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Richard Delgado

*University of Alabama - School of Law*, rdelgado@law.ua.edu

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# Review Essay

## Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?

*And We Are Not Saved: The Elusive Quest for Racial Justice.* By Derrick Bell.\* Basic Books, Inc., 1987. Pp. xii, 288. \$19.95

Richard Delgado†

Derrick Bell's *And We Are Not Saved*,<sup>1</sup> an expansion of his 1985 *Harvard Law Review Foreword, The Civil Rights Chronicles*,<sup>2</sup> is about America's oldest and most intractable problem: race. Through the vehicle of ten "Chronicles," imaginative tales designed to probe aspects of society's treatment of race, together with analyses of those tales by the book's narrator and his fictional alter ego, Geneva Crenshaw, Bell exposes the nerves and sinews of United States race-remedy law.

Bell does this with surgical skill, yet the operation discloses much that we would rather not see. Bell offers a somber prognosis: The patient may never recover, and perhaps was never intended to. American civil rights law is not aimed at improving conditions for blacks, except on the rare occasions when doing so coincides with whites' self-interest. Instead, our system of civil rights statutes and case law serves a homeostatic function, assuring that society has exactly the right amount of racism: Too little

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\* Professor of Law, Harvard Law School.

† Professor of Law, University of Wisconsin School of Law. J.D., University of California at Berkeley School of Law (Boalt Hall), 1974.

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1. D. BELL, *AND WE ARE NOT SAVED* (1987) [hereinafter cited by page number only].

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

would forfeit psychic and financial benefits, too much would risk disruption. Accordingly, Congress and the courts periodically announce victories, such as *Brown v. Board of Education*,<sup>3</sup> with great fanfare. Blacks and their sympathizers hail these landmark events as evidence that salvation is at hand. Then, predictably, the new rights are cut back by narrow construction, foot-dragging, or delay. The optimistic, ahistorical, incrementalist, moderate-liberal mindset that characterizes most writing and teaching about civil rights in the United States thus does little to advance blacks' cause and may actually impede it. Bell uses literary techniques—humor, irony, myth, and anecdote—to show how this mindset operates.

In the *Chronicle of the DeVine Gift*,<sup>4</sup> for example, Geneva is hired to teach at one of the nation's leading law schools, the first of her race to hold a tenure-track position there. Geneva's credentials as a law teacher are impeccable: She graduated high in her law school class and had extensive experience as a civil rights litigator. Accordingly, her faculty colleagues are initially pleased to have her among their company. Their smiles turn to frowns, however, when she begins to outstrip them in the usual measures of professional merit: teaching, scholarly publication, consulting jobs, and appointment to prestigious commissions. Their concern deepens when Geneva, aided by a mysterious wealthy benefactor, is able to bring to the law school a parade of even more superbly qualified minority teaching applicants, each of whom is hired. When the seventh such candidate is proposed, the faculty decide they will go no further in hiring minorities and the black candidate is rejected. The Dean apologizes to Geneva, lamely reporting that the alumni were beginning to fear that the faculty was taking on the appearance of "a professional basketball team." When Geneva hears of this reaction, she quits her teaching position to rejoin the world of practice. The *Chronicle* suggests that affirmative action programs are intended to benefit blacks, but only so far; as soon as blacks' gains threaten whites' status, limits set in. For Bell, this *Chronicle* is not simply a tale revealing the psychology of particular individuals; rather, it illuminates the way that law functions in our society.

The *Chronicle of the Slave Scrolls*<sup>5</sup> is even more painful. Geneva walks on a beach in Ghana during a personal pilgrimage aimed at losing her despair over the intractability of the race problem. On the beach, half buried in the sand, she discovers a miniature model ship, which she recognizes as a replica of the type of ship that slave traders used to transport African captives. Inside the hollow vessel, she discovers a parchment scroll, whose writing exhorts her to preach a message of survival to black people. The message is simple: Teach blacks the seldom-read history of

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3. 347 U.S. 483 (1954).

4. Pp. 140-61.

5. Pp. 215-35.

slavery and black subordination in America, a history "gory, brutal, filled with more murder, mutilation, rape, and brutality than most of us can imagine or easily comprehend."<sup>6</sup> Geneva becomes a preacher and encourages blacks throughout the nation to form "healing groups," which dedicate themselves to learning the lessons of the scrolls. Those who complete the lessons wear metal bands on their wrists to remind themselves of the trials their forbears endured. Graduates of the groups quickly transform their communities. Crime, addiction, and joblessness drop rapidly. Black churches become self-help centers. Reliance on welfare agencies virtually vanishes. Blacks begin out-achieving whites in every area but sports and entertainment, which they scorn as shallow and unfulfilling. In short, blacks begin to act exactly as white people have long maintained blacks must act to win full acceptance. Rather than respond warmly and with congratulations to the sudden improvement in blacks' status, however, white America finds itself threatened. Working-class whites, resenting the competition and loss of status, carry out violent attacks on black self-improvement centers. Soon laws are passed, ironically termed Racial Toleration Laws,<sup>7</sup> which are applied to prohibit black healing groups' practices as the preaching of racial hatred. The black churches are forced to burn the scrolls and model ship.

Each of the eight additional Chronicles—the *Constitutional Contradiction*,<sup>8</sup> the *Celestial Curia*,<sup>9</sup> the *Sacrificed Black Schoolchildren*,<sup>10</sup> the *Black Reparations Foundation*,<sup>11</sup> the *Amber Cloud*,<sup>12</sup> the *Twenty-*

6. P. 217.

7. P. 220.

8. Pp. 26–42. In the *Chronicle of the Constitutional Contradiction*, Geneva is transported back in history to the time of the Constitutional Convention. Entering the great hall in Philadelphia, she introduces herself as a black woman from the twenty-first century. The audience listens to her impassioned speech about the tragic results of the slavery compromises they are about to enact, but rejects her request on the ground that the nation's unity depends on preserving a system of black slavery. The narrator and Geneva then discuss how the taint of these compromises set the nation on its current unfortunate course.

9. Pp. 51–56. The *Chronicle of the Celestial Curia* considers the potential of litigation to achieve justice for blacks. After Geneva's completion of the tale, she and the narrator analyze recent law reform cases and conclude that civil rights litigation proceeds, at best, with one step forward, then one step back. Judicial breakthroughs occur only when they benefit whites; any benefit to blacks is limited through narrow interpretation, recalcitrance, and delay. Blacks end up no better off than before, and often worse: Society is led to believe that the "race problem" has been solved, and that further agitation on blacks' part is simply bellyaching, an unreasonable insistence on benefits not deserved by people who have suffered no unfairness.

10. Pp. 102–07. After Geneva recites the *Chronicle of the Sacrificed Black Schoolchildren*, she and the narrator discuss the failure of court-mandated school desegregation to improve the lot of blacks. Black schoolchildren end up worse off than before in newly integrated schools, black teachers and administrators are reassigned or fired, black schools are closed, and the black community's solidarity is impaired.

11. Pp. 123–30. The *Chronicle of the Black Reparations Foundation* discusses an imaginary program to improve the circumstances of the black underclass through economic supports and incentives. An extremely wealthy white benefactor turns over his and his friends' fortunes to poor blacks who wish to improve their lot. Society finds the ensuing rapid improvement in the fortunes of lower-class blacks intolerable, and the program is stopped.

12. Pp. 162–65. The *Chronicle of the Amber Cloud* discusses the limits of the equal protection

*Seventh Year Syndrome*,<sup>13</sup> the *Ultimate Voting Rights Act*,<sup>14</sup> and the *Black Crime Cure*<sup>15</sup>—sounds this same bleak note: American racism is here to stay in our most prized legal institutions despite our most exalted legal rhetoric. American society oppresses and subordinates minorities of color at every turn, subscribing to a nearly invisible ideology that finds this oppression tolerable, natural, and inevitable. Our oppressors sleep well at night: This is the perverse virtue of the mindset Bell's characters probe and test in the Chronicles.

Despite these hammerblow messages, the final pages of the book<sup>16</sup> are unabashedly positive. The ten Chronicles show that neither litigation, integrated education, emigration, separatism, self-help, nor armed insurrection (which would be ruthlessly put down) will undo American racism. Nonetheless, the reader is told, there is hope. Just as blacks have transformed the Bible, finding in it a source of strength and continued struggle, so should they and their sympathizers work within the current constitutional structure to try to make it a source of humanizing reforms. This will require a many-faceted program of education, litigation, disruption, and community organizing. The extra-legal tactics will put pressure on the system to reform itself, and the Constitution is sufficiently flexible to allow reform to occur without bloodshed. The struggle will ennoble all who labor in it; both its means and ends are ethical.

It may be, as Bell hopes, that in the United States racial attitudes and

clause in achieving justice for blacks. Geneva describes an imaginary disaster that causes previously well-behaved white youths to suffer "ghetto disease," an illness whose main symptoms are lack of motivation and propensity to commit crime. Society displays great concern and leading scientists quickly discover a cure. The cure is expensive, however, and is therefore restricted to whites, even though it would also help black youths become productive members of society. The racial limitation on the distribution of the treatment is challenged but upheld in court.

13. Pp. 198–203. The *Chronicle of the Twenty-Seventh Year Syndrome*—the only Chronicle recited by the narrator and not by Geneva—discusses problems in intimate relationships between black men and women.

14. Pp. 75–88. In the *Chronicle of the Ultimate Voting Rights Act*, a southern senator with a long track record as an opponent of black causes is saved from drowning by a black woman. He has an epiphany, after which he delivers an impassioned speech decrying blacks' historical exclusion from citizenship rights through the black codes, poll taxes, and violence. The Senator introduces a bill which provides a \$100 incentive to citizens who vote, and guarantees minority voters proportional representation.

After Geneva relates this Chronicle, the narrator and she consider the bill's constitutionality and potential effectiveness in promoting blacks' interests. The narrator concludes that such a bill would be declared unconstitutional, and Geneva doubts its effectiveness, even if it survived challenge.

15. Pp. 245–48. In the *Chronicle of the Black Crime Cure*, a gang of young black criminals discovers a bed of brightly colored stones while exploring a cave. One youth tastes a stone and inadvertently swallows it. The stone has an immediate effect; the boy's character is transformed. He no longer is interested in dealing drugs or mugging pedestrians. Instead, he is seized by a desire to work for good. The message of the stones soon spreads and many others swallow them. Soon crime in the black community almost disappears. Yet again the story has an unhappy ending. White society cannot absorb the large numbers of clean-cut, peaceable black youths demanding work. Police and security guards are threatened with loss of their jobs. Lower-class whites fear the changes; they can no longer tell themselves that they are better off than the blacks. Soon, the supply of magic stones is mysteriously destroyed. The status quo returns. Inner-city crime increases to its former level, where it once again serves its usual function of uniting the white community against blacks.

16. Pp. 248–58.

laws are elastic. Yet elastic things—as the Chronicles repeatedly suggest—have a way of snapping back. The gap between the bleak picture painted by the first part of the book and the rosy ending is puzzling.<sup>17</sup> At the start of the book's final chapter, Geneva recites the *Chronicle of the Black Crime Cure*<sup>18</sup>—as despairing a Chronicle as any she told before—yet she suddenly shifts to a tone of hope and optimism.<sup>19</sup> Bell does little to tell the reader why Geneva, usually spunky and challenging, abandons her skeptical stance and joins Bell in the hazy homilies with which the book ends. Although it is as startling as any produced by the slave scroll or the crime cure stones, Geneva's transformation is unexplained. Thus we must search for an explanation, travelling in a fictional vehicle as Bell does.<sup>20</sup> What happened to Geneva to leave her so optimistic?

17. At least one reviewer in the liberal press noted this disjunction, but praised it. See Book Review, *NEW YORKER*, Dec. 7, 1987, at 192, 193 (“[H]is surprising conclusion is noble and edifying.”).

18. See *supra* note 15 (describing *Chronicle of the Black Crime Cure*).

19. The starkness of this sudden change in Geneva's outlook may be witnessed in the book's final ten pages. Just after Geneva recites the *Chronicle of the Black Crime Cure*, the narrator observes that “[n]one of her stories had been models of optimism, but this Chronicle of the Black Crime Cure touched the very nadir of our despair.” P. 248. Compare this observation to Geneva's ringing conclusion which comes shortly thereafter:

Both history and experience tell us that each new victory over injustice both removes a barrier to racial equality and reveals another obstacle that we must, in turn, grapple with and—eventually—overcome. . . .

Let us, then, rejoice in the memory of the ‘many thousands gone,’ those men and women before us who have brought us this far along the way. Let us be worthy of their courage and endurance, as of our own hopes, our own efforts. And, finally, let us take up their legacy of faith and carry it forward into the future for the sake not alone of ourselves and our children but of all human beings of whatever race or color or creed.

P. 257. The eleventh Chronicle seeks to answer this question: How does Geneva travel from the *Chronicle of the Black Crime Cure*, in nine short pages, to this almost transcendent conclusion?

20. My explanation takes the form of a story. Like all stories, it is metaphorical, not literal. It attempts to show how consciousness may work, for Geneva, Bell, or anyone else. I adopt this format for several reasons. Like Bell, I believe that stories are useful vehicles for probing mindsets. See B. BETTELHEIM, *THE USES OF ENCHANTMENT* (1975). Narrative and metaphor are particularly useful in the highly charged area of race, where the zigs and zags of doctrine are less easily explained by precedent than by history, economic conditions, and class consciousness. Stories that contain dialogues can probe the tensions and contradictions among world views, permitting the reader to pick and choose elements of either story and form a new story that synthesizes the dialogues into an account that rings true in light of his or her experience. See, e.g., Fuller, *The Case of the Speluncean Explorers*, 62 *HARV. L. REV.* 616 (1949) (mythical case report); see also Greene, *A Short Commentary on the Chronicles*, *HARV. BLACKLETTER J.*, Spring 1986, at 60, 62 (Platonic dialogues and law professors' classroom exercises probe and test belief). Stories are useful tools for the underdog, as they invite readers to suspend judgment, listen for, and reflect on the point of the story. This process is essential in our society, as all movements for change must gain the support of the dominant group, which is white.

My friend Bill Powers has suggested to me that dialogues which present opposing viewpoints without arriving at conclusions as to which are correct are “cop-outs.” But I believe that authors perform a disservice in purporting to reason neutrally and then coming to predetermined conclusions in accord with their biases, as many legal writers do. “Neutral” approaches often mischaracterize or dismiss opposing viewpoints (or disregard them entirely, see Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 *U. PA. L. REV.* 561 (1984). Implying that objective, correct answers can be given to legal questions also obscures the moral and political value choices at the heart of any legal inquiry.

THE ELEVENTH CHRONICLE: HOPE, DESPAIR AND THE MODERN-LIBERAL PERSONALITY FIX

To set the stage for this final Chronicle, let us note a few facts about Geneva's background. As depicted in the book, Geneva had been a litigator at the NAACP Legal Defense Fund. She was one of the most talented of the Fund's lawyers until she suffered a severe nervous breakdown caused by overwork, racist violence, and the strain of working for goals that seemed always to recede. Geneva was institutionalized for twenty years, during which her mind wandered, out of touch with reality. Just before the book begins, Geneva suddenly regains her mental health. She leaves the institution and seeks out Bell's narrator, in an effort to catch up on, and come to terms with, what took place in race relations law during her long absence.

The book proceeds by having Geneva recite a visionary Chronicle (she presents all but one of the ten), and then discuss it with Bell's narrator. In this way they work together to discover how much—or little—American civil rights law has progressed. Now let us imagine that on completion of the tenth Chronicle, but prior to her final discussion with the narrator,<sup>21</sup> Geneva returns to the mental institution from which she had been furloughed to request a discharge and pick up her personal effects. Shortly after her arrival, she meets with Dr. Jeffrey Gilder, a psychiatrist in charge of her care and treatment. He must certify that she is fit to be released from the institution, and he interviews her to make that determination. Dr. Gilder is about forty, and wears a tweed sport jacket and a neatly trimmed beard. The two sit down on opposite sides of a table in a small, comfortable room.

DR. GILDER. I see you are back, Geneva. How was your furlough?

GENEVA. Fine. I am now refreshingly devoid of hope, thanks to my sessions with my mentor. Since I now see things as they are, I am well. I want you to discharge me. There is much work to be done, and I still have catching up to do.

DR. GILDER. You look much improved, Geneva, and I can see you are better. It's pleasing to see your reconnection with reality. But tell me about this hopelessness you feel.

GENEVA. I did not say hopeless. I said devoid of hope. As I'm sure you remember, it was the disjunction between reality and my hopes that drove me here originally. Thanks to my friend and mentor, I am now much better. So will you please sign my discharge papers so that I can collect my things and leave?

DR. GILDER. As you know, Geneva, we no longer subscribe to the double bind theory of schizophrenia as an article of faith.<sup>22</sup> But I'm happy if

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21. See *supra* note 19 and accompanying text.

22. The double bind theory holds that inconsistent treatment, usually by parents early in life,

your conversations with your friend did you some good. You certainly don't seem to be hallucinating any more, I'm happy to see.

GENEVA. If you're willing to sign the papers, I'll call a friend who agreed to pick me up.

DR. GILDER. (*Fixing Geneva with an appraising look.*) Yet I think we should explore this dejection of yours, Geneva. It may indicate some sort of mood disturbance. Tell me how you are feeling right now.

GENEVA. Fine. Stone cold sober, and just as in touch with reality as you are. Before, I was idealistic and hopeful, and look where it landed me. I now see what oppression can do to my people, and what little chance we have of stopping it. I also see that your class—nothing personal, Doctor—subscribes to a bland, invisible ideology according to which things are fine, and as nature intended them to be—with your people on top and mine at the bottom. I have no hope; hence I'm cured. Now, please sign the papers and let me out.

DR. GILDER. I'm not so sure I can do that, Geneva. You've opted out of your dilemma by embracing nihilism and despair, which is incompatible with mental health. Emotional well-being requires hope.<sup>23</sup> How can I in good conscience discharge you unless you concede that there are grounds for hope?

GENEVA. How can you demand optimism—of me, a black woman, of all people? *That's* crazy. You drag us to this country in chains, maintain us that way for two hundred years,<sup>24</sup> pass a few symbolic laws, announce a few "great" court victories, and now demand that we salute the flag, praise the Lord, and concede that salvation is just around the corner. No wonder we minorities have a high incidence of mental disorder.<sup>25</sup> Well, I went that route before and it drove me crazy. I'm not about to repeat my mistake.

DR. GILDER. (*Firmly.*) You can't live—nor can you leave here—without

predisposes individuals toward schizophrenia. See R. LAING, *THE POLITICS OF EXPERIENCE* 77-81 (1967); Bateson, Jackson, Haley & Weakland, *Toward a Theory of Schizophrenia*, 1 *BEHAV. SCI.* 251 (1956).

23. On the theory that hope is essential for mental health, see B. BETTELHEIM, *THE INFORMED HEART: AUTONOMY IN A MASS AGE* (1960) (hope distinguished those who survived prison camps from those who died); V. FRANKEL, *MAN'S SEARCH FOR MEANING* (1959) (discussing salutary effects of small choices made by prisoners in concentration camps); E. FROMM, *THE REVOLUTION OF HOPE: TOWARD A HUMANIZED TECHNOLOGY* (1968).

24. For studies of slavery, see E. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1972); E. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY* (1967); A. HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* (1978); K. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* (1956); E. WILLIAMS, *CAPITALISM AND SLAVERY* (4th ed. 1966).

25. On high incidence of mental illness, drug addiction, and suicide among minority racial groups, see K. CLARK, *DARK GHETTO* 82-86, 90-97 (1965); W. GRIER & P. COBBS, *BLACK RAGE* 154-80 (1968); Harburg, Erfurt, Hauenstein, Chape, Schull & Schork, *Socio-Ecological Stress, Suppressed Hostility, Skin Color and Black-White Male Blood Pressure: Detroit*, 35 *PSYCHOSOMATIC MED.* 276 (1973). On the psychological effects of racism on blacks in general, see *PSYCHOLOGY AND RACE* (P. Watson ed. 1972); *RACISM AND MENTAL HEALTH* (C. Willie, B. Cramer & B. Brown eds. 1973).



hope. Without hope you are a danger to yourself and to others.<sup>26</sup> I can't let you go.

GENEVA. (*Patently, in an all-suffering voice.*) Let me try to explain it to you again, Doctor.

(*Geneva proceeds to recount the ten Chronicles,<sup>27</sup> painting such a somber portrait that the psychiatrist's expression changes from his usual professional detachment to genuine concern. When Geneva finishes, the Doctor is silent for some time.*)

DR. GILDER. Geneva, I can see that you're distressed. If I were black, I too would be distressed. As a white, I can empathize with your distress. But that doesn't justify your dwelling on the hopelessness of the situation. That way lies despair, depression—maybe more bouts with madness.

GENEVA. (*Evenly.*) Then, Doctor, you want me to pretend that there is more ground for optimism than the situation warrants? Must I do this to be discharged into the world?

DR. GILDER. Geneva, work, love, human relationships, all rest on hope. You can't go through life looking at the black side of things.

(*Geneva snorts, but Gilder continues doggedly.*)

Our system has enough flexibility to allow energetic, talented blacks like you to change it.

GENEVA. Weren't you listening, Doctor? The moral of the Chronicles is that none of the civil rights strategies will work. We've been trying them for decades without getting anywhere. The gap between whites and blacks in family income, employment, infant mortality—every measure of well-being—today is exactly what it has always been, if not wider.<sup>28</sup>

DR. GILDER. Geneva, I don't see how you can say that. Today your people can drink from integrated drinking fountains. Your children can go to integrated schools. One of you even ran for president. None of those things was true thirty years ago, or a hundred. How can you say that there has not been progress? What did we fight for in Selma if not to better the plight of your people?

26. See generally A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 675-726 (1974) (standards for civil commitment). For a richly suggestive account of the *political* dimensions of psychiatric practice in its European origins, see M. FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (R. Howard trans. 1965).

27. The *Chronicle of the DeVine Gift* and the *Chronicle of the Slave Scrolls* are summarized *supra* text accompanying notes 4-7. The remaining Chronicles are summarized *supra* notes 8-15.

28. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 457 table 766 (106th ed. 1986) [hereinafter CENSUS] (in 1959, 18.1% of white and 55.1% of black families lived below poverty level; ratio essentially unchanged in 1984); *id.* at 72 table 112 (ratio of black to white maternal deaths essentially unchanged over same period); *id.* at 68 table 106 (blacks' life expectancy four years shorter than whites'); pp. 45-48 (Geneva uses statistics to argue that racial progress has been illusory); Bernstein, *Twenty Years After the Kerner Report*, N.Y. Times, Feb. 29, 1988, § 1, at 13, col. 1 (although some middle-class blacks have prospered, black-white income gap has widened over last 15 years); see also *infra* notes 31, 34 (citing additional statistics on minorities' status in U.S.).

GENEVA. (*Her expression softening.*) I didn't know you'd been in Selma, Doctor. On the right side of the picket lines, I assume?

(*The Doctor nods.*)

In that case, thank you. But I must reject your insistence on that great myth, Progress. Sometimes I think that black people's progress means more to you white liberals than it does to us.

DR. GILDER. I'll choose to take that as a compliment, Geneva. Or did you intend it as a reflection on my sincerity?<sup>29</sup>

GENEVA. Not at all, Doctor. I do believe that you act toward me in the best of faith. You're not a conscious racist nor a deliberate suppressor of my voice. Indeed, it's your very sincerity that renders you such an effective apologist for your system. And it also explains your need to convince yourself, at any cost, that things are getting better for blacks. Otherwise, what good will your spasmodic efforts on our behalf have done? And how could you justify your comfortable standard of living, when most of us struggle to eke out a bare subsistence? So you manipulate statistics and issue selective progress reports—for your own ears, mostly—in order to convince yourselves that we're progressing when we're not.<sup>30</sup>

DR. GILDER. You're too harsh on us, Geneva. More to the point, you're too harsh on yourself. Your hopelessness is self-fueling. You take a bleak look at things, so you pick out a few facts that confirm your view that the country is racist and will never change. In fact, there's been enormous progress on all fronts. There are black judges, congressmen, law professors. There are more black mayors than either of us can name. The Hispanics are progressing. And look at the Asians.

GENEVA. You're not above selective reporting yourself, Doctor. What about infant death rates among my people that are nearly double those of whites?<sup>31</sup> What about unemployment rates among young black males that are nearly triple yours?<sup>32</sup> What about crime, drug use, and other self-destructive behavior in the ghettos and barrios of every major city?<sup>33</sup> And consider the gap, Doctor, the gap. The disparity between whites and blacks, both in income and wealth, is the same as it was fifteen years ago,

29. See Denvir, *Justice Brennan, Justice Rehnquist, and Free Speech*, 80 NW. U.L. REV. 285, 288-89 (1985) (liberals' sincerity key element of their ideology's efficacy).

30. See Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986) (criticizing celebratory style of legal scholar's writing on Supreme Court race-relations jurisprudence).

31. See CENSUS, *supra* note 28, at 72 table 112 (black infant mortality rates were 63.8% higher than those of whites in 1950; by 1982, they were 94.1% higher); see also *Black Infant Mortality Risks Studied*, 132 SCI. NEWS 218 (1987) (black infants born in U.S. twice as likely as white infants to die during their first year).

32. See THE STATE OF BLACK AMERICA 51 (J. Williams ed. 1982); pp. 45-46 (Geneva cites unemployment statistics to Bell).

33. See Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQUALITY 9, 26-28, 30-33 (1985); *The Ghetto: From Bad to Worse*, TIME, Aug. 24, 1987, at 18.

if not growing.<sup>34</sup> You say things are getting better, but it always turns out that you mean in relation to the way they were for us. Naturally, if you compare figures for blacks today with those describing our condition fifteen or one hundred years ago, you will see improvement. After all, little more than a century ago, we were in slavery. Your selection of a basis of comparison for your statistics is revealing. You compare blacks to blacks, not blacks to whites. If you did the latter, you'd find little or no progress, so you don't. You don't because you're caught in a mindset that finds it natural and normal that whites should be over blacks—that there should be a gap in educational achievement, health, longevity, and well-being, so that the only issue is whether things are getting a little better at the bottom. Am I being too harsh on you, Doctor?

DR. GILDER. Not on me, but you're still being too hard on yourself. Your gloomy outlook is of your own making, yet you're trapped in it. I wish I could start you on a more optimistic course, for you will never recover until you achieve this. Furthermore, you'll be alienated from everyone you meet. Ours is an optimistic society; we believe we can improve things with work and trust.<sup>35</sup> You refuse to enter into that community—you consciously reject our reality and insist on remaining in a melancholy world of your own.

GENEVA. I wish I had some choice about living in that world, Doctor. But I have none. You've educated me to the point where I realize my own oppression, and the impossibility of my own escape from it.

DR. GILDER. Geneva, let's concede that all you say is true—that the law is biased against your people, that the dominant group sees little need for basic change, and that progress comes at a snail's pace. Not that I believe these things, but it's obvious that you do. So let's suppose for the sake of argument that they are true. Why couldn't you, your people, and sympathizers like me work shoulder-to-shoulder to change things? Is our political system not open? Is there not flexibility, room for improvement? Our society has shown great ability to change to accommodate new immigrant groups, technologies, social movements. Why couldn't you work to trans-

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34. See CENSUS, *supra* note 28, at 457 table 766; pp. 45-47 (statistics); A. PINKNEY, *THE MYTH OF BLACK PROGRESS* 83-86 (1984); Bernstein, *supra* note 28; Hacker, *American Apartheid*, N.Y. Rev. Books, Dec. 3, 1987, at 29, col. 1 (black men on average earn 60% of what white American men earn; even if black men gained same seniority and education as whites, their income would rise by only 8%); see also R. FARLEY & W. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 137-57 (1987) (high degree of involuntary housing segregation exists in U.S., and is just as great for blacks earning more than \$50,000 per year as for others); McLeod, *Blacks are Losing Integration Fight, New Study Claims*, San Francisco Chron., Dec. 30, 1987, at 2, col. 5 (housing segregation increasing in major American cities).

35. For this reason, at least one leading advocate of minority causes urges that Third-World activists avoid taking an overly pessimistic stance. See Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 *LAW & INEQUALITY* 103, 129 (1987) ("Thus, we differ with our brothers and sisters in CLS in that we cannot afford the luxury of a wholly negative critique which distances and alienates an already historically proven hostile audience.").

form a system you regard as fundamentally unfair, and, given the justice of what you say, expect to prevail?

GENEVA. Doctor, I thought careful listening was your stock in trade. But you were obviously daydreaming when I recounted the Chronicles and the lessons they teach.<sup>36</sup> Voter registration and political work will not succeed.<sup>37</sup> Nor will disruption, integrated education, affirmative action, or attempts to reform the system incrementally through test litigation under the equal protection clause.<sup>38</sup> The legal system is cautious and conservative; it never allows great change. And when "victories" are achieved, they are undercut as soon as the celebration dies down by restrictive interpretation and stalling.<sup>39</sup> The great successes, like *Brown v. Board of Education*,<sup>40</sup> end up benefiting whites more than blacks.<sup>41</sup> And by giving the illusion of progress, they legitimize an unfair and oppressive system, driving yet another nail into our coffin. Nor is this result either accidental or a recent creation. It all began with the drafting of the Constitution, when the Framers traded enslavement of black people for security and rights for white males.<sup>42</sup>

DR. GILDER. I *was* listening, Geneva. You and Professor Bell have a name for what you're describing, as I recall. Is it the "Fundamental Contradiction?"

GENEVA. You're thinking of our friend, Duncan Kennedy, who coined that term to refer to something similar.<sup>43</sup> We call our version the "Constitutional Contradiction."

DR. GILDER. Well, Geneva, if you really believe that the trouble lies with

36. For summaries of the Chronicles, see *supra* text accompanying notes 4-7 and notes 8-15.

37. Pp. 75-101.

38. See D. BELL, *RACE, RACISM AND AMERICAN LAW* 30-44 (2d ed. 1980); Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW* 96 (D. Kairys ed. 1982); Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *MINN. L. REV.* 1049 (1978) [hereinafter Freeman, *Legitimizing Discrimination*]; see also pp. 51-74 (civil litigation and school desegregation benefit whites more than blacks).

39. See Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *HARV. C.R.-C.L. L. REV.* 301, 304-05 (1987); *The New Rights Wars*, *NEWSWEEK*, Dec. 30, 1985, at 66 (Justice Department obstructs progress of civil rights suits); see also B. WRIGHT, *BLACK ROBES, WHITE JUSTICE* (1987) (judicial system deeply biased against blacks).

40. 347 U.S. 483 (1954).

41. See Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 *NOTRE DAME LAW.* 5, 6-13 (1976); pp. 26-42.

42. See D. BELL, *supra* note 38, at 20-29. Ten provisions of the Constitution protected the institution of slavery without overtly sullyng the document's egalitarian appearance by mentioning the ugly word. The passages that guarantee the institution of slavery are art. I, § 2 (blacks counted as three-fifths persons for purposes of apportioning Representatives); art. I, §§ 2, 9 (apportioning direct taxes among states, thereby preventing Congress from laying capitation tax on slaves); art. I, § 8 (empowering Congress to call up state militias to quell rebellions, including slave revolts); art. I, § 9 (prohibiting Congress from abolishing international slave trade until 1808); art. IV, § 2 (requiring states to return runaway slaves); art. IV, § 4 (requiring Congress to protect states against domestic violence, including slave revolts); art. V (prohibiting amendment of slavery guarantees before 1808); art. I, §§ 9, 10 (prohibiting federal government from taxing exports, including products of slave labor).

43. See Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205, 211-15 (1979).

the Constitution, why don't you and your supporters agitate to change it? It's been amended many times, and there continue to be, as you know, calls to amend it in this or that fashion, even today.<sup>44</sup> If you believe that the Constitution is fundamentally adverse to your people, just work to change it. Surely persons as talented as you and Professor Bell could marshal arguments on behalf of constitutional reform. Your numbers are growing. And even if you can't rely on persuasion to get white people to go along for the reasons you mention, you and other Third-World people will soon command the voting strength to force a constitutional convention.<sup>45</sup> So you see, Geneva, there is always the possibility of hope, the possibility of change. Don't you agree?

(*Dr. Gilder reaches for the discharge papers and pauses, pen in mid-air.*)

GENEVA. Doctor, you're such an optimist. I bet you don't believe in original sin either. Of course, I could marshal arguments for changing the Constitution. And if it could actually be changed in a few key respects, our quandary might ease somewhat.<sup>46</sup> But, as I'll explain, doing so is a tall order.

DR. GILDER. I'm listening.

GENEVA. The argument for changing the Constitution is straightforward, and, from the Third-World person's perspective, compelling. Bear in mind that all of us have just been through the Bicentennial celebration. We've heard the songs of praise raised to that basic document.<sup>47</sup> Yet we cannot forget its origins, nor that it has coexisted with an unjust system that submerges and injures us at every turn. Very few minorities have been present at these Bicentennial celebrations. Our voices have been distinctly muted.<sup>48</sup> We have declined to join in the party.

44. When mercantile forces became discontented with the Articles of Confederation, they demanded a constitutional convention to draw up a document that would better advance commercial interests. See C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 31-49, 58, 63, 150, 324 (1935); Black, *Massachusetts Revolt Was Important Catalyst for Birth of Constitution*, *Minneapolis Star & Tribune*, Feb. 23, 1987, § A, at 1, col. 1 (powerful merchants and aristocrats wanted new Constitution and strong federal government able to put down rebellions and assure stability).

For various proposals to amend the Constitution, see Hertzberg, *Lel's Get Representative*, *NEW REPUBLIC*, June 29, 1987, at 15 (proposing amendment to institute proportional representation scheme); *Move Over, James Madison*, *NEW REPUBLIC*, June 29, 1987, at 19 (ideas for constitutional amendments); Kilpatrick, *Fiddling with the Constitution*, *San Francisco Chron.*, June 12, 1987, at 74, col. 5.

45. See *New Ethnic Voices*, *FOREIGN POL'Y*, Fall 1985, at 3; *Rise of Minorities*, *U.S. NEWS & WORLD REP.*, March 19, 1984, at 48; see also *Growth of a Nation*, *TIME*, July 8, 1985 (entire issue devoted to immigration); *Hispanic Population Rate Up Sharply*, *Tulsa World*, Sept. 11, 1987, § A, at 7, col. 1; *Population, People, and Politics*, *San Francisco Chron.*, Jan. 6, 1988, § 2, at 5, col. 1.

46. See *infra* text accompanying notes 129-32 (Geneva speculates on content of new Constitution).

47. See, e.g., *Letters: Historical Charter*, *TIME*, July 27, 1987, at 6 (readers praise document); *Special Issue: We the People*, *TIME*, July 6, 1987, at 23-24 (noting "aura of the sacred" and describing Constitution as having one defect, slavery, which was later cured).

48. See Lopez, *The Idea of a Constitution in the Chicano Tradition*, 37 *J. LEGAL EDUC.* 162, 163-66 (1987) (declining to join in praise of Constitution, pointing out that it has done little for

DR. GILDER. So your case for changing the Constitution would be based on its ignoble origins and inability over the years to prevent harm to blacks and other minorities of color?

GENEVA. Not just that. I've given this a good deal of thought. One could make a three-part argument, based on exclusion, harm, and legitimation. Would you like to hear it, Doctor?

DR. GILDER. Of course. Both as a politically aware person and as your doctor, I'm eager to hear what you have to say.

GENEVA. Exclusion is perhaps the easiest of the three arguments to make. No black participated in the drafting of our country's Constitution,<sup>49</sup> even though blacks fought courageously in the war against Britain.<sup>50</sup> Whites rationalized our exclusion, as well as constitutional protection of slavery, on the ground that we were property—"chattels personal" subject to ownership.<sup>51</sup> Women, Native Americans, Hispanics, and working-class people also were not represented at the Constitutional Convention. The sole invitees were propertied white males, many of whom were there to protect their own interests.<sup>52</sup> A few Abolitionists raised the question of slavery, but their voices were ignored.<sup>53</sup> The conventioners realized that sacrificing the slaves was essential to the economy of the southern states, without which there would be no strong union.<sup>54</sup> Seventy years later, in the *Dred Scott* decision,<sup>55</sup> the Supreme Court held that blacks were not included in the phrase "We the People." The Civil War wrenched apart those whose interests had coalesced to form the Constitution. During the war, blacks again fought bravely.<sup>56</sup> Yet the Emancipation Proclamation, which purported to give slaves their freedom,<sup>57</sup> brought little change. We owned few

ethnic minorities); Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987) (same). *But see* Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343 (1987) (replying to Justice Marshall).

49. See pp. 26-42; C. BEARD, *supra* note 44, at 24 (discussing Convention participants). Charles Beard's thesis that the drafting of the Constitution was motivated by the economic self-interest of the Framers has been the focus of much controversy. See, e.g., Brown, *The Beard Thesis Attacked*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION* 88 (L. Levy ed. 1969) (criticizing Beard); Main, *The Beard Thesis Defended*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION*, *supra*, at 144 (defending Beard). There is little dispute that Beard made an original and important contribution to understanding the forces behind the drafting of the Constitution. See, e.g., Komesar, *Paths of Influence—Beard Revisited*, 56 GEO. WASH. L. REV. 124, 124 (1987) (Beard's approach offered richer vision of Constitution). Beard is used here only as a source of information regarding who was present at the Convention; it is not necessary to take sides on the issue of whether economic self-interest was the main force at work at the Convention.

50. See D. DAVIS, *STRUGGLE FOR FREEDOM* 66-68 (1972).

51. See pp. 29-32; D. BELL, *supra* note 38, at 11.

52. C. BEARD, *supra* note 44, at 24; see also *supra* note 49.

53. See W. FOSTER, *THE NEGRO PEOPLE IN AMERICAN HISTORY* 63 (1954); W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848*, at 57, 63 (1977).

54. See pp. 32-42; C. BEARD, *supra* note 44, at 30; D. BELL, *supra* note 38, at 23; Marshall, *supra* note 48, at 3.

55. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857) ("We think they are not . . . and were not intended to be included . . .").

56. See D. BELL, *supra* note 38, at 31-32.

57. Proclamation No. 17, 12 Stat. 1268 (1863).

homes or farm animals and little land.<sup>58</sup> Reconstruction gave us citizenship rights but afforded little progress toward economic or political rights. We were subject to taxation, but were barred from voting, jury duty, educational opportunities, military service, and all but the lowliest of jobs.<sup>59</sup> The Supreme Court construed the Fourteenth Amendment broadly and imaginatively to declare corporations "persons,"<sup>60</sup> but applied it much less forcefully and creatively to us.<sup>61</sup> During the interval between *Plessy v. Ferguson*<sup>62</sup> and *Brown v. Board of Education*,<sup>63</sup> a space of more than three generations, the Supreme Court held that the equal protection clause allowed the states to segregate facilities, so long as those provided blacks were comparable to those for whites. The modern Court has imposed artificial and highly technical constraints on racial remedies under the Constitution, including an intent requirement,<sup>64</sup> rules requiring state action,<sup>65</sup> tight chains of causation,<sup>66</sup> and measures limiting what types of relief may be granted.<sup>67</sup> And Doctor, lest you think other minority groups have fared any better, recall that the Constitution did not provide the vote for women. It took over 130 years to win this right;<sup>68</sup> and even today women's wages, occupational levels, and rates of political representation lag far behind those of white males.<sup>69</sup> Women are excluded from the draft and from armed combat duty.<sup>70</sup> They're afforded second-class status in government benefit programs.<sup>71</sup> Our society still tolerates all-male clubs and organizations.<sup>72</sup> Native Americans, the only original Americans, were likewise excluded from national life from the beginning. A mediievally derived ideology that "savages" could be denied equal rights and status be-

58. W. FOSTER, *supra* note 53, at 285.

59. See D. BELL, *supra* note 38, at 9-10, 35.

60. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886).

61. See D. BELL, *supra* note 38, at 35, 37.

62. 163 U.S. 537 (1896).

63. 347 U.S. 483 (1954).

64. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (Fifth Amendment equal protection clause requires showing of discriminatory purpose).

65. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (state action lacking despite heavy state funding, in suit against private school); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1973) (state action lacking in suit against private club despite regulation by state liquor control board).

66. See, e.g., *Daniels v. Williams*, 474 U.S. 327 (1986) (Fourteenth Amendment due process clause not implicated by negligence of state official); *Davidson v. Cannon*, 474 U.S. 344 (1986) (negligent denial of civil rights by government agent not redressable); *Zahorik v. Cornell Univ.*, 729 F.2d 85 (2d Cir. 1984) (good-faith standard upheld for faculty hiring decisions).

67. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (preferential treatment based on race in connection with layoffs violates Fourteenth Amendment). See generally Burns, *The Activism Is Not Affirmative*, NATION, Sept. 29, 1984, at 264 (summarizing cases).

68. U.S. CONST. amend. XIX (ratified 1920).

69. See C. EPSTEIN, *WOMAN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS passim* (1970); Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW, *supra* note 38, at 117, 119.

70. See Taub & Schneider, *supra* note 69, at 119.

71. *Id.* at 119-20.

72. See Bird, *Unequal Partners: We Still Haven't Decided Whether All Women Are Created Equal Too*, Wash. Post, June 28, 1987 (Magazine), at 45 (powerful men's clubs continue to exclude women).

came an integral part of the fabric of our law.<sup>73</sup> Although books praising the Constitution and tracing the origins of its miraculous ideas generally neglect to mention this fact, some of the ideas for our form of government came from the Iroquois.<sup>74</sup> Before Columbus ever "discovered" America, the Five Nations of the Iroquois had formed a constitutional confederation based on an oral document called The Great Law of Peace.<sup>75</sup> The document contained many ideas similar to key concepts in the United States Constitution, including the notions that government should be by the consent of the governed;<sup>76</sup> that checks and balances should exist against centralized authority;<sup>77</sup> that the best government is the least government;<sup>78</sup> that bad leaders should be impeachable and removable;<sup>79</sup> and that homes should be safe from unreasonable government intrusions.<sup>80</sup> The Iroquois system also allowed women to vote, a right not granted by the white man until 1920.<sup>81</sup> Benjamin Franklin and Thomas Jefferson, both of whom had contact with the Iroquois and other Native American peoples, freely acknowledged the influence of these ideas on their political thought.<sup>82</sup>

DR. GILDER. You certainly read history differently from the way I was taught it and most people read it, Geneva. But that's your right. You emphasize exclusion, while the rest of us see increasing inclusion.

GENEVA. Of course I emphasize different things, Doctor, because history has treated my people differently from yours. When we tell our history, we tell a different story. We emphasize certain facts, certain events that have meaning for us. Your official storytellers do the same thing. They include this fact and that. In the process, other facts, equally important to some, are left out. History is storytelling. It's interpretation.<sup>83</sup>

DR. GILDER. So it is. And the story you have just told, Geneva, makes a powerful case for exclusion. No reasonable person could disagree that our legal system, at times at any rate, has excluded the groups you mention.

73. Williams, *The Algebra of Federal Indian Law*, 1986 WIS. L. REV. 219, 256.

74. See B. JOHANSEN, *FORGOTTEN FOUNDERS* (1982) (discussing Iroquois political system and its influence on early American political thought); see also Black, *Framers Took Some Cues from Iroquois System*, *Minneapolis Star & Tribune*, June 1, 1987, at 1A, col. 2 (summarizing Johansen's research).

75. See Black, *supra* note 74.

76. See F. COHEN, *Americanizing the White Man*, in *THE LEGAL CONSCIENCE* 315, 322 (1962); B. JOHANSEN, *supra* note 74, at 102, 133.

77. B. JOHANSEN, *supra* note 74, at 11, 24.

78. *Id.* at 102, 144.

79. *Id.* at 27-28, 114.

80. *Id.* at 29.

81. *Id.* at 14; F. COHEN, *supra* note 76, at 317.

82. See F. COHEN, *supra* note 76, at 321; B. JOHANSEN, *supra* note 74, *passim*.

83. Hayden White reminds us that any narrative can represent history only with significant distortion; as he puts it: "[The] value attached to narrativity in the representation of real events arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can be only imaginary." White, *The Value of Narrativity in the Representation of Reality*, in *ON NARRATIVE* 1, 23 (W. Mitchell ed. 1981).



But shameful as it was, hasn't the exclusion largely ended? And if so, is it not, as you lawyers say, "harmless error?"

GENEVA. It's not harmless error. The Constitution has failed to protect excluded groups from serious injustice. This brings me to the second prong of the argument—to my second story, if you will: the Constitution's inability, over the years, to protect outgroups from systematic evil.<sup>84</sup> It will be interesting to see if your toleration for nontraditional history extends to this second story, Doctor, because this one continues well into the present and implicates people of your race now alive.

DR. GILDER. Try me and see.

GENEVA. Very well. Slavery was more than mere political exclusion; it was accompanied by the widespread death and suffering of slaves.<sup>85</sup> Slaves were made to work long hours at backbreaking work. Female slaves were sexually abused. The Constitution tolerated this despicable system for more than a century. Even after slavery was formally declared illegal, Jim Crow laws were passed to maintain its substance, if not its form. Segregation was enforced with respect to railroad cars, streetcars, hospitals, schools, parks, waiting rooms, theaters, libraries, elevators, staircases, drinking fountains, windows,<sup>86</sup> and even cemeteries.<sup>87</sup>

Although *Brown v. Board of Education* ostensibly changed all that, the impact of Jim Crow lingers. Miscegenation laws remained in effect in several states until 1967,<sup>88</sup> and even today one hears of interracial couples denied child custody or refused marriage ceremonies by church leaders.<sup>89</sup> Social segregation has gone hand-in-hand with economic subordination. The disparity in income between blacks and whites, as I mentioned before, persists.<sup>90</sup> Blacks are underrepresented in business, professional, and policymaking positions.<sup>91</sup> The life expectancy for blacks is four years

84. Geneva is not arguing that the Constitution affirmatively harms excluded groups, but that it does not provide adequate protection against harm. It tolerates harms in many ways. See *supra* notes 64-67 and accompanying text; *infra* notes 112-115 and accompanying text (Constitution's public-private distinction permits and invites sexist behavior in private arena, while forbidding it in public); see also Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (noting law's failure to provide remedy for one-on-one racial slurs).

85. See, e.g., W. FOSTER, *supra* note 53, *passim*; L. LITWACK, *THE AFTERMATH OF SLAVERY* 276-77 (1979). The line between exclusion and harm is indistinct. Some sorts of racial exclusion may be harmful in themselves. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (forced separation of black and white schoolchildren inherently damaging).

86. See D. DAVIS, *supra* note 50, at 166-67.

87. See Martin, *Blacks and Constitution Are the Focus of a Panel*, N.Y. Times, May 31, 1987, at 44, col. 1 (reporting on address given by federal Judge Louis H. Pollak discussing law's role in perpetuating inequality).

88. See *Loving v. Virginia*, 388 U.S. 1 (1967); D. BELL, *supra* note 38, at 17 n.6.

89. E.g., *Kansas v. Barclay*, 238 Kan. 148, 708 P.2d 972 (1985) (denying relief in suit brought for refusal to perform inter-racial marriages); Blackwood, *Race as a Factor in Custody and Adoption Disputes*: *Palmore v. Sidoti*, 71 CORNELL L. REV. 209 (1985).

90. See *supra* note 34.

91. See G. SEGAL, *BLACKS IN THE LAW* 1-17, 75-94, 111-244 (1983); Silas, *Minorities In Law: Opportunity Scant, Panel Told*, 71 A.B.A. J. 32 (1985); Williams, *For the Black Professional, the Obstacles Remain*, N.Y. Times, July 14, 1987, at A-16, col. 1 (no Fortune 500 company headed by a

shorter than for whites.<sup>92</sup> The rate of maternal death among blacks is three times as high as among whites.<sup>93</sup> Our prison populations are largely black and brown. Nonwhites receive longer sentences,<sup>94</sup> and are required to serve more of their sentenced time than whites.<sup>95</sup> A larger number of nonwhites than whites are executed.<sup>96</sup> Black students and professors are subject to increasing racial harassment, both subtle and overt, on university campuses;<sup>97</sup> ethnic jokes and slurs are once again becoming respectable.<sup>98</sup>

Circumstances are not much better for other nonwhite groups and women. Native Americans have suffered great harm despite the Constitution's vaunted protections. Under it they lost their lands, their dignity, and often their lives.<sup>99</sup> The U.S. government unilaterally abrogated Indian treaties whenever it suited its interests to do so.<sup>100</sup> Native Americans today remain a colonized people whose economic and political rights are subordinate to the pleasure of the powerful majority.<sup>101</sup> They are relocated and their lands and mineral wealth plundered whenever the dominant society finds it convenient.<sup>102</sup>

black; number of blacks in federal government holding jobs at policymaking level has dropped from 44 in 1980 to 20 in 1987); Franklin, *Lack of Progress Vexes Black Faculty*, Chicago Trib., July 13, 1987, § 1, at 4, col. 1; Kaplan, *Hard Times for Minority Profs*, Nat'l L.J., Dec. 10, 1984, at 1, col. 1.

92. See CENSUS, *supra* note 28, at 68 table 106.

93. *Id.* at 72 table 112.

94. FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, STATISTICAL REPORT FISCAL YEAR 1986, at 104 table C-5 (1986).

95. *Id.*

96. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 692 table 6.70 (1984); see also *McCleskey v. Kemp*, 107 S. Ct. 1756, 1759 (1987) (statistical studies show large disparity in imposition of death sentence depending on race of defendant and victim; however, such disparity does not state constitutionally redressable claim).

97. See Bullock & Houston, *Perceptions of Racism by Black Medical Students Attending White Medical Schools*, 79 J. NAT. MED. A. 601 (1987); *Racism Flares on Campus*, TIME, Dec. 8, 1980, at 28; Simpson, *Black College Students Are Viewed as Victims of a Subtle Racism*, Wall St. J., Apr. 3, 1987, at 1, col. 1; see also White, *The New Racists*, Ms., Oct. 1987, at 68 (reporting on racist graffiti and radio messages at major campuses).

98. See *Racism Flares on Campus*, *supra* note 97 (black dean at Harvard University attributed upsurge in racial slurs and acts to change in national mood which made such acts "once again . . . respectable").

99. See W. FOSTER, *supra* note 53, at 52; see also Black, *supra* note 74, at 14, col. 1 (Framers claimed large sections of land occupied by Native Americans).

100. See Indian Law Resources Center, *United States Denial of Indian Property Rights: A Study in Lawless Power and Racial Discrimination*, in RETHINKING INDIAN LAW 15, 19 (1982); Williams, *supra* note 73, at 256-58.

101. THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880s (S. Cadwalader & V. Deloria eds. 1984); H. KITANO, RACE RELATIONS 150 (1974). About one-fourth of all Native American women of childbearing years has been sterilized without consent. See Bender, *The Trail of Tears Continues: Dispossession and Genocide of the Native American Indian*, 21 FREEDOMWAYS 247, 253 (1981).

102. See R. BARASH & J. HENDERSON, THE ROAD ix (1980). Present-day mistreatment of Indians living on reservations takes many forms, including forced relocation and predatory land use for the benefit of white-dominated corporations. See *Here's Chronology of Government Shame*, Davis (Cal.) Enterprise, June 5, 1987, at 7, col. 3 (describing relocation of Navajo-Hopis from lands they have occupied for over 1,000 years); *Job Botched From Start: Indian Relocation Efforts Continue to Fail*, Davis (Cal.) Enterprise, June 5, 1987, at 7, col. 1 (describing federal government's forced relocation of Native Americans, resulting in lost homes, depression, and resistance); *New Mexico Uranium*

Mexicans and Asians have fared little better. How effective has your Constitution been in protecting them? The Treaty of Guadalupe Hidalgo, entered into by the United States and Mexico on February 2, 1848, purported to guarantee to Mexicans caught on the U.S. side of the border full citizenship and civil rights, as well as protection of their culture and language.<sup>103</sup> The treaty, modeled after ones drawn up between the U.S. and various Indian tribes, was given similar treatment: The Mexicans' "[l]and and property were stolen, rights were denied, language and culture suppressed, opportunities for employment, education, and political representation were thwarted."<sup>104</sup> The Constitution and the courts have done little to interfere with racist immigration quotas, the Bracero system, and dragnet searches, seizures and deportations of anyone who looks Mexican.<sup>105</sup>

And, finally, what about Asians?<sup>106</sup> Your wonderful Constitution was

*Boom Is Exploding at the Heart of Laguna Pueblo*, Navajo Times, June 1, 1978, at 17, col. 1 (describing cultural and environmental damage to Laguna Pueblo from uranium mines); *Widespread Contamination Found*, Navajo Times, June 1, 1978, at 39, col. 1 (reporting EPA finding of uranium contamination of drinking water and ponds in village area and complaints of lung diseases, coughing, and cancer); see also Rosenthal, *Dark Days at Black Mesa*, EARTH ISLAND J., Fall 1986, at 9, 10-11 (describing cultural upheaval in wake of massive relocation spurred by federal government's desire to gain access to coal and uranium). Reservations are also hampered by their remoteness and lack of infrastructure. Tribes have difficulty obtaining development capital and commercial credit to finance investment initiatives. Lack of a skilled labor force and experienced managerial and technical personnel further inhibits growth and prevents the formulation of effective development strategies for Native American communities. See Williams, *Small Steps on the Long Road to Self-Sufficiency for Indian Nations*, 22 HARV. J. ON LEGIS. 335, 341-52, 356 (1985).

103. A. RENDON, CHICANO MANIFESTO 71 (1971).

104. *Id.* at 71-72.

105. For example, the Literacy Law of 1917, Pub. L. No. 644-301, 39 Stat. 874, was enacted largely to exclude Mexican immigrants; those who could not pass the reading test were prevented from immigrating legally. See Rodriguez, Corral & Roman, *The Struggle Against the Immigration Control Act*, 8 CHICANO L. REV. 1, 2 (1985). Later, the Bracero program was enacted to allow importation of Mexican workers for specific purposes and their deportation once their services were no longer needed. See H. KITANO, *supra* note 101, at 246. Since 1945, Congress has brought relatively unrestricted immigration between the U.S. and Mexico to a stop. Immigration laws and practices have been used to burden Mexicans in many ways. No minority has been deported in larger numbers. For example, in 1954 alone "Operation Wetback" expelled over one million Mexicans, including some American citizens—a figure then representing about one-fourth of the U.S. Mexican community. See Rodriguez, Corral & Roman, *supra*, at 3. The Supreme Court has held that the exclusionary rule does not apply to deportation proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). Border patrol agents need not have reasonable suspicion to stop persons to check for illegal aliens. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (roving border patrols need only "particularized suspicion" to stop car believed to contain illegal aliens). At fixed checkpoints, authorities may base decisions to stop and inspect cars without a warrant solely on the Mexican appearance of the occupants. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). See generally A. MIRANDÉ, GRINGO JUSTICE 1-26, 50-100, 100-46, 216-36 (1987) (describing excessive violence used by police against Mexicans).

A tenured professor of law at the University of California, I have twice been stopped by police while jogging in conventional running clothes. In one case, the police explained that they had heard a report of a Mexican "running between the houses with something in his hand." (I was carrying home legal papers.) In the other, the police justified a 20-minute stop, which included two radioed warrant checks, on the ground that there had been reports of auto theft in the area.

106. First-generation Japanese immigrants were not allowed to become U.S. citizens, vote, or freely own land until 1954. They were barred from employing "white girls," were required to pay exceptionally high prices for fishing licenses in California, and were subject to laws against marrying whites. See P. IRONS, JUSTICE AT WAR 348 (1983); H. KITANO, *supra* note 101, at 215-18; see also Moore, *Pride & Prejudice*, IMAGE, Nov. 15, 1987, at 14 (describing instances of racist violence

interpreted to permit the involuntary internment of peaceful Americans of Japanese descent during World War II.<sup>107</sup> More than 120,000 persons of Japanese ancestry were removed from their West Coast homes and placed behind barbed wire.<sup>108</sup> Most were American citizens.<sup>109</sup> Many advocating their removal were liberals who believed that internment was in the Japanese citizens' best interest.<sup>110</sup> The evacuees lost homes, possessions and farms. Their losses have been estimated at over four hundred million dollars in property alone.<sup>111</sup>

Have you heard enough, Doctor, or do you want to hear about women, too?

DR. GILDER. Go on. I hope you realize how powerful a case you are making.

GENEVA. Women were denied the ballot for more than a century and even today have little political representation.<sup>112</sup> The legal system is biased against us; sexism suffuses rape laws, pornography statutes, sexual harassment laws,<sup>113</sup> distribution of benefits such as social security and welfare, and treatment of problems such as domestic violence.<sup>114</sup> The private/public distinction bolsters patriarchy by constructing a private sphere in which women are subordinated, insulted, and assaulted, and by maintaining a "hands off" attitude toward activities that take place there. In this way, the law gives men license to dominate and exploit women without fear of legal intervention.<sup>115</sup> And in their professional lives, few women are promoted to partnerships in law firms, to executive positions, or to tenured jobs in the nation's colleges and universities.<sup>116</sup>

(*Dr. Gilder remains silent for a long time.*)<sup>117</sup>

against Asians).

107. See *Korematsu v. United States*, 323 U.S. 214 (1944).

108. P. IRONS, *supra* note 106, at 365.

109. *Id.*

110. H. KITANO, *supra* note 101, at 217.

111. P. IRONS, *supra* note 106, at 348. Attempts to compensate the Japanese for their losses have been woefully inadequate. The Japanese American Evacuation Claims Act of 1948, Pub. L. No. 80-886, 62 Stat. 1231, paid only \$37 million on claims totalling four times this amount. Moreover, the Act was limited to property losses and did not redress lost wages, profits, human dignity, and personal and familial relationships. *Id.*

112. See *supra* notes 68-72 and accompanying text.

113. See Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 402 (1984).

114. See Taub & Schneider, *supra* note 69, at 118, 122.

115. See Olsen, *supra* note 113, at 398; Taub & Schneider, *supra* note 69, at 122.

116. See Harris, *Female Professors Still Earn Less than Men, Even the Best Educators Get the Worst Treatment*, San Francisco Chron., Dec. 10, 1987, B7, col. 1.

117. Here Dr. Gilder considers asking Geneva whether blacks' plight is not largely a matter of economic status and the breakup of the black family rather than of race and white racism. Gilder decides against raising these rationales for blacks' condition, however, recognizing that he would further antagonize Geneva and that such arguments, which justify continued oppression by pointing to victims' debased condition, contradict his liberal viewpoint.

Geneva thinks: I bet he is going to bring out the neoconservative artillery now, blaming blacks' inferior status on our refusal to work or on the black family. If he does, I'll recount the *Chronicle of the Magic Mushrooms*, in which blacks eat some rare mushrooms and turn into Mexicans, convert to

DR. GILDER. Geneva, you've made a strong case for harm, as well as exclusion. But what's the third prong of your argument for amending the Constitution?

GENEVA. Legitimation. You're a politically sophisticated person, Doctor, so I'm sure you'll grasp this point quickly. I've demonstrated that your Constitution does not protect outgroups. But it does protect privilege. The system's defenders hold out the "great" document as a consolation: Life may be unfair and miserable, but at least we can claim that "we've got our rights."<sup>118</sup> The Constitution holds out the appearance of formal fairness. Equal protection and due process imply that if one is not succeeding, it's one's own fault—look how fair and neutral our system is.<sup>119</sup>

Antidiscrimination law is a case in point. Civil rights law, ostensibly aimed at protecting us, adopts what Alan Freeman calls the "perpetrator" rather than the victim's perspective.<sup>120</sup> He notes that civil rights law is "indifferent to the condition of the victim; its demands are satisfied if it can be said that the 'violation' has been remedied."<sup>121</sup> Antidiscrimination law sees racism as a series of isolated acts by vicious-willed perpetrators, anomalies in our otherwise fair society.<sup>122</sup> When charges of discrimination are leveled at corporations, government agencies, and universities, the law is quick to insert fault, motive, and causation requirements, which make successful prosecution of claims very difficult.<sup>123</sup> Because of the myth that society is color blind, the actual conditions of racial powerlessness, poverty, and unemployment are considered just that—mere conditions—rather than as redressable discrimination. Those conditions are then rationalized by blaming the victim as incapable of functioning in our meritocratic society.<sup>124</sup> The Constitution also legitimizes the status quo by promising certain freedoms in the Bill of Rights, such as freedom to worship, assemble, speak, and petition, and by Fourteenth Amendment guarantees of due process and equal protection. These features are trumpeted to the skies as though they in themselves assure a fair and just society, but they do not. The songs of praise deafen us to the Constitution's failure to protect other rights that really matter: economic rights and rights to distributive justice, such as the rights to housing, income, and human dignity

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Catholicism, and develop strong family ties, yet remain poor and stigmatized.

Gilder has tactfully decided not to raise these issues, however, so Geneva continues as follows.

118. See Delgado, *supra* note 39, at 304; Freeman, *Legitimizing Discrimination*, *supra* note 38, at 1050 ("[A]s surely as the law has outlawed racial discrimination, it has affirmed that black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing . . . without any violation of discrimination law.").

119. Freeman, *Legitimizing Discrimination*, *supra* note 38, at 1103.

120. *Id.* at 1052-57.

121. *Id.* at 1054.

122. *Id.*

123. *Id.* at 1054-55; see also *supra* notes 64-67 and accompanying text.

124. See Freeman, *Legitimizing Discrimination*, *supra* note 38, at 1103.

and respect.<sup>125</sup> The rights the Constitution does protect—speech, worship, privacy—are of little interest to those struggling for daily existence. Yet we ignore this discrepancy, pretending that the Constitution benefits everyone equally.<sup>126</sup>

So you see, Doctor, the Constitution protects privilege, is consistent with serious, recurring evil, and, by mystifying and concealing the injustice in our political and legal system, makes these injustices even more difficult to correct. There you have it, Doctor—the case for scrapping the Constitution, as William Lloyd Garrison suggested,<sup>127</sup> and writing a new one.

DR. GILDER. Geneva, I hope you're as invigorated by all this as I am. I, and people like me, are ready to stand shoulder-to-shoulder with you in your effort to revitalize the Constitution.

GENEVA. I said scrap, not revitalize, Doctor.

DR. GILDER. Well, scrap then, and start over. It could be done, don't you think? Is there not hope?

GENEVA. Doctor, you keep coming back to the idea of hope, progress, success. I think you want to turn me into some sort of Pollyanna. No, I don't think there are grounds for hope.

DR. GILDER. I don't know how you can say that. You insist on looking at things in the bleakest possible light. But even if change can't come overnight, time is on your side. Demographers say that if present birth rates continue, minorities of color will be a majority of the United States population sometime next century.<sup>128</sup> And even before that, forming a coalition of minorities and even a fraction of white women would yield voting strength sufficient to force a constitutional convention. Look how close the Equal Rights Amendment came to passage.

125. The constitutions of Mexico, Sweden, and the Soviet Union go far in this direction. See MEX. CONST. art. VI reprinted in A. BLAUSTEIN & G. FLANZ, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (1987); SWED. CONST. (Instrument of Government) ch. 2 reprinted in A. BLAUSTEIN & G. FLANZ, *supra*; KONST. SSSR ch. 10, reprinted in A. BLAUSTEIN & G. FLANZ, *supra* (Soviet Constitution); *The Ark of America*, TIME, July 6, 1987, at 23, 35 (many twentieth-century constitutions, but not ours, have followed Mexico's example and guaranteed economic rights).

126. It might be argued that even though the Constitution contains few provisions for positive rights or economic entitlements, this omission is compensated for by progressive legislation and liberal judicial interpretation—that our legal-constitutional system, taken as a whole, provides adequately for the poor and unfortunate. Unfortunately, outgroups and the poor cannot rely on the good will of the current white majority to redress longstanding social inequities. See D. BELL, *supra* note 38, at 41 (discussing interest-convergence theory that whites will act in the interest of black justice only when doing so benefits whites); *id.* at 126–206 (chronicling use of force, intimidation, ostracism, trickery, white primaries, poll taxes, gerrymandering, and other fraudulent or thinly disguised schemes to deter or dilute black vote); Pp. 51–74 (Geneva narrates Chronicle exploring how our system of civil rights law benefits whites more than blacks).

127. Garrison, whose newspaper, *The Liberator*, had as its motto, "The compact which exists between North and South is a covenant with death and an agreement with hell," burned a copy of the Constitution on July 4, 1854, in Framingham, Massachusetts. See L. MILLER, *THE PETITIONERS* 29 (1966); Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION* 188 (R. Beeman, S. Botein & E. Carter eds. 1987).

128. See sources cited *supra* note 45.

GENEVA. But failed, Doctor, failed.

DR. GILDER. Yet it may revive. But you said earlier, Geneva, that certain constitutional changes might help, if you could get them enacted. What did you have in mind?

GENEVA. It's easy to visualize what would be on the agenda of a convention proposed and dominated by ethnic minorities. We should begin by eliminating the pro-slavery provisions the Framers included in the original slavery compromises.<sup>129</sup> They're galling and offensive, but have never been repealed. They should go, the sooner the better. On the positive side, I can make a number of suggestions. Economic rights, such as the right to meaningful employment, would rank high on my list.<sup>130</sup> Redress for past racism, and institutions such as a cabinet-level position to confine and punish racism, would also be on the agenda.<sup>131</sup> A new Constitution could eschew the male paradigm of law and politics.<sup>132</sup> It could mandate political representation, decent schools, opportunities for interracial housing and marriage, and employment opportunities for all. It could declare interference with any of these rights to be a serious offense.

DR. GILDER. A noble platform, Geneva. Although some might quarrel with this detail or that, no one could oppose the general plan. Don't you agree?

GENEVA. No one should, but many will, Doctor. For, as surely as I speak, none of these reforms will come to pass. Those who control things will employ every available technique to prevent such change from coming about—the stakes are simply too great. They'll use propaganda and advertising to inflame blacks' concerns about a runaway convention that could be taken over by the Right. They'll enlist the aid of middle- and upper-class blacks to preach to their brothers and sisters about the virtues of the current system and the dangers of rocking the boat. They'll attempt to prevent the population boom of black and Third-World children that threatens a numerical preponderance of brown-faced citizens in this country by next century.<sup>133</sup> They'll use sterilization and incentives to limit

129. See *supra* note 42 (listing provisions of U.S. Constitution that directly or indirectly accommodated slavery).

130. See *supra* note 125 (citing examples of nations whose constitutions contain these or similar guarantees); cf. Miller, *Taking Needs Seriously: Observations on the Necessity for Constitutional Change*, 41 WASH. & LEE L. REV. 1243-46, 1291 (1984) (proposing that Constitution be amended or interpreted to provide for human needs).

131. The document produced by such a convention could begin: "We the people, mindful of the exclusion, harm, and legitimation of harm to women, people of color, and Native Americans perpetrated in the name of our founding document, and desiring to correct and make amends for these injustices, do hereby enact . . ."

132. On the need to dismantle this paradigm, see Olsen, *supra* note 113; Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW*, *supra* note 38, at 294, 300; Taub & Schneider, *supra* note 69.

133. A recent book sounds the cry: The middle class have too few children; the lower class, too many. See B. WATTENBERG, *THE BIRTH DEARTH* (1987) (warning that Western values are in jeopardy unless middle-class families increase rate of child-bearing; our superior values and life styles will be swamped by sea of lower-class and Third-World newcomers).

black births: Consider Arthur Jensen's and William Shockley's preachings about black inferiority and the need to limit black population growth.<sup>134</sup>

If, despite such efforts, minority numbers increase to the point where true political reform seems possible, the dominant group will once again employ the violent, coercive, sleazy, legal, and illegal means that have been used to curb black political power for a century and a quarter.<sup>135</sup> Finally, even if we succeed in forcing some revisions, we'll have a very hard time stopping the dominant group from using the usual tricks, such as those employed to gut the Fourteenth Amendment, to deny the revisions any efficacy.<sup>136</sup>

DR. GILDER. And so you reject your own argument? You say there's no hope for incremental or sweeping reform?

GENEVA. None. Those who oppose transformation of our political-legal system are too entrenched. Not only that, but too complacent as well. No insult to you, Doctor, and to others like you, but when it comes right down to it, many who we thought would stand with us ended up slipping away, opting for compromise and accommodation. So I think we're going nowhere at all. And now that I have figured everything out, I feel, as I said, much better. I demand to be discharged from this institution as a matter of right.

DR. GILDER. Geneva, I'm torn. You're obviously improved, yet you don't share my, or almost anyone's, reality. You lack hope. Furthermore, your approach is calculated to get your people absolutely nowhere. Progress requires a creative tension—requires holding up to those in power the gulf between the world as it is and the world as it should be. You believe that the gulf will never close. You concede its existence as a permanent feature of our political landscape. That's not how reform comes about. You short-change society by taking that position, even if it's true. Progress is dialectical; it requires tension. Alienation and despair of the sort you accept will lead nowhere. You should work within the liberal tradition, bringing out the best it has to offer—and it has much to offer your people. You are too ready to jettison it, and for what?

GENEVA. Almost any alternative would be better. We lead narrow, constricted lives. And we can't even say so, on penalty of being labelled crazy. We must go on pretending we are all "equals" in this great democracy. Well, I don't buy that. I have the unique advantage of having really been

134. For a description of the views of Jensen and Shockley, see Delgado, Bradley, Burkenroad, Chavez, Doering, Lardiere, Reeves, Smith, & Windhausen, *Can Science Be Inopportune?: Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 UCLA L. REV. 128, 132-39 (1983).

135. See D. BELL, *supra* note 38, at 126-206; see also Bode, *Ballot Bollix, Vote Fraud in Alabama*, NEW REPUBLIC, July 15 & 22, 1985, at 21 (white Southerners brought voting fraud charges when blacks gained political power).

136. See pp. 51-74; D. BELL, *supra* note 38, at 30-44 (describing gutting of Civil War amendments); *supra* notes 60-67 and accompanying text.



crazy for the past twenty years. Being out of circulation, I've avoided the ideological pressures that almost brainwashed some of my colleagues. I see things as they are. That's why I disturb you, Doctor. I'm like a mirror. I'm forcing you to see what your society does to minorities of color.

DR. GILDER. It's true that you disturb me, Geneva, but not for the reasons you say. My concern for you is purely professional. You're depressed. There are elements of paranoia in your ideas as well. You think society is conspiring against you, trying to control your thoughts. That's not healthy, and it's not true. I'm genuinely concerned about what might happen if I let you out.

GENEVA. I am completely nonviolent, Doctor, as you perfectly well know.

DR. GILDER. I do recognize the force of your arguments, Geneva. And you move me more than you realize. But your total pessimism is not normal. Unless you concede grounds for hope, I think you should remain here, at least for a little while, until your mood lifts.

GENEVA. And I cannot change your mind, Doctor?

DR. GILDER. I am afraid not.

*(Geneva is silent for a long time.)*

GENEVA. Doctor, let me think about it for a short time. I want to reflect on what you say. It's possible that I may reconsider. If I am *forced*<sup>137</sup> to hope, maybe I could muster the will to believe, with King, that "unearned suffering is redemptive."<sup>138</sup>

137. See *supra* note 26 and accompanying text (noting incarceratory power of psychiatric professionals).

138. Here Geneva quotes Martin Luther King Jr.'s speech at the 1963 march on Washington. M. KING JR., *I Have a Dream*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217, 219 (J.M. Washington ed. 1986). By invo-King, Geneva reflects her struggle—under some degree of coercion, see *supra* note 26 and accompanying text—to reach optimism through faith. Throughout their history, there has been a strain of optimism rooted in black Americans' religious belief; indeed, such optimism is a universal mechanism to cope with adversity.

It is worth noting some of the places in which Bell and his characters reflect this theme throughout the book. Bell first raises the spiritual theme in the book's title, which is taken from *Jeremiah* 8:20. P. vii; see also p. 3. Again, Bell refers to the civil rights movement as a "spiritual manifestation of the continuing faith of a people who have never truly gained their rights . . ." P. xi. Similarly, Geneva describes how pressing questions about America's treatment of racial minorities led her, "in growing despair, to abandon [her] civil rights law practice and seek refuge in religion." P. 216. Just before reciting the *Chronicle of the Black Crime Cure*, she tells the Black Bicentennial Convention (to which Bell's narrator had brought her) of her hopes that "we can together discover the true road to our salvation." P. 243. Her statement is followed by the singing of the spirituals "The Lord Will Make a Way Somehow" and "There is a Balm in Gilead," after which the narrator describes Geneva herself as a "transcendent presence, otherworldly, radiant." P. 243. Finally, just before the end of the book Geneva offers a ringing quasi-evangelical message of hope, p. 257 (quoted *supra* note 19), and Bell ends the book with a refrain from another spiritual.

What are readers to make of these many hints that spiritual faith might be a source of Geneva's (Bell's?) optimism? Perhaps Geneva, like King, is a Kierkegaardian "knight of faith," a person who, in Ernest Becker's concise description:

lives in faith, who has given over the meaning of life to his Creator, and who lives centered on the energies of his Maker. He accepts whatever happens in this visible dimension without complaint, lives his life as a duty, faces his death without a qualm. . . . He is fully in the world on its terms and wholly beyond the world in his trust in the invisible dimension.

E. BECKER, *THE DENIAL OF DEATH* 257-58 (1973) (discussing S. KIERKEGAARD, *Problemata: Preliminary Expectoration*, in *FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH* 39 (W. Lowrie

I don't buy your Hegelian dialectic approach, not for a minute. But I do need to get out of here. My people need what feeble efforts on their behalf I may be able to muster after our long conversation, which frankly has left me exhausted.

DR. GILDER. Fine, Geneva. I'm sure you'll make the right decision. In the meantime, I'll hold onto these discharge papers. I have a feeling we'll be needing them soon.

*(Geneva and the Doctor exchange a quick handshake and leave.)*

#### CONCLUSION

And so it was that a book by the title *And We Are Not Saved* came to have a happy ending.

The above is, of course, a story—or, more accurately, a counter-story. The exchange between Geneva and the psychiatrist, like those between Geneva and her mentor in Bell's book, is intended to probe the strains and weaknesses of the accounts by which we organize experience. Cases and case analysis purport to be objective, impartial, rigorous, rational, quasi-scientific. They proceed to a pre-determined conclusion, leaving the reader little opportunity to reach a different one, or the same one in a different way. Stories, by contrast, are noncoercive. They invite readers to pick and choose elements that ring true and thus construct their own story. Probably no reader will adopt Gilder's or Geneva's stories en toto. Geneva's is dark and pessimistic; she believes minorities of color will never escape their subordination and goes along with Gilder's demands only because she must. Yet her skepticism may have a positive side. Exposure to an unfamiliar counter-story may spur recognition, as it did to some extent for Gilder, of the gap between our ideals and life as it is experienced by outgroups. Reality, like our hopes for it, is not fixed. We construct it through conversations, through our lives together. The sad fact of race is that too few of these conversations ever take place; to that extent our lives are diminished. Books like *And We Are Not Saved* help us avoid this impoverishment and may, perhaps, set us on a more positive course in dealing with our most intractable problem.

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trans. 1954)).

If we are to take Geneva as beknighted in faith, readers must also keep in mind that she is not benighted in fancy. She herself is quick to remind the narrator at one point that "[f]aith is not foolishness," since "Faith, if it hath not works, is dead, being alone." P. 44 (quoting *James* 2:17).

Does the spiritual element justify Geneva's optimism at the end of the book? Readers must decide for themselves whether this spiritual optimism is more than an opiate.

