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DERRICK BELL'S CHRONICLE OF THE SPACE TRADERS: WOULD THE U.S. SACRIFICE PEOPLE OF COLOR IF THE PRICE WERE RIGHT?

RICHARD DELGADO & JEAN STEFANCIC

INTRODUCTION

As many legal readers know, Derrick Bell has been writing a series of "Chronicles,"¹ pungent tales aimed at probing the convolutions and recesses of our thinking about race. In his latest, the *Chronicle of the Space Traders*,² he offers up his bleakest scenario yet. In *Space Traders*, a force of highly advanced extraterrestrials lands on earth in the year 2000 and offers us a deal: give up all African-Americans in return for three gifts—enough gold to retire the national debt, a magic chemical that will cleanse America's polluted skies and waters, and a limitless source of safe energy to replace our dwindling reserves.

The traders give us 17 days to think it over.³ National debate moves quickly to a foregone conclusion. Legislation is drafted ordering citizens to perform "special service for transportation" and is approved by a national referendum and the Supreme Court. On the appointed day, Blacks are made to line up. Heads bowed, they leave the United States just as their ancestors arrived 400 years ago, sacrificed on the altar of white greed.

Hardly anyone who reads the Chronicle remains unmoved. Many whites are offended at Bell's suggestion that we have made no racial progress—that we would sacrifice Blacks today, just as we did in former times, out of self-interest and avarice. This time, they say, Bell has gone too far. People of color, by contrast, tend to find the Chronicle quite believable.⁴ It captures an uneasy intuition that we live at the sufferance of whites—that as soon as our welfare conflicts with something they consider essential, all our gains, all our progress, will turn

1. D. BELL, AND WE ARE NOT SAVED (1987); Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

2. 42 RUTGERS L. REV. 1 (1990). The Chronicle is reprinted in slightly revised form, with additional commentary, in 34 ST. LOUIS L. REV. 3 (1990).

3. The offer is made on Jan. 1, 2000. It expires on Jan. 17, Martin Luther King's birthday.

4. On white optimism versus Black despair, see Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988).

out to be illusory.⁵

Which interpretation is correct? Would the shocking conclusion of *The Space Traders* come to pass? Our view is that both versions are true—that optimism and pessimism, hope and despair, are inextricably linked in America's racial experience. By emphasizing different aspects of that experience, either outcome can be made to seem more likely.⁶ Part I examines the plausibility of Bell's version.⁷ History shows that when nonwhite populations have stood in the way of westward expansion, they have been summarily relocated or exterminated, a practice that has continued well into this century and would be easier to carry out in the time of Bell's parable.⁸ His dire prediction has the ring of truth.

But a different ending is also possible. By highlighting other themes and events, Part II revises Bell's account to come to a different conclusion—the American people decisively reject the space trade. Hope and despair are thus poised on a knife's edge—the trade could go either way. Bell's brilliant allegory captures only part of our national potential. It draws on historical fact—in this sense it is disturbingly, shockingly "true." But our culture may yet free itself from its racist legacy. A redemptive ending is just as possible. The future is still open. Nothing is foreclosed.⁹

I. BELL'S CHRONICLE OF THE SPACE TRADERS—FOOTNOTES FOR A NIGHTMARE

On numerous occasions, the white majority has relocated or exterminated nonwhite populations that stood in the way of its quest for wealth, energy, or a more congenial environment.¹⁰ Each time we used religion, legal doctrine, and myth to rationalize our actions.¹¹

5. On the "interest convergence" theory that whites will tolerate racial justice for Blacks only when it is in whites' interest to do so, see D. BELL, *RACE, RACISM AND AMERICAN LAW* 39-44 (1981); Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). See also Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407 (1988).

6. On the difference that perspective makes on the "half full-half empty" problem, see Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

7. Bell offers little historical documentation for his bleak prediction. See *infra* Part I ("Footnotes for a Nightmare") supplying that evidence.

8. See *infra* notes 26-27 and accompanying text. (Advances in media and communication technology would make it even easier to persuade the American public of the trade's legitimacy.)

9. Compare Delgado, *supra* note 4, at 947. ("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.")

10. These assets correspond to the three gifts the Space Traders offer in return for Blacks.

11. See *infra* notes 26-29 and accompanying text. On the way colonial regimes, including our own, have used law, political theory, and religion to rationalize cruel acts, see Williams, *Documents of*

When the white settlers arrived, they found a continent rich in land, water, game, and minerals. They set out to make it their own. When some of the Indian tribes resisted, they were quickly and ruthlessly put down.¹² One of the largest and most advanced tribes was relocated more than a thousand miles from its homeland in a "Trail of Tears" which saw many die and nearly destroyed its culture.¹³ Legal theories of property and waste and Supreme Court doctrines such as the "Discovery" rule were used to justify these and other acts of barbarism.¹⁴ Organized religion also added its voice; the Indians were heathens who must be Europeanized for their own good.¹⁵ Similar flimsy pretexts were used to justify colonialist wars, such as the Mexican-American War, by which the United States seized one-third of the territory of Mexico.¹⁶ In an ironic twist, the barren lands to which some of the Indians had been relocated turned out to have mineral wealth; the tribes were simply moved a second time.¹⁷

On other occasions, colored populations have posed the opposite problem: their presence was necessary to perform labor too back-breaking for whites. Thousands of Chinese laborers were imported to build railroads needed to link the developing nation.¹⁸ Later, they were summarily expelled, and racially exclusive immigration quotas were established to guard against their return.¹⁹ When agriculture required large numbers of field workers, we established the Bracero program.²⁰ When the Mexican workers were no longer needed they, too, were sent back home, and anti-Mexican sentiment was whipped up to justify mass deportation of even legitimate U.S. citizens of Mexican descent who had lived here all their lives.²¹ Of all forced relocations,

Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law, 31 ARIZ. L. REV. 237 (1989).

12. Williams, *supra* note 11, at 239-48. See also THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S (S. Cadwalader & V. Deloria, eds. 1984); A. GUTTMAN, STATES' RIGHTS AND INDIAN REMOVAL: THE CHEROKEE NATION V. GEORGIA 82-83 (1965).

13. G. FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES (1932). See also Ball, *Constitution, Court, Indian Tribes*, 1 AM. B. FOUND. RES. J. 3 (1987).

14. Williams, *supra* note 11, at 250-60; Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2290-308 (1989).

15. Williams, *supra* note 11, at 265-69.

16. Delgado, *supra* note 4, at 940; A. RENDON, CHICANO MANIFESTO 71-72 (1971).

17. See R. BARASH & J. HENDERSON, THE ROAD ix (1980); Williams, *The Algebra of Federal Indian Law*, 1986 WIS. L. REV. 219.

18. R. TAKAKI, STRANGERS FROM A DIFFERENT SHORE (1989); see also H. KITANO, RACE RELATIONS 215-18 (1974).

19. See sources cited *supra* note 18.

20. Delgado, *supra* note 4, at 940; Rodriguez, Corral & Roman, *The Struggle Against the Immigration Control Act*, 8 CHICANO L. REV. 1, 2 (1985); H. KITANO, *supra* note 18, at 246.

21. Rodriguez, Corral & Roman, *supra* note 20, at 3.

black slavery is the most notorious.²² Slave traders, driven by greed, remorselessly rounded up African villagers, often separating members of the same family.²³ They transported them in chains on sailing vessels bound for America; many died.²⁴ Once here, the survivors were sold as chattels, a practice which continued for over two hundred years and was protected by the original Constitution in no fewer than ten clauses.²⁵

Bell's scathing skepticism thus finds ample support in our history. Indeed, the space trade might in one respect be even easier to carry out than African slavery or Indian relocation. Throughout our past, acts of mass cruelty have been preceded by a barrage of publicity aimed at convincing ourselves that our cause was just.²⁶ With the communication and media technology available today, disseminating the necessary stories and myths might be even easier than before. Bell may well be right, then, that Americans would quickly and with few qualms endorse the space trade. Yet, by emphasizing slightly different elements in our culture and consciousness, a different account can be made to emerge.

II. BELL'S TALE RETOLD

After the space traders departed, events unfolded initially much as Bell described them. Early polls showed most Americans favoring the trade. A few expressed misgivings about shipping the Blacks off to an uncertain fate. But a larger number pointed out that African-Americans had generally made poor use of their opportunities in the United States and that it was time for them to try their fortunes elsewhere.²⁷ Emancipation, desegregation, and affirmative action were all deemed well-meaning but failed experiments.²⁸ It was time for white Americans to get on with the serious business of shoring up our slip-

22. See generally L. HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978); D. BELL, *supra* note 5, at 10-30.

23. D. BELL, *supra* note 5, at 23; L. HIGGINBOTHAM, *supra* note 22, at 12.

24. L. HIGGINBOTHAM, *supra* note 22, at 12.

25. D. BELL, *supra* note 5, at 10-23. The 10 clauses are enumerated in Delgado, *supra* note 4, at 933 n.42.

26. See, e.g., Williams, *supra* note 11, at 262-67 (discursive strategies by which we dehumanize those we plan to exploit or kill).

27. See, e.g., D. BELL, *supra* note 5, at 24 (reporting that even Benjamin Franklin, who went on to become leader of the Pennsylvania Abolition Society, favored sending Blacks back to Africa). Thomas Jefferson had the same view, Lynd, *Slavery and the Founding Fathers*, in *BLACK HISTORY* 119, 131 (M. Drimmer, ed. 1968).

28. See, e.g., T. SOWELL, *BLACK EDUCATION: MYTHS AND TRAGEDIES* (1972); *AFFIRMATIVE ACTION RECONSIDERED* (1975) (eloquent statements of these and other neoconservative views of race). See also *City of Richmond v. Croson*, 488 U.S. 469 (1989) (subjecting to strict scrutiny race-conscious municipal ordinance).

ping economic position, a predicament many laid at the doorstep of Blacks.²⁹

Support for Blacks reached its nadir a week into the response period, when a poll showed a bare 19 percent of Americans opposing the trade, 70 percent in favor, and 11 percent undecided. Then the tide began to turn. No one knows what started it; it is difficult to identify a single precipitating event. A white governor of a Southern state notorious for earlier diehard resistance to integration condemned the trade on national television.³⁰ "We who have passed through the crucible of racial hate and division must take a stand against this immoral trade," he said. "A region that rose above the abominations of slavery, lynching, and Jim Crow laws must oppose this latest, and most virulent, expression of the same ignoble impulse. We have been getting along with shrinking fuels and a polluted environment for some time. While these things are deplorable, they are not of Blacks' making. If we put our minds and bodies to the task, we can solve these problems without sacrificing our Black brothers and sisters." The governor appeared side by side with the African-American mayor of his state's largest city. At the conclusion of the program, the two shook hands and embraced.

At the time, the governor's speech seemed a voice in the wilderness. But shortly after he spoke, a discredited television evangelist made a widely reported and emotional speech also opposing the trade.³¹ His former denomination, several million strong, unexpectedly seconded him in a statement declaring "All men and women are sons and daughters of one God. We condemn this trade. As Jesus said, 'As you did it to one of the least of my brethren, you did it to me.'³² This trade would sully a great nation. On judgment day, the Lord will not look kindly on those who voted for it."

Within the next few days, an extraordinary groundswell made itself felt. Middle-aged bankers, stockbrokers, lawyers, and executives,

29. For discussion of the role race plays in our recent economic decline, see Delgado, *Zero-Based Racial Politics: An Analysis of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L. J. 1929 (1990).

30. The governor's stand was not entirely without self-interest, see *infra* text and notes 36-37. Yet, it may have had a component of sincerity—compare his about-face with that of Governor George Wallace following his injury at the hands of a would-be assassin. Before the event, Governor Wallace was a staunch opponent of racial reforms; after it, his views softened remarkably.

31. For the view that a person's private morality (the evangelist fell victim to a sex scandal) is no sure indication of his or her public morality, see *Infidelity*, *The Nation*, May 16, 1987, at 633; Schneider, *Opinion: An Immorality Crusade*, *L.A. Times*, Mar. 26, 1989, § 5, at 1, col. 1; Lichtenberg, *Sexy Politicians Who are Do-Gooders*, *San Francisco Chron.*, Jan. 4, 1990, at A-23, col. 1 (Editorial: Open Forum); Cohen, *In a Medieval Town*, *Wash. Post*, Nov. 13, 1987, at A-23, col. 1; Safire, *Post-Hart Morality*, *N.Y. Times*, June 25, 1987, at A-27, col. 5.

32. *Matthew*, 25:40.

who had come of age during the sixties, left their offices, donned blue jeans and other cultural insignia of their generation, and marched in the streets.³³ They used fax and teletype machines to coordinate the mass demonstrations and vigils that took place in every city. Peter, Paul and Mary, the musical icons of the sixties, emerged from retirement and with creaking voices sang, "If I Had a Hammer." Over two dozen rock groups held a "Concert for Unity" at Woodstock, New York.³⁴ Despite the bitter cold, over 600,000 attended. At the conclusion, the entire gathering joined hands and sang "We Shall Overcome" into the night. A video was made and played regularly on MTV.

The popular Soviet premier paid a surprise visit to the White House, after which he called on the American people to refuse the trade;³⁵ conservatives immediately branded his stand self-interested. By then, however, the tide had turned. Citizens met in small groups to discuss refusal of the offer. "We may have to tighten our belts, but it's better than selling our souls," most agreed. Blacks and whites crossing in the streets met each other's glances and smiled. Neighbors who had never met or spoken got together across color lines and embraced. Schoolchildren, urged on by their teachers, wrote thousands of letters opposing the trade.³⁶ The referendum held on the twelfth day was but a formality: The vote was 93 percent against the trade, seven for. America had achieved catharsis. Most vowed never again to allow relations between the races to deteriorate to their previous sorry level.

When the space traders returned, precisely on schedule, America's leaders politely but firmly rejected the offer. "As we hoped," the alien leader said. "Congratulations on your breakthrough. Accept these gifts with our blessings." And, leaving the magic chemical, the store of gold, and the energy source, the space traders left in a fiery fly-by that seemed a fitting conclusion to the traumatic events that had preceded it.

* * * *

Afterward, cynics rejected any idealistic interpretation of the space trade's rejection. They pointed out that the white governor needed Black votes for re-election in the wake of a series of scandals

33. On the revival of activism among the middle-aged, see, e.g., *Nuclear Freeze Supported, Attacked*, Wash. Post, Nov. 15, 1982, at A-2, col. 1; Barker, *March Bars Abortion, Gay Issues*, Wash. Post, Aug. 23, 1983, at C-1, col. 1.

34. For a retrospective on Woodstock and its cultural significance, see Atkinson, *Coverage of Woodstock Anniversary: The Sequel*, L.A. Times, Sept. 9, 1989, § 5, at 10, col. 1.

35. On the charismatic current Soviet leader and his ability to influence world events, see TIME, Dec. 24, 1989 (declaring Gorbachev "Man of the Decade").

36. See *Aurora Schools Boycott Tuna Fish*, Denver Post, Jan. 10, 1990, at B-1, col. 5 (school children campaign to save dolphins).

that shook his administration. The fundamentalist denomination had just gone through a tumultuous reassessment of its membership policies, which until then had barred Blacks, and did not want to have nothing to show for the bruising experience which had cost it one-quarter of its membership.³⁷ Even the rock groups' role was not without self-interest—at least one of the groups had been heard to remark, "Without the Blacks, man, our music is going nowhere."³⁸

Yet, it happened. Just as with abolition, the Underground Railway, *Brown v. Board of Education*, the Great Society, the Marshall Plan, the Civil Rights Act of 1964, Selma, Alabama, and the March on Washington, America showed the ability to rise above historical animosities and racial division. Would the gains produced by the Space Trade crisis prove lasting? And will our society be able to effect even a fraction of these gains without the spur of such an extraordinary outside intervention? Recent events give grounds for doubt.³⁹

Yet, as the retold account shows, more than one ending is always possible; equality and brotherhood are powerful chords resonating throughout our culture and history. Like all such notes, however, they grow faint if not restruck, and in time fade away. Bell's Chronicle is a striking morality tale warning us of the very real possibility that this may come to pass.

III. LAW AS WORLD-MAKING: STORYTELLING AND LAW'S CONSTRUCTION OF SOCIAL REALITY

Bell's bleak Chronicle and our more optimistic one are examples of storytelling, an emerging form of legal scholarship. In this Part, we offer a brief explanation of why this scholarship has been emerging and what it can offer. We believe that legal storytelling is a necessary transition between a more universalistic, static view of law and politics that prevailed until recently, and one more suited to our times.⁴⁰ In literature and the social sciences, the assumption that one "true" understanding of meaning or culture is possible has been vigorously challenged.⁴¹ Theorists in these disciplines have been acknowledging the

37. The Church of Latter-Day Saints (Mormon) recently went through a similar upheaval when it changed its policy to allow Blacks to serve as bishops. See Pace, *Spencer Kimball, Mormon Chief, Dies*, N.Y. Times, Nov. 7, 1985, at D-27, col. 1. See also N.Y. Times, June 10, 1978, at 1, col. 1; June 18, 1978, at 1, col. 2 (coverage of Spencer Kimball's revelation and ordination of first Black).

38. On the debt white musicians have to Black culture and music, see Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1755 n.44, 1759-60 (1989); Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987).

39. See Delgado, *supra* note 4, at 929-45 (plight of nonwhites deepening, although many refuse to acknowledge it).

40. On the dialectical potential of legal storytelling, see Delgado, *supra* note 6.

41. See, e.g., M. FOUCAULT, *THE ADVOCACY OF KNOWLEDGE* (1972); LYOTARD, *Answering the*

fragmentariness of knowledge, emphasizing perspective and point of view as much as previous generations emphasized neutrality and universal principles.⁴²

Law and legal scholarship are just beginning to feel the impact of these ideas. Just as social scientists acknowledge the multifariousness of social reality, law is beginning to expand to incorporate the views of feminists, legal realists, Critical Race theorists, members of the Critical Legal Studies (CLS) movement, and other reformers.⁴³ This development is occurring just when American society is becoming increasingly diverse, the two forces synergizing each other into the foreseeable future.⁴⁴

Legal storytelling is a means by which representatives of new communities may introduce their views into the dialogue about the way society should be governed. Stories are in many ways more powerful than litigation or brief-writing and may be necessary precursors to law reform.⁴⁵ They offer insights into the particulars of lives lived at the margins of society, margins that are rapidly collapsing toward a disappearing center. This is not true just of our times. In Biblical history, storytellers for oppressed groups told tales of hope and struggle—for example, that of the Promised Land—to inspire and comfort the community during difficult times. Reality *could* be better—and, perhaps, will be. Other storytellers have directed their attention to the oppressors, reminding them of a day when they would be called to account.⁴⁶ Stories thus perform multiple functions, allowing us to uncover a more layered reality than is immediately apparent: a refracted one that the legal system must confront.

Until recently, law has aimed for consistency, for the “rule of law.” Today we are beginning to realize that this universality was false, that it perpetrated exclusion.⁴⁷ It cohered only by ignoring certain experiences, stories, and viewpoints. Today, these experiences

Question: What is Postmodernism, in *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (C.G. Bennigton & B. Massurni trans. 1984).

42. See Sources cited *supra* note 41; See also P. RICOEUR, *TIME AND NARRATIVE* (1984); P. BERGER & T. LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967); N. GOODMAN, *WAYS OF WORLDMAKING* (1978).

43. On Critical Race Theory, see, e.g., Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 *VAND. L. REV.* 1 (1990); Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988).

44. Stefancic & Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?* — *OHIO ST. L. J.* — (1991, forthcoming).

45. Delgado, *supra* note 6, at 2414-18.

46. The classic Biblical story is the Jeremiad, in which the prophet warned of dire consequences unless the chosen people returned to their calling.

47. See Delgado, *supra* note 43, at 6-12.

and viewpoints are moving from the periphery to the center. Storytelling is one of the vehicles that propels this movement.

Bell's Chronicle is a classic Jeremiad—a tale aimed at making a powerful group aware of its own iniquitous history and potential for more of the same. It aims at kindling conscience and jarring complacency. It performs this function ably: its pessimistic message rings true. Yet, people cannot live without hope, without signposts, without some indication that the future will not be a continuation of the present.⁴⁸ Storytelling is essential for social movement, precisely because it insists that our choice of narrative *matters*.⁴⁹

It matters precisely because we are learning that the quest for a universal theory of law or culture is fruitless but nevertheless continues. There is no one single Good, no single best law, no single best way of governing ourselves.⁵⁰ There are only multiple perspectives; nothing is static, our ideas are constantly evolving, we redefine ourselves without end. Microcosmic goods—acts of kindness and compassion—may ultimately be all that we can have and know.⁵¹ If the law aims for these, it may accomplish more than it has in the past—when it ignored particularity, overlooking concrete, demonstrable evil in the vain hope of finding a universal Good.

48. See Delgado, *supra* note 4 (role of hope and despair in transforming culture).

49. See BOOTH, *THE COMPANY WE KEEP: AN ETHIC OF FICTION* (1988).

50. On the breakdown of universalism, see *THE POLITICS OF LAW* (D. Kairys, rev. ed. 1990) (essays on Critical Legal Studies and postmodern attack on conventional legal values and themes including objectivity and Rule of Law).

51. On the decline of grand theory and normative legal scholarship, see Symposium, *Critique of Normativity*, 139 U. PA. L. REV. — (1991, forthcoming); Delgado, *Pep Talks for the Poor: A Reply and Remonstrance on the Evils of Scapegoating*, B.U. L. REV. — (1991, forthcoming); V. GROSSMAN, *LIFE AND FATE* (R. Chandler trans. 1987).

