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Mary E. Becker

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Racism and Legal Doctrine

AND WE ARE NOT SAVED. By Derrick Bell.† New York: Basic Books, Inc., Publishers, 1987. Pp. xii, 288. \$19.95.‡

Reviewed by Mary E. Becker*

Legal doctrines have lives of their own, often independent of and irrelevant to the real-world problems with which they purportedly deal. One such doctrine is the equal protection standard under the fourteenth amendment, which has little to do with the reality of racial inequality in the United States today. *And We Are Not Saved* makes this point in a number of ways and on a number of levels.

The title is from Jeremiah: "The Harvest is past, the summer is ended, and we are not saved."¹ Professor Bell asks how, why, after so much struggle by so many for so long, we have achieved so little in the "quest for racial justice."² He explores this question through a series of mythical encounters between the narrator (who, the reader assumes, is Bell himself) and Geneva Crenshaw, a colleague of the narrator during the early sixties when both were lawyers for the NAACP Legal Defense Fund. The narrator is now a professor at an elite law school (presumably Harvard). Geneva was seriously injured in a suspicious car accident during the summer of 1964, while organizing voters in the Mississippi delta. Since then she has had strange visions, which she presents to the narrator in a series of eight chronicles describing the relationship between the races.³

Geneva's visions are allegories: symbolic representations of the racial status quo and of the impossibility of achieving racial equality through any legal strategy. Together, Geneva and the narrator explore the meaning of these allegories and consider alternative strategies for achieving racial equality. Both Geneva's visions and the encounters be-

† Professor of Law, Harvard University.

‡ Hereinafter cited by chapter or page number only.

* Professor of Law, University of Chicago. I thank Cass Sunstein for helpful comments on an earlier draft. Research support was provided by the Kirkland and Ellis Faculty Research Fund.

1. *Jeremiah* 8:20.

2. P. 3.

3. There are ten chronicles altogether, including one based on a dream the narrator experiences about the effect of racism on the relationships of black women and men: "The Chronicle of the Twenty-Seventh-Year Syndrome" (or "The Race-Charged Relationship of Black Men and Black Women"). Most of the final chronicle is a report of the revelation of "The Ultimate Civil Rights Strategy," which I discuss at the end of this Review.

tween Geneva and the narrator have a mythic or science-fictional quality.

I will concentrate on three of the levels on which Bell's book operates. First, Bell effectively conveys, at least to those who have ears to hear, the complex feelings of black people about the racial situation, particularly in elite white institutions. Second, he effectively conveys an appreciation of the otherworldly character of much of the Supreme Court's equal protection jurisprudence. In contrast, Geneva's chronicles are grounded firmly in the harsh reality of life for black people in the United States. Finally, Bell's allegories repeatedly highlight the real problem in achieving racial equality in this country: white racism, the (sometimes unconscious) assumption that whites and blacks are essentially different—and that the better race is the white race. Lawyers tend to become obsessed with legal standards and to expect salvation through the development of the ideal legal standard in litigation. Bell reminds us that no legal standard can eliminate racial inequality in a racist society.

To illustrate these points, I will describe in detail two of Bell's most moving chronicles: "The Chronicle of the DeVine Gift" (or "The Unspoken Limit on Affirmative Action")⁴ and "The Chronicle of the Amber Cloud" (or "The Declining Importance of the Equal-Protection Clause").⁵

The Chronicle of the DeVine Gift explores affirmative action on many levels, including the emotional. In this vision, Geneva has been teaching at one of the best law schools in the country. As the vision begins, Geneva is in the spring of her second year and is thinking of resigning. Although she likes teaching and writing, she is exhausted. Her status as the only minority faculty member in the law school creates many special demands on her time. She has served on every law school and university committee needing minority representation. In addition, she is one of the few faculty members (of any color) willing to take out time for students. As the only minority teacher, she has felt pressure to give an award-winning performance in every class.⁶ When she was hired, the law school assured Geneva that other minority teachers would be hired in the near future. But none were. Every candidate Geneva suggested—some with better credentials than her own—was found wanting.⁷

Then, one spring afternoon, Mr. DeVine Taylor, the president of an

4. Ch. 6.

5. Ch. 7.

6. P. 140.

7. P. 142.

extremely successful black-owned business, visits Geneva and offers the use of his staff and resources to search for other qualified minorities to teach at Geneva's institution. Within a year or two, the school has six minority teachers, more than any other top law school.⁸ DeVine's next candidate (who would be the seventh minority teacher) has superb credentials, better perhaps than those of any of the six minority members already on the faculty.⁹ But the Seventh Candidate is not hired. The Dean explains to Geneva that "[t]his is one of the oldest and finest law schools in the country. It simply would not be the same school for our students and the alumni with a predominantly minority faculty."¹⁰ When Geneva protests that twenty-five percent of the faculty can hardly be considered a majority, the Dean replies that "we want to retain our image as a white school just as you want Howard to retain its image as a black school."¹¹ Finally, he tells Geneva that "a law school of our caliber and tradition simply cannot look like a professional basketball team."¹²

Geneva resigns. The Seventh Candidate writes from an all-black town in Oklahoma to tell Geneva that he has decided he can no longer operate within such a hypocritical system and that he therefore is changing from "apologist" to "avenger."¹³ DeVine Taylor writes to tell Geneva the actual purpose of the DeVine Gift: to destroy the school's false liberal image, which it created by employing her as a token minority teacher.

Geneva and the narrator discuss several aspects of the chronicle. They consider what it is like for a "black faculty member who did not earn the highest grades or graduate from a top school" to be at an elite institution.¹⁴ What is the message to this faculty member when minority candidates she recommends are rejected on the ground that they

"just don't seem to have the intellectual background we need at this school."

....

... "What were they trying to tell me? Was it that I was doing such a great job that they saw no need to hire others like myself? Or was it, rather, that my performance was so poor that they refused to hire anyone else for fear of making another serious

8. P. 142.

9. Pp. 142-43.

10. P. 143.

11. P. 144.

12. P. 144.

13. P. 146.

14. P. 148.

mistake?"¹⁵

Geneva and the narrator also consider the problems that would likely afflict a discrimination suit challenging the rejection of the Seventh Candidate. Of course, the school would not admit in court what the Dean told Geneva about the rejection of the Seventh Candidate. In court, the school would claim that the Seventh Candidate's qualifications were inferior to those of other (white) candidates.¹⁶ Courts have been very reluctant to second-guess employers making subjective "upper-level hiring decisions in the 'elite' professions,"¹⁷ especially in academic settings.¹⁸ The fact that the school has more minority faculty than any similar institution would prove to many judges that the rejection was not discriminatory.¹⁹

The narrator predicts that the school would ultimately prevail in court because judges (like the school's faculty) would believe that if there were discrimination in this situation, it was needed to preserve the school's status as a "majority institution."²⁰ Judges would perceive the maintenance of a predominantly white faculty as necessary to preserve the school's image, elite status, and financial viability (through alumni contributions).²¹ In housing cases, lower courts have upheld overt policies limiting the number of minority residents to the number tolerable to white residents—the level at which white flight will not occur.²² All major institutions sustain racism, not by any express conspiracy but "by a culturally ingrained response by whites to any situation in which whites aren't in a clearly dominant role."²³

This analysis, put forward by the narrator, helps Geneva understand her interaction with white faculty members. Geneva feels that when she was a beginning teacher, struggling with her first writings and spending a great deal of time helping minority students, her white colleagues regarded her warmly. But when Geneva achieved success as an academic—publishing in prestigious journals, serving on commissions, and lecturing at other schools—her white colleagues began to regard her with hostility. The more successful Geneva became, "the harsher . . . the

15. P. 148 (footnote omitted).

16. P. 149.

17. P. 149.

18. Pp. 155-58. Bell is on firm ground in asserting that the law school would probably prevail if the Seventh Candidate litigated the decision not to hire him. The courts have usually deferred to employers when discrimination is not blatant, especially in university settings. Pp. 155-58.

19. See p. 151.

20. P. 150.

21. Pp. 150-51.

22. P. 152 (citing *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1140 (2d Cir. 1973)).

23. P. 157.

collective judgment of my former friends.’ ”²⁴

Geneva and the narrator might be somewhat paranoid. There is no way to know whether an elite law school would actually reject a qualified minority candidate in order to preserve its identity as a predominantly white institution. Geneva may have been wrong in supposing that her success generated hostility from white colleagues. The faculty members’ rejection of the initial (pre-DeVine) candidates whom Geneva recommended might reflect only their honest judgment that Geneva showed greater scholarly potential. Geneva herself admits that questions about who is qualified and who is “ ‘really smart . . . bedevil even those whites on the faculty who have flawless academic credentials.’ ”²⁵

It would be a mistake, however, to dismiss Bell’s story on the basis of such objections. Regardless of whether the chronicle accurately describes elite institutions and their predominantly white faculties, it does describe the experience of token²⁶ minority faculty. It is difficult to be a token minority representative in a majoritarian institution *without* becoming paranoid. One never knows how to interpret an event. Was one put on the appointments committee because one’s colleagues trusted one’s judgment or because they needed a minority for the sake of appearances? Was a particularly hostile statement of a student or colleague based on differences in perception or opinion, or was it actually a reaction to one’s presence as a minority person in a majoritarian institution? Perhaps it is obvious to everyone that you were hired only because of your minority status; everyone knows that you are not, in fact, as smart or as qualified as others. In white institutions with no objective measures of performance, black faculty feel particularly “ ‘exposed and vulnerable.’ ”²⁷

Token minority faculty feel that they are accepted only within certain well-defined parameters. They are to help minority students and to struggle to make the academic grade. They are not to be more successful than, or even as successful as, their white colleagues.²⁸ Inevitably, the feeling that one is not expected to succeed engenders self-doubt and even self-hate.²⁹

24. P. 157.

25. Pp. 148-49.

26. I do not mean, by using the word “token,” to refer to any particular intent of any individual involved in a hiring decision. I use “token” to refer to a faculty member who is a member of a group not present on the faculty in significant numbers. The token inevitably represents her group in every situation.

27. P. 147.

28. As Geneva points out in another context, you do not win “ ‘an argument with a white man by proving [that] you [are] smarter than he [is].’ ” P. 43.

29. Elsewhere, Bell points out:

The chronicle portrays how alien an elite institution is likely to feel to a token minority faculty member. The very fiber of the institution consists of ties between whites and traditions developed by and for whites. Regardless of whether the institution would reject a qualified minority candidate in order to preserve its elite status, it feels to the token minority faculty member like a white institution committed to preserving its elite (white) traditions.

The chronicle also documents minority faculty members' conflicting feelings about their own participation as tokens in elite institutions. Perhaps, rather than representing the initial wave of real change and acting as role models for minority students, tokens serve only to legitimate racist institutions, losing their souls in serving white interests.

Bell does a wonderful job of demonstrating that the work environment of token faculty members differs qualitatively, in countless emotional and professional ways, from the work environment of members of the majoritarian group. As a workplace, an elite law school differs greatly depending on your race.

Furthermore, I suspect that most elite, predominantly white institutions would react on some level, perhaps automatic and unconscious, to maintain the institution's traditional status were it actually threatened with becoming a "black" (or "minority") law school. Such a change would threaten its status in a white racist society. Alumni contributions would become uncertain. The tipping point would be less than fifty percent. Although the administration would not be as honest as Geneva's Dean, there would be resistance to a significant change in the racial makeup of an elite institution's faculty.

True, most elite institutions are not facing precisely this problem. Instead, they are having difficulty finding black applicants with the required qualifications who are willing to join their faculties. Yet surely there is a connection between these two problems: between attracting qualified minority candidates to elite institutions and the fact that in our society, elite means white.

Thus far, I have focused on how effectively Bell describes the minority experience in elite institutions. There are two other major points from Bell's book that I want to highlight: Bell's depiction of the science-

"[B]lack cannot purge self-hate without nurturing black pride through teaching designed to show that the racism of whites, rather than the deficiencies of blacks, causes our lowly position in this society—a dangerous truth that indicts the nation's leaders, institutions, and long-hallowed beliefs. And yet the teaching of that truth is essential if black people—not just those in the underclass, but *all* black people—are ever to view themselves as fully capable human beings."

Pp. 228-29 (footnote omitted).

fictional equality standard developed by the Supreme Court and Bell's reminder that the major barrier to racial equality is not the absence of an ideal legal standard but white racism. I use the Chronicle of the Amber Cloud to bring out these points.

Geneva describes a vision in which an amber cloud descends over the country one evening for a few hours, striking white adolescents of wealthy parents with "Ghetto Disease." Society treats the victims like lepers, and "[y]oungsters who had been alert, personable, and confident became lethargic, suspicious, withdrawn, and hopelessly insecure, their behavior like that of many children in the most disadvantaged and poverty-ridden ghettos, barrios, and reservations."³⁰ An experimental cure is eventually found with the help of black social scientists and black volunteers. But the cure is expensive (costing up to 100,000 dollars per person). Congress decides to offer the experimental treatments only to Amber Cloud victims, and not to poor children with Ghetto Disease. Although litigants challenge the exclusion of minority children as a violation of the Constitution, lower courts dismiss the suits on various procedural grounds.³¹

Geneva asks whether the Supreme Court would find the failure to cure poor children unconstitutional. She and the narrator agree that the Court would probably uphold the exclusion unless it was willing "to undertake a full-scale review of equal-protection jurisprudence and its usefulness in contemporary racial cases."³² To think of this exclusion of poor children as racially neutral is nonsense. Nonetheless, the Supreme Court's equality decisions, such as *City of Memphis v. Greene*,³³ suggest that the narrator and Geneva may well be right.

In *City of Memphis v. Greene*, Memphis closed the north end of a street at the border between an all-white neighborhood and the adjacent black neighborhood. As a result of the closing, motorists from the northern area, which was largely populated by blacks, had to circuit the white neighborhood to reach the city zoo and other facilities to the south.³⁴ According to the official in charge of street closings, this was the only time city officials had closed a Memphis street to control traffic.³⁵ The Court held that the city's actions did not violate either the thirteenth amendment or section 1982. The exclusion was facially neutral, said the

30. P. 163. It is not clear to what extent the symptoms are the product of the disease itself or a reaction to being treated differently because of the disease.

31. Pp. 164-65.

32. P. 175.

33. 451 U.S. 100 (1981).

34. *Id.* at 102-03.

35. *Id.* at 143 (Marshall, J., dissenting).

Court, and there was no intent to discriminate: "The city . . . conferred a benefit on certain white property owners but there is no reason to believe that it would refuse to confer a comparable benefit on black property owners."³⁶ The Court held that there had been no violation of section 1982³⁷ because the exclusion "does not involve any impairment to the kind of property interests that we have identified as being within the reach of section 1982."³⁸ The only injury the plaintiffs established was the slight inconvenience caused by having to use an alternate route for certain trips within the city. Nor did the Court discern a violation of the thirteenth amendment.³⁹ The Court found that city officials grounded the closing in a desire for safety and tranquility.⁴⁰ Although the closing had a disproportionately adverse impact on black motorists, the inconvenience of using another street "cannot be equated to an actual restraint on the liberty of black citizens that is in any sense comparable to the odious practice the Thirteenth Amendment was designed to eradicate."⁴¹

As Geneva and the narrator point out, given *City of Memphis*, the Court might well uphold the Amber Cloud legislation.⁴² The legislation Geneva describes is, after all, neutral on its face, extending the cure not to whites with Ghetto Disease but to victims of the Amber Cloud. When a challenged classification can be characterized as facially neutral,⁴³ *City of Memphis* suggests that even "evidence of obvious racial hostility may not be enough."⁴⁴ In *City of Memphis*, the Court ignored the obvious racial motivations for the city's actions.⁴⁵ It also ignored the obvious

36. *Id.* at 119 (Stevens, J.).

37. Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real property." 42 U.S.C. § 1982 (1982).

38. *City of Memphis*, 451 U.S. at 124.

39. *Id.* at 120-24. The thirteenth amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

40. *City of Memphis*, 451 U.S. at 126-27.

41. *Id.* at 128.

42. The narrator and Geneva also interpret the following two cases as suggesting that the Court would uphold the Amber Cloud legislation: *Palmer v. Thompson*, 403 U.S. 217, 219 (1971) (upholding decision by Jackson, Mississippi: to close public swimming pools rather than integrate them); *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (upholding internment of citizens and legal residents of Japanese ancestry during war). Pp. 167, 172.

43. Alternatively, suggested Geneva,

"the Court might find that the targeting provision was a racial classification and that strict scrutiny should be applied, but nevertheless conclude that, in light of the crisis created by the Amber Cloud, the government had shown a compelling state interest justifying the limiting of the cure to victims of the Cloud—to the exclusion of minority children. The opinion would read much like the one in the wartime Japanese-American exclusion cases."

P. 173 (referring to *Korematsu*, 323 U.S. at 214).

44. P. 171.

45. The record included evidence of such motivation. See *City of Memphis*, 451 U.S. at 141-44

message to black citizens: black citizens are undesirable in white neighborhoods because they are inferior. Instead, the Court focused exclusively on the measure's official articulated purpose: the desire for safety and tranquility. Similarly, in the Amber Cloud litigation, the Court would ignore the obvious racial motivations in the decision to extend a cure only to white teenagers. It would also ignore the obvious message to blacks: wealthy white teenagers are more worthy than poor black teenagers. Rather, " 'the Court would focus on the different *sources* of the ailments—the Amber Cloud and the sociological conditions of life in the ghetto—and conclude that the racial differentiation of the act was entirely fortuitous, rather than invidiously intended.' ”⁴⁶ The Court could then conclude that Congress reasonably decided to address one problem at a time.

Like the Chronicle of the DeVine Gift, this story tells something of the pain and isolation of black Americans. They feel that society at large does not seek solutions to the problems they face because it regards the problems as theirs rather than as those of affluent white America.

This chronicle also illustrates the otherworldly quality of constitutional equality jurisprudence. Only an alien visitor could honestly perceive as racially neutral—in any sense—the closing of a city street to prevent black citizens from going through an all-white neighborhood to reach the city zoo and other city amenities. Only by ignoring the obvious purpose and social meaning of closing a street between white and black neighborhoods could the Court pretend that the action was racially neutral. Only then could the Court openly imply that black residents' interpretation of the action as a sign that they are “undesirable traffic”⁴⁷ was merely the construction they chose to put on it.⁴⁸

In addition, the Chronicle of the Amber Cloud illustrates that however elusive solutions to some of the problems facing minority communities may be, the major obstacle to racial equality is not discovering solutions but eliminating racism. Were the Amber Cloud to descend in real life, I suspect that Geneva is right: the cure would be available only to its victims. Of course, in the real world, there may be no available

(Marshall, J., dissenting). The city of Memphis also had “an unfortunate but very real history of racial segregation.” *Id.* at 143-44.

46. P. 173.

47. See *City of Memphis*, 451 U.S. at 141-42 (Marshall, J., dissenting).

48. The Court's denial of the obvious in *City of Memphis* is reminiscent of *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896), which upheld a state statute requiring separate railroad carriages for the white and “colored” races. The plaintiff in *Plessy* argued that segregation necessarily implied the inferiority of the “colored race.” *Id.* at 551. The Court rejected this argument, reasoning that if the “colored race” interpreted the statute as stamping them with “a badge of inferiority,” it was “because the colored race [chose] to put that construction upon it.” *Id.*

cures for some of the problems of poor children, regardless of price. But there is a connection between these two things: between, for example, the racial makeup of the current victims of bad inner-city schools and our inability, in Chicago and elsewhere, to find a solution for Ghetto Disease.

The problem is not simply that the Supreme Court and lower courts have failed to develop the right equality standard. In a racist society, a predominantly white judiciary will not and cannot develop effective standards for ending all discrimination. Instead, even with the best intentions, the judiciary will naturally develop standards that tend to obscure inequality and protect white status.

I have discussed two of the ten chronicles in *And We Are Not Saved*, stressing their importance on three levels: as reports of what it is like to be black in America today, especially in elite institutions; as critiques of the Supreme Court's equality jurisprudence; and as reminders that the primary problem is not faulty legal standards but white racism. In his book, Bell uses these chronicles, and others, for another purpose: to discuss the efficacy of various strategies for achieving racial equality.

In the Chronicle of the DeVine Gift, Bell considers affirmative action as a strategy and concludes that " 'progress in American race relations is largely a mirage, obscuring the fact that whites continue, consciously or unconsciously, to do all in their power to ensure their dominion and maintain their control.' " ⁴⁹ Affirmative action remedies advance black frustration as much as racial equality. ⁵⁰

The Chronicle of the Amber Cloud considers whether "progress for blacks might evolve out of a national crisis endangering whites as well as blacks." ⁵¹ The chronicle concludes that even if such a crisis occurred, nothing—neither the Constitution nor the political process—ensures that society would solve black problems along with white problems.

Bell considers a number of other strategies in various chronicles, including those addressing civil rights litigation, ⁵² voting rights and political participation, ⁵³ and school desegregation. ⁵⁴ Bell concludes that each strategy is unlikely to effect racial equality. Moreover, each strategy is potentially dangerous because of its latent ability to aggravate existing racial inequality. ⁵⁵

49. P. 159.

50. See p. 160.

51. P. 165.

52. Ch. 2.

53. Ch. 3.

54. Ch. 4.

55. Pp. 63, 89-90, 112-13.

It is on this level—the level of strategic policy analysis—that I find the book weakest. Bell is surely right in saying that in a racist society, none of the strategies he considers is likely to bring about racial equality. He is also right in asserting that each strategy has the potential to aggravate inequality rather than achieve equality. But these points are true of all strategies for change to the racial status quo in a racist society. There is no sure path to salvation. Every path has its hazards. Yet unless we accept the status quo, it is necessary to weigh the potential costs and benefits of various strategies and then risk the hazards of action.

Bell never adequately addresses these points, though in the end he does advocate the continued use of the legal system to try to change the relative status of the races. He asserts that we must seek “‘the goal of a just society for all’”⁵⁶ rather than merely attempt to provide proportional minority representation within existing power structures.⁵⁷ In his last chapter, Bell describes this as the “The Ultimate Civil Rights Strategy,” unveiling it with mythic drama.

Bell is both too pessimistic and too optimistic. In rejecting strategy after strategy in chronicles one through nine, he seems overly pessimistic, indifferent to the marginal benefits of any ultimately unsuccessful strategy. (And, of course, to date all strategies have been ultimately unsuccessful.) For example, in “The Chronicle of the Ultimate Voting Rights Act” (or “The Racial Limitation on Black Voting Power”), the narrator argues that seeking voting rights has been an effective strategy because “‘millions of blacks . . . now are registered and do vote’” and there are “‘more than six thousand black elected officials.’”⁵⁸ But Geneva retorts “‘that the so-called changes you boast of are more cosmetic than real, that increased black voting has not much increased political influence or provided representation even close to the percentage of our population.’”⁵⁹

Black voting power clearly has not effected racial equality. Poor people tend to vote less, and the poor are disproportionately black. It remains extremely difficult for black voters to build effective, reliable coalitions with other groups. Whites remain unlikely to vote for a black candidate. But there certainly has been progress. The political status quo is significantly more responsive to minority concerns than it was when black citizens were unable to vote in much of the United States. To label such changes “more cosmetic than real” does nothing to advance

56. P. 256.

57. See pp. 250-56.

58. P. 92.

59. P. 93.

our understanding of how to achieve social change and denigrates the worthwhile struggles of real people.

On the other hand, when he reaches chapter ten, Bell suddenly turns wildly optimistic. He presents the just society strategy as the "Ultimate Civil Rights Strategy" without any serious consideration of that strategy's weaknesses or its potential to aggravate existing inequality. Bell's final recommendation rests on restructuring society and eliminating inequities between *all* citizens. But the problems with seeking equality through finding common ground in common crises—discussed in the *Chronicle of the Amber Cloud*—are ignored in Bell's rosy and emotional presentation of the Ultimate Civil Rights Strategy.

Despite the book's weaknesses on the level of tough-minded policy analysis, it makes important contributions to our understanding of both racism and legal doctrine. White readers should finish the book with a better understanding of how it feels to be a racial minority and of how an elite (white) institution feels to black colleagues. In addition, they should have a better appreciation of how inadequate—silly on one level, invidious on another—equality doctrine seems to racial minorities. Finally, if readers are honest, they will admit that white racism, which is still a potent force in elite institutions, remains the major obstacle to racial equality.