

The Racial Preference Licensing Act

At an elaborate Rose Garden signing ceremony witnessed by the many right-wing groups that worked for its passage, the President assured the nation that the new Racial Preference Licensing Act represented a realistic advance in race relations. "It is," he insisted, "certainly not a return to the segregation policies granted constitutional protection under the 'separate but equal' standard of *Plessy v. Ferguson*." "And," he added, "it is no more than an inopportune coincidence that the Act was passed exactly a century after the Court announced the *Plessy* decision. Rather, the new law embodies a bold new approach to the nation's oldest problem. It does not assume a nonexistent racial tolerance, but boldly proclaims a commitment to moral justice through the workings of a marketplace undisturbed by government interference."

Indeed, the new Act ratified discriminatory practices that by the early 1990s had become the de facto norm. Under the new Act, all employers, proprietors of public facilities, and owners and managers of dwelling places on application to the federal government could obtain a license authorizing the holders or their agents to exclude or separate persons on the basis of race and color. The license itself was expensive, though not prohibitively so. After obtaining a license, the holder was required to pay to a government commission a tax equal to three percent of the income derived from employing, serving, or selling to whites during each quarter in which a policy of racial preference was in effect.

Holders were required to display their licenses prominently, and to operate their businesses in racially selective fashion. Discrimination had to

be practiced on a nonselective basis. Licenses were not available to those not planning to discriminate but seeking to use a license as a form of insurance against discrimination suits. Minority group members carried the burden of proof when charging discrimination against a facility not holding a license, but the minority group members could meet that burden with statistical and circumstantial as well as direct evidence. Under the Act, successful complainants were entitled to damages and attorney's fees.

... License fees and commissions were placed in an "equality fund" used to underwrite black businesses, offer no-interest mortgage loans for black home buyers, and provide scholarships for black students seeking college and vocational education. To counter charges that black people would be segregated and would never gain any significant benefit from the equality fund, the commission overseeing collection and distribution of license fees consisted of five members—each a representative from a major civil rights organization—appointed by the President to their posts for three-year terms.

The President committed himself and his administration to effective enforcement of the new Racial Preference Licensing Act. He warned that those found guilty of discriminating without a license or who failed to comply with the license provisions were subject to civil penalties as stiff as those under the RICO statutes.

"It is time," the President declared, "to bring hard-headed realism rather than well-intentioned idealism to bear on our long-standing racial problems. Policies adopted because they seemed right have usually failed. Actions taken to promote justice for blacks brought injustice to whites without appreciably improving the status or standards of living for blacks, particularly those members of the group who most needed protection."

"Within the memories of many of our citizens, this nation has both affirmed policies of racial segregation and advocated policies of racial integration. Neither approach has been either satisfactory or effective in furthering harmony and domestic tranquility. Today, I sign what may be the final civil rights law. It maximizes freedom of racial choice for all our citizens while guaranteeing that people of color will benefit either directly from equal access or indirectly from the fruits of the license taxes paid by those who choose policies of racial exclusion."

"I respect the views of those who vigorously opposed this new law. And yet the course we take today was determined by many forces too

powerful to ignore, too popular to resist, and too pregnant with potential to deny. We have vacillated long enough. We must move on toward what I predict will be a new and more candid and collaborative relationship among all our citizens. May God help us all as we seek in good faith a new way of resolving our oldest and most ineluctable problem."

Debating the Final Civil Rights Act

To: Ms. Geneva Crenshaw (proponent and drafter of the Act)
Electronic Mail Route 47-782

Dear Geneva,

My God, woman! What are you trying to do to me? . . . Your allegorical racial chronicles, despite their rather radical critiques of the civil rights movement, have become quite well-known both among lawyers and laypersons. As you predicted, they have stirred a healthy and much-needed debate. . . .

But give me a break! . . . Your odious proposal will earn me permanent enmity from the civil rights community. Of course, the right-wing conservatives whom you accurately designate as the sponsors and supporters of this anti-civil rights law will hail me as the "The Black Savior" of racial reform.

. . . But suggesting a black-bonus-based return to state-supported racial segregation is simply going too far. God may be dead, but the Fourteenth Amendment, though wounded by the current Supreme Court, still lives.

Realistically,
Derrick

To: Professor Derrick Bell

Dear Doubting Thomas,

Oh ye of little faith! Even after all these years, you remain as suspicious of my truths as you are faithful to the civil rights ideals that events long ago rendered obsolete. Whatever its cost to your relationship with your civil rights friends, why can't you accept the inevitability of my Final Civil Rights Act?

As to the viability of the Fourteenth Amendment, or, for that matter, any civil rights law, you—not I—wrote that the first Rule of Race Relations Law is that:

Racial remedies are the outward manifestations of unspoken and perhaps unconscious conclusions that such remedies—if adopted—will secure, advance, or at least not harm the interests of whites in power.

What I assume you are saying is that while blacks struggle for legal protection against one or another form of racial discrimination, the country responds only when the requested relief will serve some societal interest deemed important to whites. Virtually every piece of civil rights legislation beginning with the Emancipation Proclamation supports your position.

. . . .

Your second Rule of Race Relations Law, if you remember, is that:

The benefits to blacks of civil rights policies are often symbolic rather than substantive, and when the crisis that prompted their enactment ends, they will infrequently be enforced for blacks, though in altered interpretations they may serve the needs of whites.

. . . .

Now, I can hear you asking, "How do the rules justify my Racial Preference Licensing Act, which looks like a new, more subtle, but hardly less pernicious 'separate but equal' law?" Let me try and explain.

Derrick, today as it did in the mid-1890s, the Supreme Court is reacting to a range of social forces that are hardening racial attitudes. Whites, as they did a century ago, are concluding that the country has done enough for its racial minorities. The never-vigorous enforcement of civil rights laws has slowed, encouraging open violations and discouraging victims from filing complaints they fear will only add futility and possible retaliation to their misery.

What the President calls the Final Civil Rights Act is, in fact, a manifestation of your Rule Two. The society—or much of it—has tired of its commitment to protect blacks against the preference of whites. It believes that the return of legal protection of racially discriminatory policies is in its interest. And it seeks to give that interest legitimacy by claiming that the notion—suggested early in theory—that whites have a right of nonassociation should be recognized in law.

However, the Act is attractive to many whites because it seems

to contain provisions that conform to an inversion of your Rule One. That is, because of the Equality Fund, they are able to rationalize a return to legalized segregation by viewing this as the necessary means to reach the black reparations end long sought by black groups.

Your challenge is to determine whether in this, as in any seemingly hostile, racial policymaking lies unintended potential that African Americans can exploit. Think about it, Derrick. Legislation like the Final Civil Rights Act may be all African Americans can expect, and could prove all that they need.

Prophetically,
Geneva

To: Ms. Geneva Crenshaw
Electronic Mail Route 47-782

Dear Geneva,

Even as a vehicle for discussion, I cannot accept the legalized reincarnation of Jim Crow. Too many of our people suffered and sacrificed to bury those obnoxious signs: "Colored" and "white." . . . Your Final Civil Rights Act will simply squander our high principles in return for a mess of segregation-tainted pottage. Victory on such grounds is no victory at all.

Resolutely,
Derrick

To: Professor Derrick Bell

Dear Derrick,

Tell me: What principle is so compelling that you continue your support for obsolete civil rights strategies while ignoring the contemporary statistics regarding black crime, broken families, devastated neighborhoods, alcohol and drug abuse, out-of-wedlock births, illiteracy, unemployment, and welfare dependency? Segregation was hateful, but if I knew that its return would reduce the devastation of black communities to the ante-desegregation levels, I would think such a "trade" entitled to serious thought, not self-righteous dismissal.

. . . You and other civil rights policymakers must realize that you have been formulating your strategies without any real assessment of the continuing importance of racial subordination of black people

to the stability of the American economic and political system. It is not that you civil rights advocates do not admit the existence of racism. You know it exists and assert on every public occasion that no social fact in America is more salient than racial difference. You readily and pessimistically recount the developments marking the end of the second reconstruction and the parallels with the end of the first reconstruction a century ago. But you do not see the critical connection between the social subordination of blacks and the social stability of whites.

"The fact is, friend, you do not have forever to see my point."

"What!" I said, startled. I had been reading Geneva's words from my computer screen when I became conscious of a low, melodious voice saying those very words. I turned, and. . .

There she was. Seated on the small couch in my study, her over six-foot, slender frame gave her a regal presence. Geneva's strong features were framed by her intricately braided hair that was now quite gray and made a striking contrast with her still smooth skin that was almost translucent in its blue-black glory. She greeted me with that smile of hers that conveyed both warmth and authority.

"Welcome," I said, trying to mask my shock with what I hope was *savoir-faire*. "Is it now your practice to visit folks who are still at work at 2 a.m.?"

"If you spent more time worrying about our people and less meddling in my business, we would all be better off and I would not have to visit you at any time.

. . . .

"I decided our computer correspondence was inadequate to convey the real significance of the *Final Civil Rights Act*."

"Well," I said, "I am more than delighted to see you, but you did not have to come back to lecture me about the reasons for the continuing and increasingly virulent vitality of American racism. I understand, moreover, the importance of race as a stabilizing force in American society. . . ."

. . . .

" . . . Racism is more than a group of bad white folks whose discriminatory tendencies can be controlled by well-formed laws, vigorously enforced. It is a nonnegotiable essential element of America as we know it. Belief in the superiority of their whiteness leads many whites to accept unthinkingly a status that is often as disadvantaged as that involuntarily

held by blacks. It is tied to the existing economic system and serves as a principal stabilizer of that system."

"Whatever happened to 'We Shall Overcome'?"

"Racist opposition has polluted and transformed the dream that phrase once inspired into a myth that comforts and distracts you from the harsh racial reality that is closing in around us and ours."

... Geneva continued. "Don't you see? Just as parents used to tell children stories about the stork to avoid telling them about sex, so we hold to dreams about a truly integrated society. . . . In his recent book, *Love's Executioner and Other Tales of Psychotherapy*,¹ Dr. Irvin Yalom reports that a fundamental principle in psychotherapy is the inevitability of death for each of us and for those we love. He describes the myriad ways we devise to escape or deny the terrible reality of death. . . . We chuckle and agree with Woody Allen when he says, 'I'm not afraid of death. I just don't want to be there when it happens.' The fact is, 'full awareness of death ripens our wisdom and enriches our life.' A dying patient recognized this when he stated, 'though the *fact*, the physicality of death destroys us, the *idea* of death may save us.'²

"Derrick, the analogy is not exact, but just as death is inevitable and inherent in life, so racism in America, while not inherent, is intractable. It is socially constructed, but no less real. We must deal directly with American racism, just as we do with death. Civil rights advocates and their organizations must face the unavoidable truth that this nation's social stability is built on a belief in and a determination to maintain white dominance. Racism is the manifestation of this deeply entrenched determination. It plays a key role in a capitalist society where the growing gap between the wealth of the rich and the poverty of the rest of the populace is both large and obscene. But even a total reform of our economy would not erase—and might intensify—the need of whites to measure their self-worth by maintaining blacks in a subordinate status."

"Geneva. What you are saying sounds like a prescription for terminal despair. As applied to your Racial Preference Licensing Law, it is simply too risky."

"It is risky," Geneva agreed, defiantly. "It is an approach with risks quite like those we must face as we seek the salvation in life that comes when we accept the reality of death."

"But, Geneva, if death and racial subordination are inevitable and unavoidable, if all our efforts and accomplishments will come to nothing,

then what is the meaning of life and what then is the value of working for civil rights?"

Geneva brightened. "As discouraging as that sounds," she explained, "it seems to me that when we ask that question aloud, we are dealing directly with the unstated question that has bedeviled us all along. Out in the open, we can forthrightly deal with the seeming paradox of a people long oppressed by law continuing to look to law for remedies that elude our grasp, deceive our minds, and frustrate our hopes."³

....

"I agree with the need for a more realistic perspective, Geneva, but how do you move from realism to your Racial Preference Licensing Law?"

"In the face of disaster, the person who is truly liberated from the fear of death looks for redeeming possibilities. Civil rights advocates, freed of the 'We Shall Overcome' syndrome, should and can make a similar assessment of all racial policies—including the Racial License Preference Act.

"Consider that by authorizing racial discrimination, the Act removes the long-argued concern that civil rights laws deny a right of nonassociation. By requiring the discriminator to publicize his actions and to pay all blacks a price for that 'right,' the law may dilute both the financial and psychological benefits of racism. Most whites pay a tremendous price for their unthinking and often unconscious racism, but they are less willing to make direct payments for the privilege. Today, even the worst racist denies that he is a 'racist.'

"Black people, moreover, will no longer have to divine whether an employer, realtor, or proprietor wants to exclude them. The license will give them—and the world—ample notice. Those who seek to discriminate without a license will place their businesses at risk of serious, even ruinous, penalties.

"It may seem crazy, but racism is hardly based on logic. We need to fight racism with racism the way a forest ranger fights fire with fire. . . .

....

"Civil rights advocates must face up to the racial realities of American social and economic stability and try to structure initiatives and responses in the light of the racial world as it is rather than as they would like it to be."

....

Geneva, still smiling, stood, ready to head toward the door when she delivered this last zinger. Bending to give me a kiss, she said, "Write soon. You are as impossible as ever, but I've missed you nonetheless."

The usually squeaky door to my study opened and closed silently as she departed. My two large Weimaraner hounds—usually alert to the slightest sound—had slept soundly through Geneva's visit.

Could I have fallen asleep and imagined what had happened? But no. There on my monitor was all of our conversation, miraculously transcribed and ready to insert into my now completed chapter. The notion of a license to practice racial discrimination in the 1990s seemed absurd, but no more so than the reality of worsening racism as we approach the twenty-first century.

NOTES

1. Irvin Yalom, *Love's Executioner and Other Tales of Psychotherapy* (1989).
2. *Id.* at 7.
3. See *id.* at 12.

CHAPTER 2

Racial Realism

The pieces in this chapter, which opens with Bell's famous Space Traders Chronicle, sound a second signature theme in Bell's writing—the permanence of racism. If whites in this country hold most of the power and manipulate civil rights advances for blacks to maintain their ascendancy, no force known to humanity is likely to change this state of affairs. Hoping for more is foolhardy; the best one can do is come to terms with one's destiny and find what meaning one can in struggle itself. Power ineluctably asserts and reasserts itself, treating ruthlessly those (like Paul Robeson) who get in its way. Yet, a certain nobility attends refusing to submit meekly to one's fate. And, by mobilizing its own resources, the black community even without white help may accomplish much for its own, for example, its children. Bell thus addresses the "so what" question about what blacks should do in light of their predicament. He also describes his role in inspiring a movement, Critical Race Theory, that struggles with many of these issues.