

## Lecture Notes – Derrick Bell, “Racial Realism”

- Defining “Racial Realism” and its relationship to Legal Realism
  - Legal Realism – the position that formalistic reasoning and reliance on abstract principles serves as a pretense or veil of objectivity for judges who are really making decisions based on personal moral beliefs, ideological leanings, or what they perceive as being in the public interest.
    - The upshot is that judges should be more open about what values really inform their decisions so that we can better predict how they will decide cases and so that we can openly debate those values rather than get mired in the pretenses of formalism.
  - Recall Holmes’s “bad man argument”
    - The law is a prediction of what judges will decide; all that the bad man is concerned with is what he can get away with.
    - Once we see that judges decide cases on the basis of morality, ideology, and public interest, we should factor that into our predictions about their decisions.
    - From the perspective of the bad man, it is important to understand what really motivates the decisions judges hand down.
  - The claim of the Racial Realist is that race and the maintenance of racial hierarchies and power structures are one of the key ideological components that determine how judges decide cases and so that determine what the law really is.
    - Racial Realism entails that “Black people will never gain full equality in this country, even those Herculean efforts we hail as successful will produce no more than temporary ‘peaks of progress,’ short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance...We must acknowledge [this hard-to-accept fact] and move on to adopt policies based on what [Bell] call[s]: ‘Racial Realism.’ This mind-set or philosophy requires us to acknowledge the permanence of our subordinate status. That acknowledgement enables us to avoid despair, and frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.”
    - The central realist idea is that law functions to *preserve the racial status quo*.
    - In another work, Bell uses a nice metaphor to capture what he means by Racial Realism:
      - “Issues of race in America,” he says, “are perceived through a kaleidoscope. They excite attention and elicit emotions of great intensity, but rarely motivate serious or sustained consideration. Like the vivid patterns in a kaleidoscope, racial issues change constantly. Fascination with the changing patterns and colors

distracts first eye and then mind from noticing that the basic elements of the mosaic are always the same.” Racial Realism is the recognition that they are always the same.

- This position obviously raises some serious questions:
  - On what grounds could one defend the claim that judges make decisions on moral, ideological, and public interest grounds rather than what the law compels?
    - This is the Realist’s argument that law is necessarily incomplete, sometimes contradictory, and often ambiguous, and so judges must fill in the gaps. We’re going to set it aside for now.
  - On what grounds could one defend the claim that race is one of the key ideological components that determines the way judges decide cases?
    - These are the arguments we’re going to examine today.
  - And, finally, how should we respond? If racial equality and racial remedies are not the answer to achieving liberation for people of color, what are we and they to do?
    - We’ll look briefly at Bell’s thoughts along this dimension if we have time.
- **Our central question:** On what grounds could one defend the claim that race is one of the key ideological components that determines the way judges decide cases?
  - Much like our last meeting, I want to focus on some themes of Bell’s arguments. Their main thrust is to present a number of cases that demonstrate:
    - In general, though conditions have changed, racial hierarchies have perpetuated....Slavery – Share Cropping – Jim Crow – War on Drugs/Mass Incarceration.
    - That the effect of *racial remedies* is often to preserve the racial status quo and to place the *costs* of those remedies mostly on the oppressed people who they are ostensibly to help.
      - The prizes of such remedies often accrue most abundantly not to black folks but to white folks...they are often beneficial to the ruling class.
    - That racial remedies are only undertaken under conditions of *interest convergence*, i.e., when the interests of white converge with those of oppressed blacks.
      - The remedies only hold so long as those interests remain aligned.
    - That the interests of *property* have nearly unanimously outweighed the interests of *justice* in our society.

- And, finally, that the Constitution and its various amendments have within them contradictory results...The Civil War Amendments, for example, can be used to justify or to nullify racial remedies like affirmative action.
  - These themes converge, for Bell, in the idea that racial remedies are simply measures to maintain a veneer of racial progress, which is in the interest of the oppressors, and that such peaks of progress will, as history has shown, inevitably be reversed by the underlying structures of racial hierarchy that remain unchallenged.
- Let's begin with Interest Convergence. We'll look at three cases:
  - *Brown v. Board of Education*
    - Desegregated schools...but set a very slow timeline for doing so.
    - Bell argues in other work that, in fact, the motivation for Brown was international affairs, in particular, the Cold War
      - Chief Justice Warren in his opinion: "Education is the very foundation of good citizenship...it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."
      - Both Warren and Douglas were well aware of international implications.
        - Maintaining moral high ground and US soft power to be leveraged against the Soviet Union.
  - *Regents of the University of California v. Bakke*
    - Upheld affirmative action in admission to professional schools, but outlawed quotas.
    - Maintained standards that are inherently preferential to upper-class whites, maintaining the status quo. It was inevitable that there would be a push for change in admissions policies to remedy racial disparities. Allowing the use of affirmative action, a racial remedy, meant that schools would not need to examine or change their use of grades, class rank, and test scores in admissions.
  - Civil War Amendments
    - Served interests of northern industrialists
    - Reconstruction was largely abandoned as part of the Hayes-Tilden Compromise.
- The Costs of Racial Remedies
  - School integration after Brown.

- Black children are burdened with the cost of treating “white” educational standards as normative. To be a good student, to be a good citizen, to be a good employee is to be like a white person in those roles.
      - Black students must bear the psychic cost of always being forced to try to be something they are not.
    - The schools that poor white children attended often benefited from desegregation because more resources were poured into them.
    - And the interests of upper-class whites were protected...their schools remained largely unintegrated or they sent their kids to private or parochial schools.
  - Desegregation in the south vs. in the north.
    - The educational integrity argument...
  - Costs in Bakke...
    - Borne by lower-class whites and POC insofar as they are the ones who continue to be excluded from opportunities and are forced to work under the impression that they are there only by some special privilege.
- Contradictions
  - Principle vs. Practice in Brown...recognition in Warren’s opinion that “segregated schooling patterns adversely affect black children’s “hearts and minds in a way unlikely to ever be undone” yet relief is deferred for a year and then the standard of “all deliberate speed” is adopted, which delayed Brown’s effects for nearly a decade in most communities.