to fundamentally change and improve the racial and economic relationships between those with accumulated wealth, educational opportunities and marketable skills and those without. The pitiful history of America illustrates all too well that constitutional amendments, “landmark” judicial decisions and federal civil rights laws are meaningless if those charged with enforcement of “new” laws are those who benefit most from racial and economic injustice. In my view we have failed because of self interest. We have failed because Americans have never intended to live together equally. Americans have never agreed to share the wealth and resources of this country. Indeed, from the beginning America has existed for a privileged elite. Thus, America needs a miracle. This country is in economic chaos and is racially and ethnically divided. Much of our population is relegated to lives of destitution, and the continuing effects of slavery and racism have emaciated Blacks of hope and spirit.

Blacks have the unfortunate distinction to be the only Americans who have suffered the violence of slavery. The current status of Blacks throughout the country indicates that we have not recovered from the physical or psychological trauma of institutionalized racial and economic injustice. This should really not surprise anyone who remembers that throughout American history many Americans were (and still are) taught that Blacks are inferior. The ensuing racial hatred has permeated all human relationships in America. And, while such bizarre notions of racial superiority can be equated with the views espoused by Adolf Hitler, there has never been a collective outcry against the genocide of Blacks in America, as with, for example, Jews who were slaughtered during the Holocaust. While American slavery and the Holocaust are by no means identical experiences, this writer has always found it intriguing that the common themes of each have not forged an affinity and trust between the Black and Jewish communities. Instead, it seems self-interest and racism are too great foes.

With relatively few in this country acknowledging the centuries-old wrongs against Blacks, many Blacks continue to suffer and live lives of resentment and despair. Blacks resent that their communities are owned by outsiders. Their apartments or homes are owned by outsiders. Their local grocer or gas station owner is not a member of their community. Therefore, money spent in Black communities does not “turn over” in their communities. Most lending institutions virtually refuse to take “risks” with Blacks by providing requisite financing for homes or businesses. There is no money for community repairs. It does not matter whether the owner-merchant is Korean, Jewish or Black. What matters is the owner-merchant has no interest in or commitment to the Black community.

Blacks do not simply experience such private economic injustice. One need only examine public streets, parks, schools, and recreation facilities in Black communities to confirm that Blacks still are second-class citizens with respect to government resources. Without maintenance, such community facilities become eyesores for Whites in rural and suburban America, and, even

more important, they are the gauntlets that Blacks and other poor people must exist and die in.

Without effective schools, recreation centers, jobs with fair wages or other opportunities to gain economic power, some Blacks have organized and joined with criminals to bring drugs and violence into many American homes. For those Blacks, many of them just children, this is seen as their only way out of the hunger and filth of American ghettos. For many Black and poor communities, the presence of crime and drugs has residents under siege and fear. They are afraid not only of the criminals, but also of overzealous law enforcement who often find it difficult to differentiate between the criminal and the resident.

Beyond economic powerlessness, Blacks resent their apparent political powerlessness. Again, throughout American history, Blacks have been shown by White America that with or without the ballot they have very little political influence. This is especially true in national elections. Despite recent increases in Black voter participation, White America remains firm in its refusal to adopt and live by its "creed." Whites, generally, refuse to vote for Black candidates. When one listens to Black people, one hears the growing impatience among American Blacks concerning treatment of Black people throughout the world and with this nation's complicity in such treatment.

Blacks believe the politically powerful in American have a double-standard for the abuse of Black people and other people of color in the world. So, while some Americans praised American military heroics in Grenada, many Blacks saw those events as another example of American interference with Black self-determination. The most obvious example of this double-standard for abuse against Blacks is the ongoing struggle in South Africa. If there is a modern world-crime against humanity which compares to the genocide of American Indians, American slavery or the Holocaust, it is the genocide of Blacks in South Africa. Yet, America, the "leader of the free world," has seen fit to effectively turn its face and ignore the national crisis there, perhaps because American "interests" are inextricably linked to continuing that national crisis. Moreover, the alleged connections between the Israeli and South African governments, especially with respect to arms which are so integral to maintaining the subordination of nearly eighty percent of the South African population, further strain domestic relations between Blacks and Jews. Blacks view their political powerlessness with disdain.

World history illustrates recurringly that oppressed people always rise against their oppressors. The uprisings have taken numerous forms and have brought about varying degrees of fundamental change throughout the world. America is in many ways a newcomer to the world history scene and in comparison to many other nations. But like other nations, America and its oppressors will have to answer for their transgressions. More protests are inevitable; however, it seems unlikely that the coming waves of protests will have at their center the civil disobedience themes of the past. All of the evils which continue to ruin Black lives will cause Blacks and their empathizers to again demand justice. Unfortunately Americans could make the changes voluntarily without all the costs of violence and destruction which accompany involuntary changes.

America needs a miracle. America needs to undertake a Second Civil

Rights Movement. Americans need to demand that our leaders, our representatives, fashion new policies and strategies for economic and political justice.

The Second Civil Rights Movement must begin with each of us who wish to achieve a truly great America. Each American must adopt, live by and enforce a new creed that applies to all Americans. This has never been done. Our nation cannot survive on its present course. The creed must be that all people of the world, including every American, deserve to be treated equally with respect to basic rights affecting human dignity. With such a creed in mind, we must examine every aspect of our individual and collective experience. Every human relationship must be re-examined. Individually, where we are personally responsible for violating this creed, we must make the required adjustments. Where we do not pay a laborer a fair wage, we must do so. Where we charge someone an exorbitant fee for rent, we must adjust it downward. Where we encounter the homeless, hungry, or the mentally ill who are forced to beg and steal for food and shelter, we must no longer turn away. We must open our homes and health-care services to the needy and must demand that our tax dollars and other philanthropy be directed toward helping those who need assistance. Every human relationship in America must change in light of this new creed, and the change begins with each of us.

Consistent with this new creed, we must end the political powerlessness of too many Americans. Whites who have collectively refused to vote for Black candidates must begin to do so. Under this new creed, it can no longer be what is good for American business or what is good for American farmers or what is good for Blacks, Latinos, Greeks or American Jewry. If our current political parties will not provide leadership in these efforts to live out this new creed, we must take our creed and start new political parties. The political parties are far more fungible than our creed.

Even with our new creed, Americans have to acknowledge and take responsibility, retrospectively, for the current plight of Blacks and many other poor Americans. Blacks have a unique, nearly four-century-old stake in America's prominence and prosperity. Others have since joined Blacks near the bottom of American society. For all of these people, and especially Black Americans, it seems obvious that reparations are essential to counterbalance the institutionalized racial and economic injustice. As with American Indians, Japanese-Americans and Jews in Germany, an effective way to remedy past racial, economic or religious injustice is to pay victim reparations. Without meaningful reparations for Blacks, as evidenced from the last twelve and a half decades, Blacks cannot meaningfully exist in America.

I agree with Thaddeus Stevens that the federal government should be the source of such reparations. First, it seems very unlikely that any of the wealthiest of our citizens is preparing to contribute his or her entire fortune to such a reparations program. Since basic racial attitudes remain perversely hostile, it is very unlikely that any Rockefellers, Gettys, DuPonts, Cosbys or Jacksons are planning to step forward, or that their fortunes would be enough. Additionally, while many Americans participate in private philanthropy, such philanthropy is not generally provided for food, shelter, job training or community redevelopment. Moreover, because of current constitutional case law regarding standing of federal taxpayers to challenge federal spending, federal

tax dollars could easily be directed to a reparations fund without significant political or legal challenge. And, politically, if taxpayers who object to huge outlays for defense projects cannot object to such spending, then those who object to similar outlays for reparations cannot object either. Furthermore, as for the frequently stated argument that reparations programs cannot discriminate against Whites, such programs which have as their chief objective to remedy past discrimination ought to be classified as "benign" and should survive any level of judicial scrutiny. Moreover, creatively drafted reparations programs could include among its beneficiaries those others who too have been victims of American history.

With our new creed and an effective reparations program, we can change America for our common good. We can challenge racial and economic injustice in every American institution. American businesses and our schools must adopt our new creed at every level. Our residential communities, churches and social clubs must yield to primary rather than only secondary integration. Those who are unwilling to make America great domestically and abroad must be persuaded of the importance and potential of this new creed.

As we enter the twenty-first century, we have to make a choice: Will color and class ruin the next century as well, or will we make a change? If we do not make that change, I am afraid our posterity will be far worse off than us. What kind of world do you want to leave for your posterity? As 1988 Democratic Presidential candidate the Reverend Jesse Jackson often urges: "We must take the high road." Can you imagine . . . ?

“THE LORD DON’T LIKE NO UGLY.”— RACISM IN AMERICA

And We Are Not Saved: The Elusive Quest for Racial Justice. By Derrick Bell. New York: Basic. Pp. 288. \$19.95.

Beverly M.M. Charles*

INTRODUCTION

The Bible warns us that “Where there is no vision the people perish: but he that keepeth the law, happy is he.”¹ Harvard Law Professor Derrick Bell’s *And We Are Not Saved* ensures that Black people will not perish at least for a very long time. Using the allegorical² visions or chronicles of Geneva Crenshaw, Bell, weaves a riveting, thought-provoking, evocative, enthralling and ugly tale about racism in America and the struggle of Black Americans to achieve racial equality in a society stained by the tears, sweat and blood of slaves. Like Shakespeare’s Lady Macbeth who cannot remove the bloodstains from her hands, the United States cannot cleanse itself of slavery’s stains.

This review is divided into several parts. The first section provides background information about the development of *And We Are Not Saved*. The second section contains an overview of Bell’s tales and describes his literary method which is more typical of literature than of a legal treatise on constitutional law. The next section is akin to qualifying the witnesses in a trial; it

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1. *Proverbs* 29:18.

2. To one inclined to be literary, Bell’s allegory offers an opportunity to look for more than one meaning in everything. Bell names his female soothsayer, Geneva. Other than being a neutral meeting place in Switzerland which hosts international conventions between disparate political figures, a Geneva cross is a red Greek or St. George’s cross on a white ground, used as a symbol by the Red Cross and as a sign of neutrality. A Geneva gown is a loose black academic or clerical gown with wide sleeves worn by Calvinist clergymen in Geneva. Calvinism is defined as the religious doctrines of John Calvin, which emphasized the supremacy of the Scriptures in the revelations of truth, the omnipotence of God, the sinfulness of man, the salvation of the elect by God’s grace alone, and a rigid moral code.

The women who come with the message for the future, Bell calls the Celestial Curia. “Celestial” means of, or pertaining to the sky or the heavens, or of, from, or suggestive of heavens, spiritual and divine. “Curia” comes from the Latin and one of its definitions is a royal court of justice. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1975).

Bell’s work invites scrutiny given Geneva’s summons to the narrator.

Dearest friend, I have folded my wings for a little while and returned to this world. . . . Like the Crusaders of old, we sought the Holy Grail of “equal opportunity” and, having gained it in court decisions and civil rights statutes, find it transformed from the long-sought guarantee of racial equality into one more device that the society can use to perpetuate the racial status quo. . . . [¶] I have come back with a purpose. My mind is filled with allegorical visions that, taking me out of our topsyturvy world and into a strange and a more rationale existence, have revealed to me new truths about the dilemma of blacks in this country. To be made real, to be potent, these visions—or Chronicles, as I call them—must be interpreted.

BELL, AND WE ARE NOT SAVED 22 (1987).

describes Bell's Black legal titans—Geneva Crenshaw, a civil rights lawyer and her male law professor friend, who debate the implications of various civil rights strategies in light of Geneva's visions or chronicles. Section four summarizes each of the tales. Section five focuses on one tale, "The Chronicle of the DeVine Gift" and its impact on minority law professors as a vehicle for illustrating the power of the tales to scrutinize the application of a legal or policy question in a practical context. A critique of the tales follows in section six. In the final section, one finds the conclusion and recommendations about who would benefit from reading the book.

I. BACKGROUND

And We Are Not Saved had its genesis when the editorial board of the Harvard Law Review asked Bell to write the foreword to volume 99.³ What emerged was an unorthodox means of discussing jurisprudential matters in a language and format more usual in literature than in law.⁴ Bell's foreword, the precursor to the book, contained four chronicles⁵, which later appear in some form in the book. *The Civil Rights Chronicles*, as Professor Bell called them, sparked a flurry of commentaries among its readers.⁶ The dialogue which *The Chronicles* provoked is probably one of the factors that resulted in Bell's expanding his Article into the book which is the subject of this review.⁷

2. AN OVERVIEW OF BELL'S TALES AND HIS LITERARY METHOD

Bell's approach to analyzing constitutional law in *And We Are Not Saved* resembles a work of fiction rather than a legal treatise. Bell laces his book with visions and visionaries. Our first visionary is Geneva Crenshaw, a Black civil rights lawyer, who has a near-fatal accident when her car is forced off the road in Mississippi in the summer of 1964. Her physical injuries heal, but she remains in a mis-diagnosed coma for twenty years during which she experiences her chronicles. The second visionary is, [believed that Geneva has recovered and in response to her summons,] Bell's narrator, Geneva's Black male law professor friend, who visits her in a Virginia cottage where she relates her chronicles, and they try to interpret them. Only later the narrator

3. BELL, *supra* note 2, at xi. See also Greene, *A Short Commentary on the Chronicles*, 3 HARV. BLACKLETTER J. 60 (1986) (describing the selection process, and its confirmation of Professor Bell's stature and achievements as a scholar and teacher). Critics may attack Bell's use of fantasy in his book and foreword as lacking in intellectual rigor and for trivializing an enduring subject among members of the legal community, historians and policy makers. Such criticism lacks support given Bell's astute and novel analysis of the race issue and his use of footnotes to substantiate the points the narrator and Geneva Crenshaw make. Moreover, see Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935), ("The law is not a science but a practical activity, and myths may impress the imagination and memory where more exact discourse would leave minds cold.").

4. BELL, *supra* note 2, at xii.

5. Bell, *The Supreme Court 1984 Term—Foreword: The Civil Rights Chronicles* 99 HARV. L. REV. 4 (1985). "The Chronicle of the Celestial Curia" *Id.* at 17; "The Chronicle of the DeVine Gift" *Id.* at 39; "The Chronicle of the Amber Cloud" *Id.* at 57; "The Chronicle of the Slave Scrolls" *Id.* at 68.

6. See *Forum on Professor Derrick Bell's Civil Rights Chronicles*, 3 HARV. BLACKLETTER J. 46 (1986).

7. Bell, *The Civil Rights Chronicles Revisited: Comments and Introduction*, 3 HARV. BLACKLETTER J. 46, 48 (1986).

discovers that neither of them could have been in the abandoned cottage, which raises a question about whether he imagined the entire episode.

Bell also conjures up the vision of Geneva and the Celestial Curia. The Celestial Curia are two women, who appear at the Black Bicentennial Convention held to develop strategies for "our racial deliverance." The Curia attempt to offer solace to the dejected Blacks who read the chronicles at a fog-shrouded mythic convention site with a Great Hall, the sacred nucleus of the meeting place, which the narrator describes as a cross between a courtroom and a church. Bell fantasizes about a picture of the United States that achieves its professed but unfulfilled ideal as a nation that ensures justice for all.

Bell's goal is "to examine from a new perspective—beyond even the most exacting exegesis of case decisions—the civil rights movement since 1954 and the *Brown [v. Board of Education]*⁸ school decision: that is, to explain or justify what has happened, or not happened, and how black people (or some of us) feel about it."⁹ Measured against that standard, Bell succeeds in identifying the strategies used by diverse civil rights activists and in evaluating the Achilles' heel of each. But while Bell evaluates the success or failure of each plan to obtain racial justice in this country, necessarily, he discusses some of the reasons why white Americans allow racist policies and practices to continue¹⁰ and how the civil rights victories that have been won are eroded or destroyed again and again. The result is that *And We Are Not Saved* is a brilliant literary achievement.

Bell uses conventions which make his book appealing to lawyers, thespians, historians, politicians and lay people. From a lawyer's perspective, Professor Bell uses dialogue which resembles the Socratic teaching method lawyers gain familiarity with in law school. By using this device, Geneva and her law professor friend, our narrator, debate the implications and legal significances, if any, of each of the chronicles.

In dramatic terms, Professor Bell uses what looks like a version of the Greek chorus to elicit the import of each of the tales. Geneva recounts her vision and the narrator as a chorus with one voice suggests what it means. Our narrator's voice is later joined with the voices of the attendees at the Black Bicentennial Convention who fume, rant, and then sit in abject silence as they think about the chronicles' dismal message.

For historians, Bell offers a view of the Constitutional Convention and the impact of various court decisions which has Geneva travelling in her

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

9. BELL, *supra* note 2, at xi.

10. Bell correctly focuses his work on justifying the development of civil rights strategies because the impetus behind these pursuits for racial justice—the fact that American society remains cloaked in the stench of racism—cannot be justified. Bell did not need to try to justify the unjustifiable. Nothing and no one can justify racism.

"Justify" means to demonstrate or prove to be just, right or valid. In theology, it means to free (man) of the guilt or penalty attached to grievous sin, and it is said to be available only through only of God. In the legal context, it means to demonstrate good reason for an action taken. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (W. Morris ed. 1975).

Bell introduces characters like the Colonel at the Constitutional Convention, in the first chronicle who offer colorable arguments on the necessity for racist policies and practices does not rise to a justification in any of these contexts.

mind's eye from the past to the present, and then leaves Geneva and our narrator speculating about the future.

For politicians, Bell sets out a way of analyzing events and decisions which suggests motives and impacts of various pieces of legislation and the policies implemented thereby. Bell encourages politicians to plumb the consequences of their positions to see if their non-Black constituents reap any benefits.

For lay people, Bell takes an emotionally riveting subject and in the conversations or debates, between Geneva and our narrator, articulates the factors which propel policy and lawmakers to offer explanations for racist programs.

His book tries to make the irrational rational, and in the process, to help all of us understand why we have travelled so far in two hundred years to achieve so little. On balance then, it is a tale of man's inhumanity to man in this country. It is a sad tale; it is an angry tale; it is a vicious tale; it is a futile tale. It reveals that a belief in the transformative power of law to effect permanent social change is misplaced. It discloses that to the extent Black people continue to appeal to legal institutions to seek redress, they legitimize a system which sustains itself by subordinating the interests of minority groups to that of the white majority. Nonetheless, given the alternatives of violent insurrection or a mass exodus of all Black people from the United States, it suggests that the tactics which resulted in advances, were later used against Black people to perpetuate the racial status quo, should be pursued again despite their failure to produce long-lasting results.

3. THE CHARACTERS

Notwithstanding the cynicism which permeates the book, Bell's work succeeds because of his characters. Bell establishes the qualifications and credibility of his characters just like litigators qualify their witnesses in a trial. Crenshaw and the narrator are veteran lawyers of the civil rights movement. Both of them fought in the trenches of the courtrooms in the North and the South for minorities access to the political and legal processes. Apart from this practical experience, the narrator's status as a Black law professor presumptively establishes him as a legal authority who can reflect on the history of the civil rights movement with some detachment. Likewise, Geneva would have been a law professor but for the fact that she was in a coma for twenty years. Because she was out-of-it, so to speak, she does not speak with the jaundiced view of someone who has not had any time to think about "what it all means" because he or she is embroiled in fighting one legal battle after another.

a. *Our Narrator, A Black Male Law Professor*

Bell's narrator, a Black law professor, plays a central role in the success of the book. First, as an educated man who survived the battles of civil rights litigation, the narrator can comment on the efficacy of courtroom victories and with the objectivity of a law professor and scholar, he ascertains their value as tools for aiding Black people. In addition, the narrator with the insight that comes from experience occupies the "minority seat" on his law faculty which means he remains seated at faculty meetings even when his white colleagues

enrage him, so that they will not replace him with a Black neo-conservative who would use the position as another forum in which to spout the white-racist rhetoric that obtains a spurious legitimacy because it emanates from a Black mouth.¹¹

b. *Geneva Crenshaw, Our Mythical Visionary*

We first learn about Geneva Crenshaw when our narrator allows his mind to wander at the Black Bicentennial Convention. The convention had the potential for being a memorable gathering of the country's best-known Black leaders. But because the harmony of the Convention begins to disintegrate in the clash of disparate views,¹² the narrator daydreams to escape his frustration and boredom of listening to repetitious statements about how to ensure our racial deliverance. In his reverie, the narrator expresses his longing for the "conciliating presence of Geneva Crenshaw."¹³

So when the narrator first introduces us to Geneva she fits her name; she is a conciliator, and it foreshadows the consensus that the desolate attendees at the Black Bicentennial Convention reach in the closing moments of the meeting. Moreover, Geneva's strikingly tall, well over six foot frame, makes her like most mythic heroes or heroines, larger than life.¹⁴

Geneva's intelligence and effectiveness as an advocate also prompt additional interest in her character. The narrator says:

Geneva's intelligence and accomplishments made her a definitive example of W.E.B. DuBois's expectations for those blacks he designated the "Talented Tenth," the exceptional individuals who would save the race. It was the great black thinker's hope in 1903 that, by "developing the Best of this race . . . they may guide the Mass away from the contamination and death of the Worst, in their own and other races."¹⁵

She is, to the narrator, the embodiment of the great nineteenth century abolitionists Harriet Tubman and Sojourner Truth, even resembling photographs he had seen of these stern Black women, who both fought and spoke for their

11. BELL, *supra* note 2, at 14. See *infra* notes 29-30 and accompanying text.

12. The narrator offers some interesting points on why Black people cannot agree about which racial deliverance strategy to pursue. He says:

It did not help that I understood our basic problem all too well. [We] veterans of the racial struggle, have willingly risked life and career and, in so doing, have escaped the fate of most blacks whose lives are narrowly walled in by racism. By our actions, we have already gained a large measure of personal independence and overcome society's built-in racial impediments. That is, we have achieved the essence of freedom, the ideal on which our society is based. We value the hard-won ability to work through problems, to implement approaches that we find right, and to hell with anyone, white or black, who disagrees or urges a different course.

We came here because we want the same thing for other blacks, and, viewing ourselves as the leaders or at least representatives of other blacks, we willingly join civil rights organizations and attend conferences like this one. But, unconsciously, at some point our personal independence comes into conflict with the requirements of a consensus that could give a large group strong and meaningful direction. In the end, while we seek and sincerely want consensus, the need to sacrifice the hard-gained independence of personal action proves too high a price to pay. Not recognizing either inner conflict or its unconscious resolution, each of use has a personal investment in our strategy. Thus is agreement rendered impossible and conflict inevitable.

BELL, *supra* note 2, at 17-18.

13. *Id.* at 17.

14. *Id.* at 18.

15. *Id.* at 20.

cause.¹⁶ “Apparently oblivious of her stunning looks, highlighted by a smooth, ebony complexion, she was proud of her color and her race at a time when middle-class Negroes (as we then insisted on being called) were ambivalent about both.”¹⁷ Not offended by the narrator’s comment that she resembled Sojourner and Harriet, Geneva says, “I’ve seen those pictures, and were I given to vanity, I would hardly find the resemblance complimentary. But those women had an inner vision that enabled them to defy the limits on their lives imposed by the world around them. I try to be a good lawyer, but my devotion, too, is to an inner vision that makes me feel close to old Harriet and Sojourner—so your thinking I resemble them is not only a compliment, it is an honor.”¹⁸

As a result, Bell prepares the reader to accept Geneva’s statement twenty years later that her “mind is filled with allegorical visions that . . . have revealed to me new truths about the dilemma of blacks in this country. To be made real, to be potent, these visions—or Chronicles, as I call them—must be interpreted.”¹⁹ Thus, Bell gains commitments from his readers to participate in Geneva’s accounts of her Chronicles and to aid in their interpretation.

4. SUMMARY OF GENEVA’S VISIONS

In Bell’s book, Geneva first recounts “The Chronicle of the Constitutional Contradiction.” Here Geneva travels back through time to the Constitutional Convention of 1787 where she unsuccessfully uses her oratorical skills to persuade the convention delegates to delete the slavery compromises from the Constitution. Here, Bell examines the original contradiction in the Constitution of the United States which lies at the heart of Black people’s efforts to seek legal redress.

In “The Chronicle of the Celestial Curia,” Geneva describes the Curia sisters as two Black women dressed in lamé robes who speak in harmonic unison. While the Curia agree in their “criticism of suffering and injustices being visited by the system on the exploited groups, and were appalled by the uncaring stance of the upper classes who justify their superior status by reason of their ability, merit, and skill, and ignore the role of economic class, contacts, and luck.”²⁰ The Curia Sisters sit on a dais which contains three throne-like chairs reminiscent of that of a federal appellate courtroom. The Curia member on the left advocates disruptive resistance whereas the member on the right urges a massive exodus by the nation’s colored peoples and a new beginning in some more receptive land. In the final pages of the book, Geneva discloses that the vacant middle chair suggests another option, what metaphysicians call The Middle Path. The chronicle serves as a tool for assessing the transformative ability of law to effect social change.

In “The Chronicle of the Ultimate Voting Rights Act,” Geneva saves the life of a bigoted, white, southern politician who sponsored a bill to reapportion the state’s legislative districts and thereby make it impossible for Blacks to gain election to the state legislature or any statewide office. Bell employs the

16. *Id.* at 19.

17. *Id.* at 18.

18. *Id.* at 19.

19. *Id.* at 22.

20. *Id.* at 52.

tale to question, among other things, the efficacy of the judicial system as a means of safeguarding the rights Blacks secure in the statehouses.

Bell uses the next story, "The Chronicles of the Sacrificed Black School Children" to discuss the benefits of desegregation to white school districts throughout the nation. On the day the schools were to be desegregated all Black children disappear, and Geneva and the narrator speculate about the consequences. The tale questions the viability of other methodologies for improving the quality of education for Black children which civil rights activists abandoned in favor of desegregation through racial balance.

The next vision, "The Chronicles of the Black Reparations Foundation," has one of the world's richest men give the bulk of his wealth, about twenty-five billion dollars, to a foundation. The foundation is to compensate Blacks, who because of the impediments of slavery and the continuing disadvantages of racism, can not escape poverty. It reveals that safeguarding the present economic structure would, in all likelihood, force white people to object to any scheme designed to improve the economic status of Blacks. Hence, the tale sparks a dialogue between Geneva and the narrator on the judicial system's recognition of reverse discrimination as a limitation on the legal remedies available to rectify racial discrimination.

In the following tale, "The Chronicle of the DeVine Gift," Geneva is a Black law professor at a major law school. Geneva receives the DeVine Gift which makes it possible for her to identify and recruit other minority candidates who join the faculty. The recruitment program works well until Geneva, with the help of the DeVine Gift, finds the Seventh Candidate. This candidate has impeccable credentials, but the law school Dean refuses to hire him because the Dean has to preserve the school's status as a predominately white institution. This tale explores the limits of affirmative action and the use of tokenism and quotas in employment and housing.

In "The Chronicle of the Amber Cloud," white adolescents whose parents are wealthy, change drastically in appearance and behavior. First, their skins take on a yellowish hue, and second, the youths become lethargic, suspicious, withdrawn and helplessly insecure. In sum, their behavior replicates that of many minority children found in ghettos, barrios, and reservations. When a cure is found, legislators limit its administration to the afflicted white youths. Consequently, Bell debunks the notion that a common crisis or extraordinary peril could eliminate racial prejudice.

"The Chronicle of the Twenty-Seventh Year Syndrome" reveals an ailment which strikes down Black women who (1) hold at least one degree beyond the bachelor's and have earned an average of thirty-five thousand dollars per year over the three years prior to their twenty-seventh year; (2) completed their twenty-seventh year of life; and (3) had neither ever been married or entertained a *bona fide* offer of marriage to a Black man. The women can be spared if a Black man is willing to make a *bona fide* offer of marriage to them. Here, Bell examines the professional relationship between Geneva and the narrator—and by extension—the impact racism has on the Black family and the resultant precarious relationship between Black women and Black men.

"The Chronicle of the Slave Scrolls" depicts a transformed Black community whose members attend healing sessions which cause them to surpass whites in every area except sports and entertainment. The tale explodes the

myth that if Blacks merely pulled themselves up by their bootstraps and adopted assimilationists strategies, like their white immigrant counterparts, their success and acceptance in America would be assured. Rather, the white Americans in the tale conclude that it is un-American for a minority group to gain so much advantage over the majority in a majoritarian society. Whites subvert and pervert the legal system to impose limits or quotas on the number of Blacks who get hired, thereby foreclosing the possibility of too many Blacks being selected despite their qualifications.

In the final fantasy, "The Chronicle of the Black Crime Cure," Blacks stop committing crimes and consequently almost destroy the crime industry. The Black Crime Cure caused thousands of people to lose their jobs as police forces shrink, court schedules diminish, and prisons close. Manufacturers who provided weapons, uniforms, and equipment of all forms to law enforcement agencies face bankruptcy. When those in power realize the threat the disappearance of Black crime has on their privileged status, the cave in which was the sole source of the crime cure stones is mysteriously blown up, and the site becomes a landfill.

The fantasies Geneva Crenshaw recounts in her chronicles allow Geneva and her male law professor friend to analyze the benefits and detriments of various civil rights strategies. They concluded that because of the civil rights advocates' successes in Congress, courthouses, statehouses and the White House, more benefits accrued to the members of the White dominant society than to the Blacks who fought the civil rights battles. For example, as Bell points out in "The Chronicle of the Celestial Curia," the fourteenth amendment may have been enacted to give Blacks the rights of citizens, but for most of its early history, people used it "to nurture railroads, utility companies, banks, employers of child labor, chain stores, money lenders, aliens, and a host of other groups and institutions."²¹ The pattern of finding civil rights gains usurped by the majority causes the narrator to assert that "[o]ur lawyers . . . are reluctant to believe that vindication of even the most basic rights for blacks actually requires a perceived benefit to whites."²²

5. AN ASSESSMENT OF THE IMPACT OF "THE CHRONICLE OF THE DIVINE GIFT" ON BLACK LAW PROFESSORS

The debates which the tales foster between Geneva and the narrator are poignant and depressing in their veracity.²³ Readers identify with the legal and policy arguments each character makes and with the characters themselves. By way of illustrating the power inherent in the tales to analyze a legal issue and to review its impact in a practical context, this section of the review focuses on the limits of affirmative action in American law schools by discussing the plight of Black law professors who teach in white law schools.²⁴ Given

21. *Id.*, at 64 (quoting Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387, 1393 (1962)).

22. *Id.* at 62.

23. See Book Note: *The Battleground of Experience*, 101 HARV. L. REV. 849 (1988) (review of D. BELL, *AND WE ARE NOT SAVED* (1987) (suggesting that Bell's experiential approach moves us as no standard liberal or leftist legal analysis can, even though the book contains shades of critical legal theory)).

24. I can attest to the accuracy of Bell's assessment since for the past four years I have taught at white law schools, and I graduated from two white law schools.

the similarities between the shorter piece in the Harvard Law Review and five of the chronicles which appear in the book, the comments of various law professors throughout the country remain apropos here.

Most minority law professors can identify with "The Chronicle of the DeVine Gift" and its disclosures about the limits of affirmative action in legal education. In that fantasy, Geneva succeeds with the help of the DeVine Gift in recruiting five other minority faculty members to the major law school where she was teaching. Then, she finds a Seventh Candidate whose academic credentials are impeccable. He was the top student at a competitor law school; he had edited the law review and written a superb student note. After clerking for a federal court of appeals judge and a United States Supreme Court Justice, he had joined a major New York City law firm where, after three years of work the firm rated his work "splendid;" he was in line for early election to partnership.²⁵ Nonetheless, the Dean at the law school refused to hire the Seventh Candidate because the law school had to retain its image as a white school.²⁶ One legal scholar characterizes racism among white law faculty members as "cognitive dissonance":

At first, the white professor feels good about hiring the minority. It shows how liberal the white is, and the minority is assumed to want nothing more than to scrape by in the rarefied world they both inhabit. But the minority does not just scrape by, is not eternally grateful, and indeed starts to surpass the white professor. This is disturbing; things weren't meant to go that way. The strain between former belief and current reality is reduced by reinterpreting the current reality. The minority has a flaw. Pass it on.²⁷

Unfortunately, too many of the white professor's white colleagues believe that scholar's assessment that "the minority [law professor] has a flaw," and they do pass it on.

Another law professor responded this way after reading the precursor to the book:

Derrick Bell's *Chronicles* was the joyful affirmation of a deep part of myself that I had always been afraid to voice. The affirmation was two fold (sic). First, the voice I had suppressed, which had condemned itself to preface every sentence with an answer to the accusation: "Who are you to tell us anything?" found expression. Secondly, the fear which had suppressed the voice, found perspective in Dean Bell's contextual review of a constitutional history premised on a heritage of contradictions between "professed ideals and . . . established practices."

A related part of my response to the *Chronicles* was my immediate identification with Geneva Crenshaw. After a few moments of ruminating, I realized that she was fictional. But her fictional essence was very familiar, drawn from my littered recollections of spent, half-mad, serious-but-not-taken-seriously black women (and men) whose literate qualifications exceeded the uses to which society could envision them put; whose existence never quite left sufficient impression on the larger world to change the course of things directly, but whose accomplishments are felt in mythic ripples.²⁸

Here, the reader observes that Bell's Geneva, whose talents lie fallow for

25. BELL, *supra* note 2, at 143.

26. *Id.* at 144.

27. *Id.* at 158 (quoting Letter from Richard Delgado to Linda Greene April 24, 1985 (copy on file with Professor Bell)).

28. Williams, *A Brief Comment, with Footnotes, on the Civil Rights Chronicles*, 3 HARV. BLACK-LETTER J. 79 (1986) (footnote omitted).

twenty years because a group of White racists forced her car off the road in Mississippi as she was driving to a voting rights meeting, touches a responsive cord in minority law professors who learn that if they are too competent their white counterparts will destroy them.

Others involved in legal education gained courage or inspiration from *The Civil Rights Chronicles* to lament on the plight of minority law professors in predominantly white law schools and to urge resistance²⁹ or the avoidance of cooptation within such a system.³⁰ In fact, Professor Henry W. McGee, Jr. observed several things: One, that with a few exceptions, most law faculties have one or no minority instructors;³¹ two, as enrollments of Black college students declined in the 1980's (citation omitted) a corresponding reduction in the number of Blacks going on to law school is an increasing possibility;³² three, the minority law professor must strive to preserve his self-identity while maximizing his effectiveness to impact the national domestic agenda, in light of conditions imposed by his predominantly white surroundings;³³ and four, race is such a

powerful determinant of personal fate in the United States; a brutal and ine-

29. See Austin, *Resistance Tactics for Tokens*, 3 HARV. BLACKLETTER J. 52 (1986). Austin states:

Reading Derrick Bell's *Chronicles* was a thrilling experience because I felt that I was participating in an intellectual exchange with other Black folks. . . .

The *Chronicles* made me feel the chill of the intellectual isolation of my token existence in a way that I have not for some time. Being a token is like being in solitary confinement, in a prison no one can enter even with the best behavior. The jailers are my colleagues who use insult as a disciplinary device. They zing and zap with abandon. The wounds heal, and the scars are the stories I swap in whispered tones and sardonic laughter with the other Black and working class women of the Law School (the cleaning ladies, the secretaries and the students). . . .

I could go on. Any token could. I cannot imagine sharing my scholarly ideas with such people. But then, they cannot imagine that I have any ideas to share. They may be right, but for the wrong reasons. Whether I am smart, or whether Black people have an activist rather than an intellectual tradition is beside the point as far as I am concerned. My intellectual muteness if not the product of my acquiescence in their beliefs in my inferiority, but of my rejection of those very beliefs. Quite simply, responding to their abuse is a full-time job. It takes vigilance, cleverness and a great deal of self-constraint. Although it would often be more expedient to blast some idiot out rather than to employ one's wiles in exacting revenge, my resistance has to be measured. I am a tenured professor, and I know that there are other minority folks who are more vulnerable than I am. They often need what little protection I can provide through diplomatic moves on their behalf. Moreover ranting and raving, while useful, has its limits and varying one's tactics keeps the enemy off guard. Thus, the best form of resistance is often covert, unsuspected and guerrilla-like. What I have in mind is the token's equivalent of poisoning the master's coffee.

Id. at 52-53.

30. McGee, *Symbol and Substance in the Minority Professoriat's Future*, 3 HARV. BLACKLETTER J. 67, 72 (1986).

Coopt traditionally means, "to elect as a fellow member of a board or committee, or to appoint summarily." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1975). However, in the Black community it means something else. Rather, it conjures up a vision of a person who has been deluded into believing that he belongs to the dominant group when in fact he does not.

31. McGee, *Symbol and Substance in the Minority Professoriat's Future*, *supra* note 30, at 67, 67 n.3 (1986) (citing an interview with Noel J. Austin, Associate Director of the Association of American Law Schools (Feb. 28, 1986)). Austin points out that in 1984-85, there were 381 minority professors known to the Association of American Law Schools out of 5,728 full-time law teachers. The 1983-84 figure was 364 out of 6,773 and the 1982-83 proportion was 337 out of 5728. The minority professor category includes Asians, American Indians, Blacks, and Hispanics/Latinos.

32. McGee, *supra* note 30, at 67.

33. *Id.* at 69.

luctable aspect of the social order which cannot be refuted, regardless of the number of minority faculty appointments that are made . . . [that] minority faculty members must come to grips with this reality, as well as recognize that they themselves, through their positions, may be playing a role in legitimizing a legal system whose hegemonic function vindicates and supports a social and political order in which non-whites are subjugated."³⁴

If then, the yoke of racism in this country burdens these minority members who are educated and part of a very small, and some would say, elite group, what help or hope is there for the masses? The short answer is: "Very little to none." But the larger question is: "Why?" The next section explores and examines, against the backdrop of Bell's book and his assessment of the thirty year odyssey for racial justice in the United States, the bleak prospects of achieving racial equality in America in the future.

6. A CRITIQUE OF THE TALES

What accounts for the peculiar burden of being Black in America? If Black law professors who teach at predominately White schools feel weighed down by the yoke of racism, why is it so and what can be done about it? Succinctly put, the institution of slavery and the concept of Black people as property vitiates the dignity of the United States Constitution and its stated goals and objectives. The flawed constitution adopted by the framers casts a pall over most, if not all, efforts to promote racial equality in America. It recognizes and preserves property interests over liberty and freedom, even though it gives lip service to the noble ideals of "liberty and justice for all." For example, Bell's Colonel, one of the framers of the Constitution in "The Chronicle of the Constitutional Contradiction," recognizes three classes of people whose relative status inspired the compromises found in the Constitution: (1) landlords, (2) landless, masterless men and (3) alien slaves. I prefer to call the three groups: (1) property owners, (2) the propertyless (most, if not all, of whom were white males), and (3) those who are themselves characterized as property. As explained by the Colonel, the framers sought to reconcile the competing interests of the majority of delegates, who were slave owners and whose rights had to be protected with the interests of others, who knew that their goal was to draft a constitution, that could be ratified by the states and of thereby save the nation from anarchy and bankruptcy.

With the establishment of a Black subclass, poor Whites identified with and supported the policies of the upper class, and White large landowners were willing to grant to poor Whites a larger role in the political process.³⁵ The coalition of Whites, both rich and poor, polarized White Americans against Black Americans in such a way that any perceived political or economic advantage, which is conferred on Black people today in a effort to compensate them for past discrimination, leads to vigorous attacks in the courts or in the legislatures.

The ugliness of Bell's tales suggests that the vested property interest White people have in being White means that the White dominant society will only operate to protect its privileged status by subjugating others and that all racial deliverance strategies are doomed to fail. If true, and there is no reason

34. *Id.* at 72.

35. BELL, *supra* note 2, at 40.

to doubt the validity of the conclusion on the record so far, it is the American dilemma; it is the American shame. The shame dehumanizes both master and slave. "Slavery" wrote Thomas Jefferson, "brutalizes slave owner as well as slave and worst of all, tends to undermine the 'only firm basis' of liberty, the conviction in the minds of the people that liberty is 'the gift of God.' . . . I tremble for my country when I reflect that God is just; that his justice cannot sleep forever." ³⁶ Bell's reiteration of Thomas Jefferson's assessment of the American dilemma reveals *And We Are Not Saved's* frail remnant of hope which rests in the blighted consciousness of racist America.

The book effectively peels away the shrouds of mystery which cloak the ostensible achievements Blacks in the United States have made over the past three decades. It exposes the reasons why civil rights legislation gained passage and why purportedly favorable court decisions emerged. While it may be true that certain White legislators and judges were moved "to do the right thing" or to implement the unfulfilled promise of the American ideals of racial equality and justice for all, the White America Bell depicts is a White America of conspirators who throw a proverbial crumb at the Black masses to quell race riots, protests, marches, sit-ins and boycotts and the like. Against this tapestry, Bell's Black Americans can remain only cynical and dejected. The civil rights activists, who fought so valiantly through the 50s and 60s and drifted rudderless in the 70s, (recall that many of the so-called Black leaders of the civil rights movements were slain) can view this book as an assessment of their efforts, or, more pointedly, an assessment of their failure.

Derrick Bell is well-qualified to analyze and evaluate the civil rights movement. As the first Black, tenured Harvard law professor and as a veteran of the civil rights movement, Bell can speak with the authority of one who has been in the trenches. His analysis has more credibility than an analysis by an outsider and nonparticipant in the struggle would otherwise have. As one of the founders of the National Conference of Black Lawyers, a group which seeks to promote racial justice through social activism, Bell continues to take unpopular stances among the White majority, breaking with tradition in an effort to sensitize people to racism or sexism in its various guises, whether subtle or blatant. Within the past year, Professor Bell staged a sit-in, which is conduct more characteristic of a bygone era, in his Harvard Law School office to protest a denial of tenure to a White woman on the Harvard Law School faculty.

As a constitutional law professor and legal scholar, Bell's review of the historical premises of the constitution and its political, economic and philosophical underpinnings has a kind of veracity which his medium of fictional tales belies. The novelty and readability of his approach should not delude people into concluding that his work lacks substance and legal significance. For today's Black underclass, Bell confirms what they know: the American dream is a myth. The attempts of the Black intelligentsia to assimilate in White American society have failed, and the Black underclass knows that it is more lucrative to participate in the subculture of selling stolen goods or contraband than to strive to achieve the promise of education because the attain-

36. BELL, *supra* note 2, at 28 ((citing DONALD ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS: 1765-1820* at p. 92, (1971), quoting from T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* (T. Abernethy, ed. 1964)).

ment of a collection of degrees or certificates fails to insulate any Black person in from discriminatory treatment—recall the treatment of Black law professors by their white peers discussed earlier.³⁷ Necessarily, some readers will therefore be inclined to conclude that Bell's book is autobiographical and that his unnamed narrator, who is also a Black, male law professor at a predominately White law school, is really Bell himself or Bell's alterego. Resolution of this question is unessential to appreciating the text and its independent validity.

One can wonder though why Professor Bell used a Black female as the other central character in his work and whether his portrayal of Black women as exemplified by Geneva Crenshaw is subject to attack. As for me, I would rather give credit to Bell's egalitarianism. My own response to Geneva, like that of Professors Williams and Austin discussed earlier, is one of strong identification.³⁸ She is the archetypal Black woman whose strength and intestinal fortitude is legend. She is observed from afar by Black men who determine she is aloof and sexually unattainable because she is more free than they are. Her increased freedom is rooted in the illusion of her greater access to a piece of the American dream. This freedom stems from her femaleness and the historical sexual exploitation of Black women by white men who used her loins to increase their property by having her give birth to additional slaves. White males find her less threatening, and as a result, White males offer her educational and employment opportunities denied to Black men thereby making of her the breadwinner for Black families and co-emascuator with them of Black men.

White males foster emasculation of Black men by insidious laws and practices which make it more prudent for an unemployed Black male to abandon his wife and children so that they can qualify for welfare rather than to stay and see his offspring go hungry. Such phenomena weaken the fiber of the Black family unit and promote dependency on White bounty in a way which is not too unlike the paternalistic relationship which existed between the master and the slave.

White males who escaped service in Viet Nam and whose counterparts sent Black males, in disproportionately high numbers to fight and die in a war of Black people against Browns and Yellows on behalf of Whites, thereby killed off the mates that the Black women in Bell's "Chronicle of the Twenty-Seventh Year Syndrome" otherwise could have married. Other forms of Black genocide include the unabated sale of addictive drugs in the Black community which by all accounts is a multibillion dollar industry. Opiates provide blessed forgetfulness to Blacks who discern the futility of their existence and in their drug-induced dreams see America with a kind of clarity that eludes them in their more sober interludes.

Another species of genocide is Black on Black crime a result of the powerlessness of being Black in America and an inability to combat the real source of one's impotence. A legal system which fails to impose identical sanctions on Blacks who kill other Blacks as opposed to the kinds of punishment imposed on Blacks who kill whites, implies that a Black life is worth less than a White life. Hence, the poignancy of Bell's "Chronicle of the Black

37. See *supra* notes 23-34, and accompanying text.

38. See *supra* notes 28-29, and accompanying text.

Crime Cure" unmasks the crucial role Black crime plays in the economic system. And with Bell's revelation, the last vestiges of hope that the eradication of Black crime is all that is necessary to secure the deliverance of Black people fades.

Bell's book will therefore remain a testament of the odyssey of civil rights activists towards racial justice. His account preserves an assessment of the failed strategies which were used in the past and can serve to prevent subsequent advocates of racial justice from pursuing futile gameplans for achieving racial equality. Despite Geneva's suggestion that Blacks should continue to pursue racial equality by using the same devices that have been employed before, with the continued hope that White America will one day fulfill its promise embedded in the constitution, the book's inability to offer new, concrete suggestions as to what strategies or tactics could succeed in the future engenders despair and frustration in readers who ask: "What's the point? And now what?" But perhaps, demanding solutions is too much to require of Professor Bell, Geneva or the narrator.

CONCLUSION

In sum, *And We Are Not Saved* makes an important contribution to American legal scholarship and to the literature concerning the history of racism in the United States of America. It evaluates the civil rights struggle over the last thirty years and asks all Americans to reassess the extent to which this country can and will embrace its professed ideals of liberty and equality for all. I recommend the book to lawyers, historians, social scientists, judges, and lay people as a thoughtful and provocative work complete with footnotes which uses a novel approach to exploring hard legal and policy issues.

Bell's characters sing a song which harmonizes with the melodies deep within the breasts of the descendents of slaves in this country. His characters also bellow against the injustices which subjugate Black people and other minorities in this country. Black people hear the refrains; we hear Jeremiah's lament that we are not saved;³⁹ and we intone just like Mamie the Black woman who raised the racist, white, state senator in "The Chronicle of the Ultimate Voting Rights Act" did: "The Lord don't like ugly."⁴⁰ And we continue to hope that White Americans heed the Lord's warning and come to know that Mamie is right: "The Lord don't like *no* ugly."

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

40. BELL, *supra* note 2, at 81.

UNCONSTRAINED IDEOLOGY: A POLEMICAL REVIEW OF THOMAS SOWELL'S *A CONFLICT OF VISIONS*

A Conflict of Visions. By Thomas Sowell. New York: William Morrow. 1987. Pp. 256. \$15.95

Lawrence Kupers*

INTRODUCTION

There's an established verity in Rhetoric and in Law: the one who defines the question wins the argument. In his latest work, economist and social critic Thomas Sowell offers a bold and imaginative definition of the terms of current political debate. This is a book about political matters, and Sowell is well known as an articulate and forceful proponent of assorted neo-conservative political views. Yet the author professes to be on a neutral mission. His purported aim, an ambitious one, is to think about the "silent shapers of our [social and political] thoughts."¹ The result is too good to be true. My questions in this review are: (1) How has the author defined the question? and (2) Should we accept his definition?

I. SOWELLIAN VISIONS

The key to Sowell's ambitious project is his conviction that what really divides the various warring political camps is neither their differing interests, nor their factual and valuative premises, nor the conscious reasoning processes by which they arrive at their political prescriptions. Rather, at bottom, these disputes result from different "visions," that is, varying sets of assumptions about social reality that are mostly taken for granted and not objects of our reflection.

In the first part of the book, "Patterns," Sowell tells us what a vision is and characterizes what he considers the two most pervasive visions of the contemporary political scene. A vision is not a theory or doctrine, not a set of values, not a position that one takes on a controversial issue; rather, a vision is a "pre-analytic cognitive act."² A vision "is what we sense or feel before we have constructed any systematic reasoning that could be called a theory, much less deduced any specific consequences as hypotheses to be tested against evidence."³ Additionally,

[a] vision, as the term is used here, is not a dream, a hope, a prophecy, or a moral imperative, though any of these things may ultimately derive from some particular vision. Here a vision is a sense of causation. It is more like a

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1. T. SOWELL, *A CONFLICT OF VISIONS* 8 (1987).

2. *Id.* at 14.

3. *Id.*

hunch or a 'gut feeling' than it is like an exercise in logic or factual verification.⁴

Furthermore, visions are important because (a) policies are based on them and these policies have wide-ranging social effects; and (b) they "fill in the necessarily large gaps in individual knowledge."⁵

Thus, a Sowellian vision appears to have these salient characteristics. First, a vision is not arrived at through a process of conscious deliberation. Second, though not the object of one's thought, a vision plays a formative role in one's thinking on social issues. Third, a vision affects our thinking (and our actions as well—in Sowell's words, a vision "set[s] the agenda for both thought and action"⁶) because it guides the way in which we link things together causally.

What is the cash value of Sowell's insistence that a vision is "cognitive" and not to be identified with a set of values? One consequence is that visions are conceptually prior to values, that is, visions and not values are the primary "shapers" of our social thought and practice. Opposing values are effects rather than causes of conflicting visions. A second consequence is that visions are subject to rational criticism because they are not irreducible value preferences. This second point will guide my inquiry below. In discussing the visions characterized by Sowell, I shall subject them to the same sort of rational criticism one would use in sizing up a theory or policy.

For Sowell, two conflicting social visions "have shaped our times and may well shape times to come."⁷ The "constrained vision," was exemplified, to varying extents, by Thomas Hobbes, Adam Smith, Edmund Burke, Friedrich Hayek, Oliver Wendell Holmes, and Milton Friedman. This vision corresponds roughly with the right-conservative side of political debates. The "unconstrained vision," is the vision more closely associated with Jean-Jacques Rousseau, William Godwin, Karl Marx, John Stuart Mill, John Kenneth Galbraith and Laurence Tribe. It corresponds to the left-liberal range of the political spectrum.⁸ In summarizing the differences between the two visions, Sowell emphasizes two key distinguishing criteria: the locus of discretion and the mode of discretion.

Each vision distributes decision-making power in a distinctive fashion. The constrained vision features "self-interested individual decision-makers" while the unconstrained vision features "collective surrogate decision-makers. . ."⁹ One imagines as a prime example of the constrained vision's prescribed locus of discretion an economic market in which consumers, as the saying goes, "vote" with their dollars. Rather than having some group of surrogates dictate what is to be produced in the next phase of economic activity, consumers decide what they want now and thereby unintentionally determine in the aggregate what shall be produced in the next phase of the economy. If

4. *Id.* at 15-16.

5. *Id.* at 16.

6. *Id.* at 16.

7. *Id.* at 17.

8. Sowell actually categorizes Marxism and Utilitarianisms as "hybrid visions" but since both viewpoints share the critical premise that social institutions can and should be shaped by rational human activity, they would seem to fall more comfortably on the unconstrained side.

9. *Id.* at 104.

this sounds like the difference between elitist autocracy and populist democracy, hold that point.

The differing loci of discretion correspond to the respective "modes" of discretion prescribed by each vision.

Man, as conceived in the constrained vision, could never have planned and achieved even the current level of material and psychic well-being, which is seen as the product of evolved systemic interactions drawing on the experiences and adjusting to the preferences (revealed in behavior rather than words) of vast numbers of people over vast regions of time. The constrained vision sees future progress as a continuation of such systemic interactions—and as threatened by attempts to substitute individually excogitated social schemes for these evolved patterns.¹⁰

The key terms in this passage are "systemic," "experiences," and "evolved." According to the constrained vision, individuals must not try to devise and implement rational schemes aimed at improving existing social practices; rather, individuals must make decisions within the boundary lines of roles assigned to them by the social *system* they have inherited. This system is legitimate because it has *evolved* over generations of human social interaction, incorporating the wisdom of the collective experiences of these earlier generations. If this sounds a wee bit like Social Darwinism, hold that point. The unconstrained vision, on the other hand, urges that certain individuals (of exceptionally high intelligence and moral character) devise rational schemes for the rest of us to follow because the rational cogitations of a contemporary few can stand up to the experiential wisdom of untold numbers of our predecessors.¹¹

I break down Sowell's lengthy characterization of the conflicting visions into three critical areas of difference. First, the constrained vision prefers accumulated experience to articulated reason. The constrained vision is not against knowledge and reason but favors particular conceptions of both.

Knowledge is thus the social experience of the many, as embodied in behavior, sentiments, and habits, rather than the specifically articulated *reason* of the few, however talented or gifted those few might be.¹²

Because knowledge is a common fund distilled from the uncountable trials and errors of past generations, and not a product of the deliberate conscious activity of a few talented contemporary thinkers, "the best social decisions are to be made . . . by systemic processes that mobilize and coordinate knowledge scattered among the many, in individually unimpressive amounts."¹³ Correspondingly, the constrained vision conceives of reason in what Sowell calls its "cause-and-effect" sense. In this sense, there is a "reason why water expands when it freezes into ice"¹⁴ and this reason exists independent of human cognition.¹⁵ The second sense of reason, cherished by the unconstrained vision, is

10. *Id.* at 100.

11. "Those with the unconstrained vision, favoring articulated rationality, see the issue as one between two sets of contemporaries, x and y, while those with a constrained vision, favoring systemic processes, see the issue as being between the experience of successive generations, represented by group x in today's generation, versus the articulated rationality of their contemporary opponents, group y." *Id.* at 54.

12. *Id.* at 42.

13. *Id.* at 49.

14. *Id.* at 50.

15. Shifting from the physical to the social world, Sowell suggests that classical and neo-classical economics exemplify this sense of reason in ascribing a rationality to a market not controlled by

“articulated specification of causation or logic. . .”¹⁶ The constrained vision, in contrast to its competitor, holds that the entire social process can be rational even though individuals may not grasp the reasons underlying its operation. Thus, the constrained vision merges into one the notions of accumulated or inherited wisdom and systemic rationality: the way things operate now manifests both notions.

Second, the two visions take distinctive approaches to the social system inherited from past generations:

The unconstrained vision speaks directly in terms of desired results, the constrained vision in terms of process characteristics considered conducive to desired results, but not directly or without many unhappy side effects, which are accepted as part of a trade-off.¹⁷

I will have more to say about Sowell’s use of the now fashionable dichotomy between process-oriented and result-oriented approaches below.¹⁸ For now, note the connection between the constrained vision’s focus on process and its preference for *trade-offs*. Whereas the unconstrained vision reacts to social problems by attempting to fashion rational *resolutions*, the constrained vision countenances social problems as the costs (or trade-offs) necessary to reap the benefits of the inherited social system.

Finally, the constrained vision’s conceptions of human nature and the genealogy of various social evils differ markedly from the conceptions of its competitor. Sowell, reviving the old debate over the perfectibility of humankind, tells us:

Those who see the potentialities of human nature as extending far beyond what is currently manifested have a social vision quite different from those who see human beings as tragically limited creatures whose selfish and dangerous impulses can be contained only by social contrivances which themselves produce unhappy side effects.¹⁹

In other words, according to the constrained vision, absent external constraints, humans will act like selfish aggressive brutes. As a corollary, the constrained vision has a “the cup is half full” view of social evils. That is, poverty, war, and the other fugitives from Pandora’s box result from inherent human imperfections; things are as grand as they are only because our social institutions have effectively constrained these tragic human proclivities and rechanneled them toward lawful productive activities. As opposed to this view, the unconstrained vision pretty much adopts Rousseau’s inversion of the Christian heritage: humans are born “good” and social evils arise due to the corrupting influence of counterproductive and needlessly oppressive institutions.

The various elements of each vision appear at first blush to fit together quite nicely. If, according to the constrained vision, humans are inherently self-serving, and if articulated rationality is far inferior to accumulated experience as a guide to behavior, then we must distrust “good intentions,” that is, the professions of allegedly superior actors, if empowered, to achieve collec-

deliberate human engineering efforts. The “reason” of the market is located in the system itself. See *id.* at 50-51.

16. *Id.* at 50.

17. *Id.* at 37.

18. See *infra* text accompanying notes 31-35.

19. *Id.* at 35.

tively beneficial results through the use of ad hoc methods. Rather, we must place our reliance on the inherited social process whose tried and true system of rules and roles imposes external constraints (incentives and disincentives) that allow selfish individuals to interact productively over the long run. Thus, "[f]idelity to roles is central to the constrained vision, for in carrying out defined roles the individual is relying on the experiential capital of nations and of ages. . . ."²⁰

The unconstrained vision, with its faith in the inherent goodness of humankind and the powers of individual human reason, is willing to rely on "wise and conscientious" individuals to devise and implement rational schemes. These intellectually and morally advanced individuals can improve the social order because they have been able to overcome the corrupting and stultifying effects of inherited social institutions. The unhappy side-effects of the social process can be avoided and desired results attained by careful revision of existing practices and institutions.

Now it is reckoning time for these visions. Do these visions actually do the job Sowell assigns to them? If visions are supposed to "fill in the necessarily large gaps in individual knowledge,"²¹ then we can expect a vision to provide at least some guidance in answering two questions: (1) How did we, as a collective, arrive at the present social system? and (2) How should I, as an individual, regard the various rules and role assignments of that social system?

The constrained vision includes the assumption that the present constellation of social practices and institutions first emerged and continue to operate because they are the most *functional* for the collective:

[T]he competition of institutions and whole societies leads to a general survival of more effective collections of cultural traits. . .

Values which may be effective at the tribal level will tend to be overwhelmed by values that permit or promote the functioning of larger aggregations of people.²²

Let's call this assumption "evolutionary functionalism" and note its two components: first, any pervasive social form is functional for the collective; and second, a form comes to be pervasive if it is more functional for the collective than existing alternative forms and the form ceases to be pervasive when an existing alternative form proves to be more functional.

There is a vicious circle here. The social forms now pervasive are the fittest (i.e., most functional) because they have survived; these social forms have survived (triumphed over alternative forms) because they are the fittest. In other words, for a social form to be pervasive it must be functional; but to be functional it must be pervasive. The constrained vision cannot offer us the slightest clue as to why certain social forms and not others came to be pervasive, i.e., how we arrived at the present social system.

Sowell might defend the constrained vision as follows. Every social system operates under a certain set of external conditions, its environment. At time (T1) a particular environment (E1), the social system (S1) is the most functional collection of practices and institutions. At a later time (T2), however, there may be substantial changes in the system's external conditions.

20. *Id.* at 60 (quoting E. BURKE, 8 CORRESPONDENCE OF EDMUND BURKE 138 (1969)).

21. *Id.* at 14.

22. *Id.* at 41.

Hence, because E2 is substantially different from E1, a new system, (S2), emerges as the most functional system for the external conditions existing at T2. Significant changes create a new environment for the collective and the social forms most functional for this environment come to be pervasive. While individual actors pursue their selfish ends, the latent consequences of their activity is an optimally functional and adaptive social system.

There is a problem with this response. Visions, like theories, should be falsifiable (or so Sowell implies²³) and this element of the constrained vision can never be falsified. If one is asked why a substantially different S2 has emerged, one replies that there is a correspondingly novel environment E2. But this sort of explanation comes *after the fact* and does no more than say that a certain social form came to be pervasive as the result of the system's adaptive response to changes in its environment. How would one ever falsify such a claim? After all, whenever a new social form is deemed to have "won out" over its alternatives, its victory is the cause for its victory: that is, it has become pervasive because it is functional but it is deemed functional only because it has become pervasive. Such an approach makes no predictions as to what social forms will arise; it only observes what is and places its imprimatur of functionality upon it. The upshot is this: someone of the constrained vision has no basis for Panglossian confidence in the present system as the optimal system for our present environment.

In addition to its circularity, there is a certain incoherence to the constrained vision's evolutionary functionalism that derives from transposing a biological theory to the sphere of social relations. Sowell himself concedes an all-important difference between applying Darwinian ideas to nature and to society: "[The constrained vision's theory] is not, however, a theory of the survival of the fittest *individuals* but of the fittest social processes."²⁴ Note, however, that the basic unit in biological evolutionary theory is a type of organism and there are no problems in distinguishing the organism from other organisms competing for the same resources and from its environment. But social evolutionary theory, the basic unit of evolution is the social form, a practice or institution, and drawing lines between this "organism," the larger system of which it is a part, and the environment is quite a bit more complicated. Where, for example, does one place technological innovations such as the invention of the stirrup in Medieval Europe? Are such inventions part of the system or part of the environment? And what about social technologies such as bureaucratic organization? The problem is that what is functional depends upon how one draws these lines because a form is functional only with respect to a specified system interacting with its environment. And the constrained vision justifies inherited social processes because they are functional. Thus, everything hangs on how these lines are drawn—and one looking to justify the current system has unconstrained discretion in drawing the lines.

The vicious circularity of evolutionary functionalism as both a justification for and an historical explanation of the existing social system becomes clearer by examining one of Sowell's analogies. He draws an analogy between an inherited social system and language. Both exemplify an "evolution of

23. See *id.* at 16.

24. *Id.* at 71.

circumstances."²⁵

Language is thus the epitome of an evolved complex order, with its own systemic characteristics, inner logic, and external social consequences—but without having been deliberately designed by an individual or council. Its rationality is systemic, not individual—an evolved pattern rather than an excogitated blueprint.²⁶

Sowell goes on to note two important features of language: languages are more effective when evolved than when artificially created; and, language as an evolved social process “serves a greater multiplicity of purposes than any given individual or council may be able to enumerate, much less weigh.”²⁷ Additionally, even though the rules of language have been written down, the resulting rules are a codification of already existing practices.

What happens, however, when a social unit (nation-state or smaller organization) consists of two groups who speak different languages? Or what happens when two groups speaking roughly the same language disagree as to whether certain sentences are grammatically correct.

Such situations reveal the differences between the linguist’s study of language and the constrained vision’s conception of the social system. A modern linguist is able to set out a system of rules, a grammar, for a language only because the linguist heuristically curtains off a specific group of language users and charts their linguistic interactions. In doing this charting, the linguist assumes that the interactions serve the purpose of communication between these users. The linguist uses past experience to decide which features of these interactions are linguistic in nature, that is, functional for the purpose of communication. The linguist would never assert that the resulting set of rules (a) is the most functional set of rules for this community of users or (b) has evolved as the most adaptive response to the conditions in which these language users live and interact.

Thus, the claims made by the constrained vision regarding the existing social practices and institutions are far removed from claims that a modern linguist would make about the grammatical rules that describe a language. The linguist indulges in functionalism as a heuristic device in order to distill a grammar from an enormous set of transactions; the proponent of the constrained vision proposes that the current “grammar” of society not only describes social interactions but also is the best possible set of rules for such interactions because it has won a competition with alternative forms. No modern linguist would ever make such claims about the conventions that constitute a language.²⁸

Legal scholars sometimes talk about “the normative power of the actual”—that is, the way things are tends to look like the right way. Sowell’s

25. *Id.* at 68.

26. *Id.* at 69.

27. *Id.*

28. A more fitting analogy but one that the constrained vision might not want to accept is the parallel between such social processes as the market economy and language *as conceived* by the traditional grammarians. These grammarians were prescriptive; when they set out the rules of a language, they were imposing these rules upon the speakers of that language, whether or not these speakers had actually followed these rules or not in their previous use of the language. Ironically, radicals would then agree with Sowell that language offers a very good analogue to a social system. Alluding to the history of prescriptive grammar, they would go on to say that the analogy is based on hegemonic imposition of standards by an elite class on the masses.

constrained vision falls into a similar Panglossian rut, adopting one side of the notorious Hegelian equation: the real is rational. The conceptual laxity of the constrained vision comes into sharp focus when we try to comprehend a society such as contemporary South Africa. What is functional about the present system and for whom? The constrained vision appears to obscure rather than clarify social settings involving serious conflicts.

All this is very bad news for an individual to consider regarding the various rules and role arrangements of the social system. The constrained vision prescribes that I follow rules and faithfully play my roles because such rules and roles are part of a social system that is better than any alternative we could devise. Hence, it is in my interest *over the long run* to pay attention and be obedient. This prescription does not make much sense.

In a modern industrial society, an individual will play a variety of roles and many of these roles will be quite complex. Being faithful to one's role is often problematic. For example, there will be times when one role conflicts with another role or when there is confusion or dispute as to whether a certain role includes or excludes a certain type of behavior. Relying on the constrained vision's admonition to follow the accumulated wisdom of past generations is difficult when one doesn't know whether such wisdom addresses a particular situation at all or if it does address the particular situation, what course of action is dictated.

The inevitable consequence of such interpretation problems is a special class of interpreters who shall tell us what the accumulated wisdom dictates. In a large society there is likely to develop an hierarchy of such interpreters. For convenience, there will be a need for a great number of lower-level interpreters but for uniformity and finality there will have to be an interpreter of last resort. Yes, this does sound like a modern legal system. More importantly, this sounds very much like the unconstrained vision: an intellectually and morally advanced elite will tell the rest of us what to do and how society should run.

Sowell might reply that there is an important difference. In the constrained vision, the text these interpreters read from is the accumulated wisdom, not the ad hoc machinations of their own minds. This is rather uncritical. Compare these two cases. In Case 1, the interpreters are told that any disputes concerning current local practices must be settled by appeal to the accumulated wisdom. In Case 2, the interpreters are told that any disputes must be settled by appeal to an actual text framed by a bunch of intellectually and morally superior individuals from a few generations back and containing a blueprint of a rational society. The constrained vision appeals to accumulated wisdom presumably to avoid the ad hoc results of fallible articulated rationality. Yet Case 1 appears to threaten greater risk of ad hoc activity by an elite than Case 2. Maybe the problem with the constrained vision's reliance on the past, on tradition, on the systemic rationality of an evolved social process, can be put this way: the fund of wisdom does not speak in unambiguous terms—in fact, it does not speak at all.

Thus, the constrained vision falls apart because (a) it doesn't suggest the slightest basis for its confidence in the inherited scheme of things; and (b) even if such confidence were justified, it is not clear in a wide range of cases that we could know with any amount of confidence when we are following and when

we are deviating from the inherited scheme of things.²⁹ Recall Sowell's claims about the constrained vision. First, its locus of discretion was the self-interested individual. Not so—inevitably a body of interpreters will emerge with potentially unlimited discretion. Second, its mode of discretion was inherited wisdom or systemic rationality, as opposed to articulated rationality. But quite a bit of articulated rationality is likely to go into “accessing” this accumulated wisdom.

Does the unconstrained vision fare any better under scrutiny? Not likely. In a nutshell, the unconstrained vision says, “A few extra-smart and well-intentioned people can make this whole thing work.” The efforts of these people, if the collective allows them discretion, will benefit all of us. But the unconstrained vision, much like Rousseau himself, has a “problem of evil” problem: if we are all so good, how did things get so bad? And when an explanation is proffered, will it be consistent with an optimistic view of the future?

In addition, when I look for guidance in deciding upon particular courses of action, the unconstrained vision gives me little comfort. The power of human reason will save us, so we are told, but in the case of competition among would-be saviors, whose rational schemes do I follow? And if force is required to implement one rational scheme rather than its alternatives, then one is left to question the morality and intelligence of such a scheme.

But it is too easy to criticize the unconstrained vision; so much so that it seems like a “straw vision.” Sowell tells us:

What is at the heart of the difference between them is the question as to whether human capabilities or potential permit social decisions to be made collectively through the articulated rationality of surrogates, so as to produce the specific social results desired.³⁰

Why does Sowell make *elitist imposition of standards* an essential characteristic of the unconstrained vision? By contrast, the constrained vision comes out sounding like some sort of populist gospel with its emphasis on evolved social processes to which the common folk of generations past have contributed. Since the constrained vision is more or less associated with the right side of the political spectrum and the unconstrained vision with the left side, it looks as though leftists elevate themselves above the masses and imperially hand down the scheme of things while rightists join the masses in following the inherited wisdom.

If Sowell is really advocating the superiority of the constrained vision

29. Perhaps I can place my finger on the source of the difficulties in the constrained vision. In concocting this “unhappy” vision, Sowell has used ingredients from the traditional conservatism epitomized by Burke and the libertarian conservatism epitomized to varying extents by Adam Smith and more recently, Robert Nozick. Burke defends a system that condones the triumph of inherited privilege over merit and emphasizes duties over rights. Smith urges adoption of a market economy with a systemic rationality promoting self-interested individual behavior that redounds to the common good over the long run. Sowell brings together in the constrained vision the systemic rationality that Smith cherishes with the conventional wisdom that Burke so favors. The marriage is not a happy one. For example, as free market economies emerged in Europe and the United States, the force of tradition was decimated. A Burkean would object to the wholesale changes brought about by the new economic order. A Smithian, however, would applaud the inexorable triumph of a new systemic rationality. In the constrained vision Sowell wants it both ways: the free market system embodies both traditional wisdom and systemic rationality.

30. *Id.* at 112.

over the unconstrained, and I am convinced that he is doing just this, then criticizing the latter is a waste of time. Instead, critical attention should be focused exclusively on the constrained vision. So far I have concluded that the constrained vision does not succeed in filling in the gaps or providing a foundation for one's political beliefs and prescriptions. In the next section I shall examine the theoretical consequences of the constrained vision and consider alternative theoretical positions that are more viable than the "straw vision" construed by Sowell.

II. THE WORLD ACCORDING TO SOWELL: EQUALITY, POWER, AND RIGHTS

The second part of Sowell's book, "Applications," discusses various consequences of seeing social matters by way of one vision or the other. I shall take a close look at three of these consequences, namely, the conceptions of equality, power, and rights, especially property rights, that derive from or that at least are consistent with the constrained vision.

Equality

The constrained vision sees equality as a process, not a result. For this reason it opts for *equality of discretion*, while the unconstrained vision favors *equality of condition*.³¹ In the rush of Sowell's words, however, his use of "condition" in the sense synonymous with "result" obscures the role played by the second sense of "condition" as a basic requirement for the successful operation of a process.

Let's take Sowell's favorite example of an evolved (and therefore admirable) social institution, the free market economy. The constrained vision is concerned about discretion: that each individual participant in the market economy should have equal liberty to compete for the rewards distributed by the market. But the unconstrained vision is more concerned about the result. Hence, after the process has run for a certain time and certain people have done so poorly in the competition as to not have anything to eat or anywhere to sleep, those of the unconstrained vision will step into the marketplace, mandate transfers of wealth from winners to losers, and thereby deprive the winners of their discretion. By focusing on results, those of the unconstrained vision disrupt and distort a social process that has benefited society as a whole.

This account is a bit too simple. Actually, certain luminaries of the constrained vision such as Adam Smith and Milton Friedman have supported schemes to ameliorate the suffering of the poor even though such schemes run counter to the operation of the free market. But "neither was prepared to make fundamental changes in the social processes in hopes of greater equalization."³² Sowell quotes Friedman:

Wherever the free market has been permitted to operate, wherever anything approaching equality of opportunity has existed, the ordinary man has been able to attain levels of living never dreamed of before.³³

31. *Id.* at 139.

32. *Id.* at 127.

33. *Id.* (quoting A. MILTON and R. FRIEDMAN, *FREE TO CHOOSE* 146 (1980)).

Friedman's caveat, "wherever anything approaching equality of opportunity has existed," completely slips by Sowell.

For Sowell, any transfer payments from rich to poor in a market economy are result-oriented. Such payments can only derive from a definition of equality that insists that people who participate in a system of production take from that system rewards in roughly equal amounts. But it is perfectly consistent to support a free market economy and still advocate transfer payments. In fact, taking Friedman's caveat seriously, such transfer payments are necessary.

What Sowell misses is the distinction between the tools required to compete in the market and the actual competitive efforts a person makes. During one's minority, one gathers by way of the tutelage of significant others a set of tools for competing in the marketplace. As an adult, one then proceeds to utilize such tools in competing for the benefits offered by the market. Where transfer payments are made so that all children and not just the children of the rich can enter the market with the basic skills needed to compete, such payments are required to maintain the integrity of the process, not to achieve desired ends. The constrained vision's process-orientation and equality of discretion are a sham where the basic conditions for a competitive market are not provided. There is an essential distinction between the results or ends of a process and the conditions required for the integrity of the process.³⁴ Sowell's constrained vision conflates results and conditions and thereby dismisses a notion of central importance to any competitive process, namely, giving each competitor a fair opportunity. Another way of making this point: to say that the impoverished circumstances of a 6-year-old child is a result of the economic system is not to distinguish between (a) a result of one's participation in the economic system; and (b) a causal result of the economic system. Ignoring the poverty of one who has had a fair chance to compete in the system is one thing; ignoring the poverty of one whose poverty virtually excludes the possibility that the person will have a fair chance is quite another thing.

One prominent issue at stake in this battle over conceptions of equality is affirmative action. The constrained vision's conception of equality can be used to justify the conservative opposition to affirmative action programs. For instance, if X is a Black, who grows up in impoverished circumstances in a racially and culturally isolated ghetto neighborhood, and leaves school at 16 to seek his destiny in the economic marketplace. His destiny is one of inconsistent employment, performing menial work at low wages. Finally, he manages to obtain a union job at a factory across town. In contrast, Y, a White, grows up in a middle-class suburb, finishes high school and, choosing to forego college, gets a highly sought-after job at the same factory as X (but a decade earlier) as a result of the influence of friends and relatives. Consider an affirmative action program that would take from Y (e.g., his job, some benefits of his seniority ranking) and give to X. According to the constrained vision, X's circumstances and comparative disadvantage with respect to Y are not

34. The term "condition" has (at least) two distinct meanings. First, one's condition is one's circumstances; in this sense, "condition" is roughly synonymous with "result." When one seeks to ameliorate the condition of the poor, Sowell can rightly say that one is trying to change the distributive result of the economic process. But the second meaning of "condition," a set of circumstances required for something to work or function, is the meaning I apply in criticizing the constrained vision.

due to any "coercive" influence (i.e. exercise of power) of any specific individual or group over X; certainly Y has not coerced X in any way. No individual or group now in existence can be ascribed responsibility. And if we attempt to trace X's disadvantage back to earlier racist institutions and practices, the constrained vision might tell us that the causal links between these historical matters and X's present circumstances are too attenuated. Once deliberate exercises of power are eschewed, what remains is this picture: Y has not caused X's disadvantage because the destinies of both have been subject to the forces of an impersonal master, the market system. And the unconstrained vision's prescription of an affirmative action program is an unjustified and inexpedient exercise of power by a government elite over Y (and presumably over X as well). For the constrained vision, X's disadvantage is unfortunate but an acceptable trade-off for an overall system that benefits us all.

Even without disputing the causation of racial disadvantage, shouldn't we all be offended by the unfair advantage Y has over X in the market system? Instead of a trade-off, isn't this really an aberration from a competitive market system? Even if we do not assign blame to specific individuals or institutions, it is very clear that X's choices have been severely restricted. The example of X and Y provides a clue as to what is wrong with the constrained vision's conception of equality. This vision places the focus on the question whether some specific person or group has deprived an individual of choices. But this notion of deprivation makes little sense if an individual, due to background circumstances effected by the system operating over time, has few if any choices. Quite simply, to be deprived of choices requires that one actually have significant choices. And having choices means being able to exercise power over one's actions. Affirmative action programs are meant to create some choices, not dictate results.

Sowell has a fallback position. He suggests at several places in his book that interfering politically in the economic process is dangerous because the benefit of greater fairness from such interference will not outweigh the cost of government intrusion.³⁵ But this is an old and worn out argument between leftists and rightists. For rightists, whatever the problems from large aggregations of economic power, to suggest schemes to solve such problems is to raise the sceptre of political power that can destroy the economic process. For leftists, those with vested economic interests cannot only skew the market process toward their own ends (so that the market is no longer competitive) but can also gain undue influence over the political process. Dick Gregory used to explain the different brands of racism in this way: White Southerners don't care how close blacks get as long as they don't get any power; White Northerners don't care how much power Blacks get as long as they don't get too close. Those of the constrained vision seem to feel that it doesn't matter how rich you get, because they are all still okay, i.e. still free, if you don't gain political power. This is nonsense but the point need not be argued here. All that need be said in suggesting an alternative to the constrained vision is that the goal of fair opportunity does not require placing into the hands of some political elite license enough to deprive market participants of their liberty.

35. See, *id.* at 56; *Id.* at 128 ("In short, attempts to equalize economic results lead to greater—and more dangerous—inequality of political power.").

The task of equalizing opportunities doesn't call for or necessarily give rise to a Lenin.

Power

Sowell ascribes to luminaries of the unconstrained vision such as John Kenneth Galbraith, Gunnar Myrdal, and Laurence Tribe, the view that whenever "one individual or group can change the behavior of another, then the former has power over the latter."³⁶ This expansive conception of power gives a bleeding heart liberal much to bleed about. For the constrained vision, power is conceived as "the ability to reduce someone's preexisting options."³⁷

The conception of power ascribed to the unconstrained vision is silly and patently indefensible. If I slip and inadvertently shove you, I have power over you according to this conception because I have influenced your behavior. (Or: If I tell you what I heard on the news, that the surf is out, and you go surfing as a result, I have exercised power over you.) To make this conception even slightly more tenable, one has to add some requirement that Y acts intentionally when influencing X's behavior. But this element of intention is not enough for if X tells Y to shove Z or else (e.g. X has a gun and is threatening to shoot Y), then Y will influence Z's behavior and acts intentionally in shoving Z, but it does not seem that Y has power over Z. So there would also appear to be some element of voluntariness required in exercising power.

The constrained vision's conception of power is much narrower. For the constrained vision,

[p]ower lies at the end of a spectrum of causal factors which include influence, individual discretion, and systemic interactions whose actual outcomes were not planned or controlled by anyone.³⁸

Though one person may influence another person's behavior in important ways, such influence does not count as an exercise of power unless the effect of the influence is to actually extinguish one choice that the other person previously had.

The battle of these two conceptions of power has implications for the important domain of contractual relations within a capitalist market society. For Sowell's constrained vision, as long as there is some consideration or quid pro quo for the services X provides to Y, the deal X and Y has made cannot be coercive (that is, cannot be a situation in which Y is exercising power over X). Some law professors, eager to debunk any antiquated bit of conventional legal wisdom, like to say that there is no such thing as "unequal bargaining power." As long as X has bargained, as long as X has a choice to accept or reject the terms of the deal offered to X by Y, then X is not being coerced by Y. So says the constrained vision.

But if X's choices are starving to death or accepting an employment contract with Y at subsistence wages, it seems intuitively implausible to say that Y does not have any power over X because Y did not deprive X of any choices. Does anyone seriously believe, for example, that the company management in a one-company town does not have a good deal of power over not only its employees but also their families and any local independent contractors?

36. *Id.* at 170.

37. *Id.*

38. *Id.* at 151.

Behind Sowell's discussion of the constrained vision's conception of power is a message: leftists should stop blaming society's ills on the economic power of rich families or large corporations. The fate of all the competitors in the market is in the hands of the process itself and not in the hands of specific persons or groups. But this is more of Sowell's conservative refrain concerning economic and political power. I just find it curious that Sowell (or his constrained vision) can be very concerned that, for example, the IRS will accumulate and exercise power malevolently and at the same time be not the least concerned that EXXON will do the same.

Justice

For the constrained vision, justice is a matter of a "conscious trade-off" and periodic unfair results must be countenanced as a result of an overall process that serves "the interest of the society as a whole."³⁹ The certainty provided by a *uniform* framework of rules outweighs any number of miscarriages of justice in individual cases that result when the framework is slavishly applied. As might be expected, those of the unconstrained vision seek to "individualize" the system of justice so as to avoid egregious results; each case presents a unique set of circumstances calling for a custom-tailored resolution. The difference between the two visions goes even deeper, though: for the constrained vision, justice is merely for the sake of order while the unconstrained vision, represented for example by John Rawls' theory, views justice as the primary good of a society.

These differing conceptions of justice involve contrasting notions of what a right is. For the constrained vision, rights are "zones of immunity from public authority" providing individuals "the legal ability . . . to carry on certain processes without regard to the desirability of the particular results, as judged by others."⁴⁰ Oddly enough, this sounds very much like what Dworkin has in mind when he speaks of rights as "trumps." For the constrained vision, however, these immunities are not absolute because "[i]ndividual rights originate, take their meaning, and find their limits in the needs of social processes."⁴¹

This brings us to property rights. Property rights, according to the constrained vision, have emerged and persisted because such rights have benefited "the population at large" over the long run.⁴² Because rights such as property rights are part of the inherited social process, these rights cannot be expanded or contracted in *ad hoc* fashion.

All this is rather simple-minded. Rights do not define themselves—legislatures and courts define rights. For example, the Supreme Court in 1985 held that the copyright included a right to first publication.⁴³ The Copyright Act of 1976 did not specifically provide for such a component right and prior judicial authority did not clearly establish whether copyright included this incident. By most accounts, the Supreme Court carved out a new incident to the copyright. And this new incident resulted from the Court's attempt to square

39. *Id.* at 176.

40. *Id.* at 186.

41. *Id.* at 202.

42. *Id.* at 186.

43. *See Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985).

one party's First Amendment rights with the opposing party's copyright. Hard cases invariably address conflicts of rights and call for a court to craft a result in which the dictates and demands of previous case law—constitutional and statutory—the interests and circumstances of the parties involved and the community at large are brought together into a coherent scheme.

Sowell's conception of the law brings to mind an algorithm or recipe: gather the ingredients, follow the directions, and get the result. He not only minimizes the judge's role; he also seeks to suppress the activity of legislatures. On the one hand, he tells us that "judicial activism" violates the separation of powers; presumably, if the judiciary is infringing the legislature's sphere of authority, then the legislature does have the power to change the law. But then, on the other hand, in the name of the constrained vision, he challenges "legislative activism": political leaders as well are not authorized to "expand or contract [individual] rights in *ad hoc* fashion."⁴⁴ But what makes a legislature's decision to contract or expand a right "ad hoc?" In the United States, with our constitutional form of government, aren't we paying all too much deference to the rational schemes of an elite group whenever we minimize the role of current government in shaping social practices and institutions? Sowell might respond that property rights go back before the Constitution; that document merely reflects the order of things at the time it was drafted. But Native Americans, here long before European settlers, had a very different conception of the property right. Even in England, the conception of a property right as a right to exclusive use was not dominant until the Enclosure Movement. That movement, one should recall, was not an "evolution" but quite clearly a new order imposed upon a society by an elite group. Why does the constrained vision consider one conception more "natural" than another, so natural in fact that a democratically empowered legislature should not alter that conception?

Sowell's answer is this: "The assessment of *long-run* social expediency is already implicit in that exemption,"⁴⁵ that is, in the existing conception of a property right or a right to free speech. This answer won't do for two reasons: first, rights do not speak for themselves and are notions requiring constant and careful demarcations in hard cases; second, even when rights are more or less clearly demarcated, Sowell's attempt to designate one set of existing rights as the optimal scheme of rights and as virtually immune to judicial or political alteration leaves one baffled as to how changes ever occur in a society's scheme of rights.

III. THE WAGES OF CONSTRAINT

Sowell tries to cover the entire playing field with his two conflicting visions. I have had much to say in criticism of these visions, especially the constrained vision and its consequences. Why is it that Sowell's twofold scheme obfuscates rather than comprehends the arena of political debate? I suggest that there is something amiss in Sowell's own vision, a central blindness, and I shall spend this section articulating just what is amiss.

Some of Sowell's dichotomies will serve as clues to this central blindness. These dichotomies are prime examples of the fallacy of bifurcation. For one,

44. *Id.* at 202.

45. *Id.*

Sowell's counterposing of systemic rationality/inherited wisdom to articulated rationality ignores a conception of human intelligence, knowledge, and rationality as a process of inquiry undertaken by a community. Sowell's conception of articulated rationality forces the individual to either take orders or give orders; his conception of systemic rationality/inherited wisdom consigns the individual to following rules and playing roles, the meaning and applications of which are problematic. The alternative to Sowell's dichotomy is a conception of deliberate social inquiry and experimentation by a community as a way of responding to special social problems within a larger context of shared norms.

Sowell's dichotomy of process-orientation versus result-orientation also obscures a viable alternative conception. As I have suggested above, any legitimate social process will depend upon certain conditions for its successful operation. Sowell can ignore conditions of equal competitive opportunity while lauding market economies presumably because he believes that the process results in overall welfare (i.e., gains in utility for the entire society). This concern for the good of all allows Sowell to dismiss claims of relative deprivation not only in regard to distributive results but also in regard to initial opportunities. Sowell's failure to distinguish between opportunities and results betrays a preference for conceptualizing an individual as a set of determinate ends or preferences rather than as an actor whose various projects and interactions with other actors create a meaningful social existence.

Finally, there is Sowell's dichotomy of those who view human nature as malevolent or egotistical and those with a benevolent or altruistic conception. This bifurcation is the most stultifying of all. When a mother risks her life to save her child, she is acting selfishly, not altruistically, because the "self" that is acting includes the child. That is, the mother is not simply playing a role as one does in a TV drama. Rather, being a mother means to this particular individual belonging to a group of (at least) two, a self consisting of parent and child.

The boundaries of our selves are fixed not by the biologically given needs and functions of individual organisms but rather by a process of self-definition that is a central constituent of human agency. Human thought and action are fundamentally processes of interpretation. One aspect of that interpretive activity is self-awareness, the actor/interpreter's conception of the acting and interpreting subject. At the foundation of one's vision, therefore, is a process of self-definition in which boundary lines are continually drawn and redrawn between "we" and "them." To fully understand any human thought or any human action requires comprehension of the subject of that thought or action. Language, one central social form, allows me to effectively communicate, one indispensable social end, because I belong to a community of language users. In following the rules of my language I am defining myself as belonging to this particular community. But the status of my membership can be taken for granted only in unproblematic or routine communicative situations. Whenever difficulties arise in communicating, speaker and audience have to re-negotiate to some extent the terms of their co-membership in the same language community by reaching agreements on the meanings of their terms.

Communication even in problematic situations succeeds as often as it does because of a background of shared rules and roles. But Sowell's vision,

because he seems to focus exclusively on the non-problematic social interactions, ignores this active process by which individuals define the boundaries of their collective membership and thereby negotiate their common social reality. For Sowell, the individual is not a process but a result, a *fait accompli*, a ready-made set of preferences or ends.

Thus we come to a surprising irony: while Sowell champions a process-orientation, he views the individual social actor as a result, rather than as an active process whose self-definition affects and is affected by social practices and institutions. Moral and political questions are rooted fundamentally in reflections on this active process by which the individual constitutes self and other. This point escapes Sowell as he discusses some of the views of his political opponents:

In this [the unconstrained] vision, the rights of individuals are to taken 'seriously' as essential recognitions of their humanity, and social expediency is to yield when basic human rights such as free speech or the right of the accused to constitutional protection are at issue. In conflicts between rights, those which define the human being as a subject rather than an object are to have categorical preference over other rights, such as rights to property, and all rights are to trump all interests, such as a general interest in social peace, or economic efficiency.⁴⁶

Sowell's myopia causes him to skirt around the suggestion of a plausible vision contrary to his own.

Rights take preference over interests in this alternative vision because rights go to the very process by which individuals come to have interests. Rights mark out the framework within which social practices and institutions create and maintain rules and roles. Sowell takes the individual as a pre-determined set of interests who enters into a completely ordered marketplace seeking profit (i.e. to further the ready-made package of interests) through exchange at arm's length with other individuals. But Sowell refuses to recognize that there are preconditions to any fruitful exchange. Rights, unstable and indeterminate as they are, represent less-than-perfect vehicles designed to secure these preconditions. Rights are much like certain universal grammatical concepts such as agent, object, speaker, and audience. Speakers of diverse languages can eventually shape vehicles by which to communicate only because they share these fundamental concepts. Actors can only profit from exchanges and other forms of interactions (involving convergent sets of interests) because or as long as fundamental rights are recognized.

Sowell's vision sees only interests, not rights,⁴⁷ because Sowell's conception of the individual human actor includes only results, not the process that shapes those results. A much more compelling "constrained vision" would recognize that society is not a *natural order* because the rules and roles of a social order are always subject to the interpretive dimension of human agency. Rather, humans are "condemned" to live in a social setting of their own making.

46. *Id.* at 199.

47. That is to say, it appears that for Sowell rights are just a species of interests. Rights are those interests that have become very deeply entrenched in a social order.

CONCLUSION

Although Sowell purports to be impartial between his two conflicting visions, this is an ideological book, not simply a book about ideology. Once the facade of neutrality is stripped away and the constrained vision is identified as Sowell's own ideological stance, the task becomes a critical assessment of this stance. I have found that Sowell's ideological argumentation goes awry in many ways.

In my view the book's moral is:

Individuals should accept assigned roles and follow recognized rules rather than looking for rational alternatives to the inherited social process.

Sowell's constrained vision arrives at this conclusion by two related routes. The first route is:

The existing social practices and institutions of a given society constitute a quasi-natural order that is optimal for that society.

The ground of this claim is what I have called evolutionary functionalism. I have argued that evolutionary functionalism is nothing more than an elaborate expression of preference for things as they are. Additionally, in ascertaining how things are, this approach ignores or dismisses the diversity of a modern society and the amount of conflict to be found in such a society.

The second route is:

Human beings are incapable of conceiving and carrying out rational schemes that benefit the society to which they belong.

I have argued that Sowell conceives of the individual as a passive set of ends, preferences or interests (or a quasi-automaton designed to achieve certain goals). An alternative vision conceives of humans as essentially interpretive creatures who actively constitute a social environment that constantly requires re-definition. On this view, the debate between those who view humans as altruistic versus those who view humans as egotistic becomes ancillary to the question of how actors define themselves.

I conclude by commenting on a recurrent thesis in this book: that at bottom political debates and disputes are not a matter of differences in value but rather differences in cognitive assumptions about human nature and social causation.⁴⁸ Sowell is wrong: one's conception of human nature and one's own moral values are not so easily separated. Using Sowell's own example, consider Adam Smith's hypothetical: were an earthquake to occur in China, a "dreadful calamity," Europeans hearing of the misery of the Chinese would pause for a moment to express sorrow and then return to their own business.⁴⁹ Smith's point is that a European would be more concerned about a "frivolous disaster" affecting him than about the utter horror faced by the people of a distant land. In such a situation, however, the difference between a European who acted to ameliorate the suffering of the Chinese and a European who could have so acted but chose not to would be a difference of moral values, not

48. *Id.* at 117 ("In short, it is not a moral value premise' which divides them but their different empirical assumptions as to human nature and social cause and effect."); *id.* at 131 ("Although the two visions reach very different moral conclusions, they do so not on the basis of fundamentally different moral principles but rather because of their differences in analysis of causes and effects."); *id.* at 216 ("Both constrained and unconstrained visions are fundamentally and essentially visions of causation. Only derivatively do they involve clashes of moral principles or differing hierarchies of social values.").

49. *Id.* at 20-21 (citing A. SMITH, *THE THEORY OF MORAL SENTIMENTS* 233-34 (1976)).

simply a difference in conceptions of human nature. It would be rather feeble for the apathetic European to say that he did not act because by nature he is selfish. Yes, we are all selfish, but the boundaries of our selves are the boundaries of our moral vision and these boundaries are of our making.