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RACIAL REALISM

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THE struggle by black people to obtain freedom, justice, and dignity is as old as this nation. At times, great and inspiring leaders rose out of desperate situations to give confidence and feelings of empowerment to the black community. Most of these leaders urged their people to strive for racial equality. They were firmly wedded to the idea that the courts and judiciary were the vehicle to better the social position of blacks. In spite of dramatic civil rights movements and periodic victories in the legislatures, black Americans by no means are equal to whites. Racial equality is, in fact, not a realistic goal. By constantly aiming for a status that is unobtainable in a perilously racist America, black Americans face frustration and despair. Over time, our persistent quest for integration has hardened into self-defeating rigidity.

Black people need reform of our civil rights strategies as badly as those in the law needed a new way to consider American jurisprudence

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prior to the advent of the Legal Realists.[1] By viewing the law—and by extension, the courts—as instruments for preserving the status quo and only periodically and unpredictably serving as a refuge of oppressed people, blacks can refine the work of the Realists. Rather than challenging the entire jurisprudential system, as the Realists did, blacks' focus must be much narrower—a challenge to the principle of racial equality. This new movement is appropriately called Racial Realism, and it is a legal and social mechanism on which blacks can rely to have their voice and outrage heard.

Reliance on rigid application of the law is no less damaging or ineffectual simply because it is done for the sake of ending discriminatory racial practices. Indeed, Racial Realism is to race relations what "Legal Realism" is to jurisprudential thought. The Legal Realists were a group of scholars in the early part of the twentieth century who challenged the classical structure of law as a formal group of common-law rules that, if properly applied to any given situation, lead to a right—and therefore just—result.[2]

The Realists comprised a younger generation of scholars—average age forty-two[3]—who were willing to challenge what they viewed as the

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1. According to one scholar:

> [T]he state of American law invited and even necessitated [the Realists'] devastating attacks. The inconsistencies between the practices of a rapidly changing industrial nation and the claims of a mechanical juristic system had grown so acute by the 1920s that in the minds of an increasing number of individuals, the old jurisprudence could no longer justify and explain contemporary practice. It had become clear, Judge Cardozo declared in 1932, that "the agitations and the promptings of a changing civilization" demanded more flexible legal forms and demanded equally "a jurisprudence and philosophy adequate to justify the change."

Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 359, 362 (Lawrence M. Friedman & Harry N. Scheiber eds., enlarged ed. 1988). Purcell calls the pre-Realist jurisprudence "a rigid and formalistic profession," and notes that even stalwart defenders of orthodoxy acknowledged the massive confusion and self-contradiction that case law overload (case law being the centerpiece of the formalists' common-law logic) had created. *Id.* at 361-62.

2. *See* Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW 18-20 (David Kairys ed., 1990). A relatively precise characterization of the classical structure is given by Purcell: "The old legal theory claimed that reasoning proceeded syllogistically from [mechanical] rules and precedents through the particular facts of a case to a clear decision." Purcell, *supra* note 1, at 360. Many historians also refer to the classical structure as formalism. Perhaps not as accurately as Purcell, Richard Posner defines "formalism" as a term that can be used "simply to mean the use of logic in legal reasoning." Richard Posner, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 326, 326 (1988). Finally, Elizabeth Mensch calls formalism's heavy emphasis on objective rights, rules, processes, and precedents "analogic refinement run rampant." Mensch, *supra*, at 18.

3. Purcell, *supra* note 1, at 362.

rigid ways of the past. More than their classical counterparts, they had been influenced by the rapid spread of the scientific outlook and the growth of social sciences. Such influence predisposed the Realists to accept a critical and empirical attitude towards the law,[4] in contrast to the formalists who insisted that law was logically self-evident, objective, a priori valid, and internally consistent. The great majority of the movement's pioneers had practical experience which strengthened their awareness of the changing and subjective elements in the legal system. This awareness flew in the face of the Langdellian conception of law as unchanging truth and an autonomous system of rules.[5]

The Realists took their cue from Oliver Wendell Holmes who staged a fifty year battle against legalistic formalism. According to Holmes's scientific and relativistic lines of attack, judges settled cases not by deductive reasoning, but rather by reliance on value-laden, personal beliefs. To Holmes, such judges engineered socially desirable policies based on these beliefs which, like all moral values, were wholly relative and determined by one's particular environment.[6] Realist notions also were grounded in the views of the Progressives during the 1890s. Concerned with social welfare legislation and administrative regulation, the Progressives criticized the conceptualization of property rights being expounded by the United States Supreme Court.[7] Creating

4. Empiricism is a crucial aspect of Racial Realism. By taking into consideration the abysmal statistics regarding the social status of black Americans, their oppression is validated. *See infra* note 30 and accompanying text.

5. *See id.* at 361-63.

6. At this point it might be helpful to recognize an implicit distinction between the *absence* of values and the *impossibility of empirically demonstrable objective moral standards.* Holmes's relativism—that values are wholly determined by one's particular environment not existing somewhere "out there" for any impartial judge to discover and apply—has been called "cynical." *See id.* at 361. Realists also embraced the notion that "there could be no such thing as a *demonstrable* moral standard." *Id.* at 367. This kind of reasoning incurred the wrath of many, particularly as the threat of war and Nazi totalitarianism made the defense of undeniable moral grounds for democracy more urgent. *Id.* at 369.

Despite having earlier agreed that formal law overemphasized logical uniformity and often frustrated the workings of justice, *see id.* at 361, Roscoe Pound called the Realists' take on morals a breed of "philosophical nominalism," *id.* at 365, and at his most vitriolic, called Realism a "give-it-up-philosophy." *Id.* at 369. Morris R. Cohen pointed to the antidemocratic implication of a judicial theory that seemed to claim that judges' subjective decisions were the only law; Cohen implied that the Realists were justifying judicial despotism when he declared, "To be ruled by a judge is, to the extent that he is not bound by law, tyranny or despotism." *Id.* at 367.

In contemporary law, positivists fearful of unrestrained judicial power have attacked modern strands of Realism, as have committed rights theorists, who reject the notion that enshrined rights are mere interests to be balanced against all other interests. *See* Anita Allen, *Legal Philosophy, in* LOOKING AT LAW SCHOOL 305, 315 (S. Gilles, ed., 1990).

7. "The Realist movement was part of the general twentieth-century revolt against formalism

a remedy based upon the finding of a property right was the Court's way of subtly imposing personal and moral beliefs. Abstraction was the method the Court used to accomplish its purpose. The Realists stressed the *function* of law, however, rather than the *abstract conceptualization* of it.[8]

The Realists also had a profound impact by demonstrating the circularity of defining rights as "objective," which definition depended, in large part, on a distinction between formalistically bounded spheres between public and private.[9] Classical judges justified decisions by appealing to these spheres. For example, an opinion would justify finding a defendant liable because she had invaded the (private) property rights of the plaintiff. But such a justification, the Realists pointed out, was inevitably circular because there would be such a private property

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and conceptualism. . . . More specifically and politically, Realism was also a reaction against Supreme Court decisions like *Coppage*, which had invalidated progressive regulatory legislation favored even by many business leaders." *See* Mensch, *supra* note 2, at 21.

In Coppage v. Kansas, 236 U.S. 1 (1915), the Court refused to uphold a state statute outlawing yellow-dog contracts. The state argued that these contracts coerced workers to accept the terms imposed by employers, rendering meaningless the formal law concept of freedom of contract. Although the Court did not deny the presence of unequal bargaining power, it reasoned that the employees merely encountered economic coercion. Because the formal common-law definition of duress that would have excused nonperformance of the contracts did not include economic coercion, the workers were deemed to have freely exercised their choice. The Court would not allow the State to invade the liberty rights of contracting parties. *See* Mensch, *supra* note 2, at 20.

8. *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 269 (1989); *see also* Purcell, *supra* note 1, at 361 ("Brandeis and Frankfurter argued that judges must consciously consider the probable social results of their decisions. Scientific studies of social needs and problems, rather than syllogistic reasoning, should be the determining factor.").

There were also instrumentalist underpinnings to the Realists' conception of law:

> Much of Realist scholarship was . . . devoted to exposing the incoherence of established patterns of reasoning in judicial decisions. By undermining the inexorability of such logic, the Realists hoped to reveal the "real" question in judicial decisions: why "the court select[ed] . . . one available premise rather than the other." This was the point in Realist analysis where social science entered . . . . The "real" question in liberty of contract cases was, therefore, not, "is there a liberty to contract in the due process clause?," but "do industrial workers in fact have no bargaining power to choose the terms of their employment?" This question was, the Realists believed, susceptible of empirical analysis.

G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819, 822-23 (1986) (citation omitted). *See also* Hall, *supra*, at 270 ("Realists . . . rejected formalistic and deductive logic, which, they argued merely concealed a judge's prejudices and preferences. The Realists indeed believed in general legal principles, but they insisted that the traditional deference accorded to precedent was merely a screen that shielded the inherently conservative biases of most judges.").

9. *See* Fran Olsen, *The Myth of State Intervention in the Family*, 18 MICH. J.L. REF. 835 (1985).

right if, and only if, the court found for the plaintiff or declared the statute unconstitutional. The cited reasons for decisions were only results, and as such served to obscure the extent to which the state's enforcement power through the courts lay behind private property and other rights claims.[10]

Closely linked with the Realists' attack on the logic of rights theory was their attack on the logic of precedent.[11] No two cases, the Realists pointed out, are ever exactly alike. Hence a procedural rule from a former case cannot simply be applied to a new case with a multitude of facts that vary from the former case. Rather, the judge has to *choose* whether or not the ruling in the earlier case should be extended to include the new case. Such a choice basically is about the relevancy of facts, and decisions about relevancy are never logically compelled. Decisions merely are subjective judgments made to reach a particular result. Decisions about the relevance of distinguishing facts are value-laden and dependent upon a judge's own experiences.[12]

The imperatives of this Realist attack were at least two: first, to clear the air of "beguiling but misleading conceptual categories"[13] so that thought could be redirected towards facts (rather than nonexistent spheres of classism) and ethics. If social decisionmaking was inevitably moral choice, policymakers needed some ethical basis upon which to make their choices.[14] And second, the Realists' critique suggested that the whole liberal worldview of private rights and public sovereignty mediated by the rule of law needed to be exploded. The Realists argued that a worldview premised upon the public and private spheres is an attractive mirage that masks the reality of economic and political power.[15] This two-pronged attack had profoundly threatening conse-

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10. *See* White, *supra* note 8, at 822-23.

11. *See infra* text accompanying notes 13-15.

12. *See* Mensch, *supra* note 2, at 22. For example, another judge might have viewed Regents of the University of California v. Bakke, 438 U.S. 265 (1978), as similar to Griggs v. Duke Power, 401 U.S. 424 (1971), in which blacks were deemed to have suffered discriminatory impact when their employer required all workers to have a high school diploma and to pass a given standardized test. The Court in *Griggs* used flexible reasoning in arriving at its decision, considering blacks' dismal access to education. Later decisions, however, prove that victories for blacks in the courts regarding issues of affirmative action are, at best, sporadic.

13. Mensch, *supra* note 2, at 23.

14. *See id.*

15. *Id.* at 23-24. Implicit in the approach taken by the Realists is the notion that courts rendered decisions that were suspect because of their reliance on subjective and abstract concepts. The history of the Realist movement bears out this fact:

> Legal scholars who came to call themselves Realists began with the perception that many early twentieth-century judicial decisions were "wrong." They [the decisions] were

quences: it carried with it the potential collapse of legal liberalism.[16] Realism, in short, changed the face of American jurisprudence by exposing the result-oriented, value-laden nature of legal decisionmaking. Many divergent philosophies emerged to combat, not a little defensively, the attack on law as instrumental, not self-evidently logical, and "made" by judges, not simply derived from transcendent or ultimate principles.[17]

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wrong as matters of policy in that they promoted antiquated concepts and values and ignored changed social conditions. They were wrong as exercises in logic in that they began with unexamined premises and reasoned syllogistically and artificially to conclusions. They were wrong as efforts in governance in that they refused to include relevant information, such as data about the effects of legal rules on those subject to them, and insisted upon a conception of law as an autonomous entity isolated from nonlegal phenomena. Finally, they were wrong in that they perpetuated a status quo that had fostered rank inequalities of wealth, status, and condition, and was out of touch with the modern world.

White, *supra* note 8, at 821.

16. *See* Mensch, *supra* note 2, at 23.

17. Process jurisprudence, for example, stressed the reliability and necessity of formal process as a means of reining in what its adherents feared was unrestrained judicial power outlined by the Realist critique. *See* HALL, *supra* note 8, at 311. Closely allied was the philosophy of "neutral principles," which urged that choices made between conflicting rights be conducted with impartiality and objectivity. In this view, "neutral principles" of jurisprudence transcended the result of any particular case at hand, judicial restraint being paramount. *See id.* at 311-12.

Ironically, the legal decisions written during the Warren Court's reign invoked principles antithetical to the Realists' approach. The philosophy of Substantive Liberal Jurisprudence emerged, in which the Court believed that it had a positive responsibility to intervene where social injustice was evident. Warren believed that the political process was too often insensitive to the values for which the United States should stand. *See id.* at 312; *see also* Mensch, *supra* note 2, at 31. Warren sympathized with marginalized populations, believing that the law must progress with changing social conditions, but he too imposed his values in legal decisions to make the result seem inevitable.

Somewhat allied with Substantive Liberal Jurisprudence, but attempting to achieve more fidelity to the empiricism of the Realist program, was the Law and Society movement. Law and Society asks at least one crucial question: "Does the law in action conform to the law on the books?" Its adherents utilize empirical research to demonstrate the dysfunctional expression of formal law in the real world, and to expose how the legal process concealed the power relations embedded in the society which the law was designed to rule. *See* White, *supra* note 8, at 830-35.

A combination of events led to the decline of Law and Society's influence, and the emergence of the more radical (and self-distinguished) philosophy of the Critical Legal Studies movement. *See id.* at 832-36. One proponent of the latter, Mark Tushnet—who had been a student of Law and Society—claimed that Law and Society ignored the extent to which the law serves to *legitimate* power relations, to persuade both oppressor and oppressed that their conditions or existence were just. Tushnet pointed out that Law and Society's emphasis on "archaic rules" highlighted the maladaptivity or outdatedness of rules. His criticism was grounded in the idea that rules, whether archaic or not, often function to legitimate a calculated unresponsiveness on the part of the legal order. *See id.* at 833.

In response to both Realism and Substantive Liberal Jurisprudence, a conservative reaction obsessed with original intent emerged, in part to cement so-called original values, in part because

As every civil rights lawyer has reason to know—despite law school indoctrination and belief in the "rule of law"—abstract principles lead to legal results that harm blacks and perpetuate their inferior status. Racism provides a basis for a judge to select one available premise rather than another when incompatible claims arise. A paradigm example presents itself in the case of *Regents of the University of California v. Bakke*.[18] Relying heavily on the formalistic language of the Fourteenth Amendment, and utterly ignoring social questions about which race in fact has power and advantages and which race has been denied entry for centuries into academia,[19] the Court held that an affirmative action policy may not unseat white candidates on the basis of their race. By introducing an artificial and inappropriate parity in its reasoning, the Court effectively made a choice to ignore historical patterns, to ignore contemporary statistics, and to ignore flexible reasoning. Following a Realist approach, the Court would have observed the social landscape and noticed the skewed representation of minority medical school students. It would have reflected on the possible reasons for these demographics, including inadequate public school systems in urban ghettos, lack of minority professionals to serve as role models, and the use of standardized tests evaluated by "white" standards. Taking these factors into consideration, the Court very well may have decided *Bakke* differently.[20]

Bakke serves as an example of how formalists may use abstract concepts, such as equality, to mask policy choices and value judgments. Abstraction, in the place of flexible reasoning, removes a heavy burden from a judge's task. At the same time, her opinion appears to render

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its adherents feared that the Warren Court's operation included the substitution of biased judicial values for that which had supposedly proven inimitable for two centuries. *See* HALL, *supra* note 8, at 312.

18. 438 U.S. 265 (1978).

19. *But see* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV L. REV. 1745 (1989), in which the author denies that racism accounts for the significant lack of black law professors in the country. Rather, he asserts that there simply are not enough qualified black candidates to fill these positions. *Id.* at 1762. The responses to the Kennedy assertion were prompt and vigorous. *See, e.g.*, Milner S. Ball, *Colloquy — Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1855 (1990).

20. Although historians disagree about the historical impact of the Realists' contributions, a few claims can be made about their influence. *See* HALL, *supra* note 8, at 271. By the 1940s, American jurisprudence regarded two Realist claims as settled propositions: first, that judges made law when they declared legal rules because the rules were not logically necessary and reflected policy judgments, and second, that the law could not be a static entity, indeed, that its progressive development depended on its rules being responsive to current social conditions. White, *supra* note 8, at 828. *Bakke* implicitly rejects this latter proposition.

the "right" result. Thus, cases such as *Bakke* should inspire many civil rights lawyers to reexamine the potential of equality jurisprudence to improve the lives of black Americans.

The protection of whites' race-based privilege, so evident in the *Bakke* decision, has become a common theme in civil rights decisions, particularly in many of those decided by an increasingly conservative Supreme Court. The addition of Judge Clarence Thomas to that Court, as the replacement for Justice Thurgood Marshall, is likely to add deep insult to the continuing injury inflicted on civil rights advocates. The cut is particularly unkind because the choice of a black like Clarence Thomas replicates the slave masters' practice of elevating to overseer and other positions of quasi-power those slaves willing to mimic the masters' views, carry out orders, and by their presence provide a perverse legitimacy to the oppression they aided and approved.

For liberals in general, and black people in particular, the appointment of Clarence Thomas to the Supreme Court, his confirmation hearings, and the nation's reaction to Professor Anita Hill's sexual harassment charges, all provide most ominous evidence that we are in a period of racial rejection, a time when many whites can block out their own justified fears about the future through increasingly blatant forms of discrimination against blacks.[21]

The decline of black people is marked by a precipitous collapse in our economic status and the frustration of our political hopes. An ultimate rebuff and symbol of our powerlessness is President Bush's elevation of one of us who is willing to denigrate and disparage all who look like him to gain personal favor, position, and prestige.[22] Here, historical parallels contain a fearful symmetry. In 1895, Booker T. Washington, another black man who had risen from the bottom—in Washington's case that bottom was slavery itself—gained instant and lasting status in white America by declaring, in his now famous Atlanta Compromise speech, that black people should eschew racial equality and seek to gain acceptance in the society by becoming useful through trades and

21. Thomas played on these fears when he invoked the image of a lynch mob to portray the Senate inquiry. As one commentator has noted, "Any American with a sense of history understood the connotations of Thomas's claim that he was a lynch victim, casting the fourteen white men of the Senate Judiciary Committee as his lynch mob." Nell Irvin Painter, *Who Was Lynched?*, THE NATION, 577 (1991).

22. One critic of Black Conservatives states, "These black men tend to be high achievers who may feel diminished by the notion they got where they are because of affirmative action. . . . [They] are really trying to affirm that their status is the result of a fair fight." Julianne Malveaux, *Why Are the Black Conservatives All Men?*, Ms., Mar./Apr. 1991, at 60, 60-61.

work skills developed through hard work, persistence, and sacrifice.

Whites welcomed Washington's conciliatory, nonconfrontational policy and deemed it a sufficient self-acceptance for the society's involuntary subordination of blacks in every area of life. The historian, Louis R. Harlan, informs us that Booker T. Washington, in his own way, was a double agent.[23] While preaching black humility to whites, Washington, privately fought lynching, disenfranchisement, peonage, educational discrimination, and segregation. It is not even a close question, however, that no amount of private support for black rights could undo the damage of Washington's public pronouncements.[24]

The Booker T. Washington speech marked a watershed in race relations at the close of the nineteenth century. There is more than ample reason to believe the Clarence Thomas appointment and confirmation proceedings that followed will mark and mar the status of blacks well into the twenty-first century. Certainly the high and low drama in those hearings contained enough racial symbols to challenge analysts for years to come.[25]

In the first phase of the confirmation hearings, Justice Thomas's testimony provided a definitive illustration of waffling, obfuscation, and disingenuousness. Thomas, and those who prepared him for his appearance, assumed—accurately as it turned out—that his seat on the nation's most prestigious Court could be secured by ignoring every politically controversial statement that he had ever said or written, while recalling precisely everything his grandfather did for him.

The hearings also provided further proof that even the most accomplished blacks can be ignored with impunity when they seek to challenge an exercise of white, conservative power. Thus, the opposition to the Thomas appointment by some of the most prestigious black, le-

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23. LOUIS R. HARLAN, SEPARATE AND EQUAL 42-43, 99-100 (1968).

24. Significantly, the most sought-after black spokespersons today are those whose views—whether honestly held or opportunistically adopted—serve to undermine affirmative action and underestimate the effects of contemporary racism, while placing the blame for blacks' ever-worsening state on characteristics that are far more the result of condition than color.

25. Clarence Thomas, no less than Booker T. Washington, could prove an unwitting double agent. In his first civil rights decision, Justice Thomas voted with the conservative majority in a voting rights case, Presley v. Etowah County Comm'n, 1992 U.S. Lexis 554 (Jan. 27, 1992). If this voting pattern continues, Thomas will disappoint those blacks who supported him in the hope that, once on the Court, he would drop the anti-civil rights views that propelled him there. In addition, he could undermine the dwindling support for law-oriented civil rights groups and cause blacks to turn to more militant leadership. Thus, as I suggested in an op-ed piece, Thomas, seemingly a black conservative, may prove to be a black revolutionary—despite himself. Derrick Bell, *A Radical Double Agent*, N.Y. TIMES, Sept. 9, 1991, at A15.

gal academics including Charles Lawrence, Stanford; Drew Days, Yale; Christopher Edley, Harvard; Dean Haywood Burns, CUNY Queens, and Patricia King, Georgetown, easily was neutralized by a collection of Thomas's childhood friends, former staff members, and well-meaning but confused blacks who, unaware of and unconcerned about his record or the anti-black stance of the conservative whites supporting him, nevertheless "hoped for the best" as they supported Thomas because he was a "brother."

The second phase of the confirmation hearings provided further proof that black people, notwithstanding their growing numbers in the middle class, are at risk of remaining in a subordinate status. I consider the nationally-televised Senate proceedings an American morality play, conducted under circumstances that forced both Judge Clarence Thomas and Professor Anita Hill to disparage each other's character regarding matters of deeply personal conduct. The battle, fought in front of the upper echelons of the white power structure, was unwinnable from the start and desired by neither combatant. Its proximate cause was the President's hypocrisy in using race to shield his effort to stack the Supreme Court with conservative judges, and the Senate's insensitivity to women's growing awareness and resentment of sexual harassment in the workplace.

The hearings were a reminder of how frequently in American history blacks became the involuntary pawns in defining and resolving society's serious social issues. Recall that black's rights were sacrificed when the Framers built slavery into the Constitution in 1787 to enable the forming of a new and stronger government. Their rights were sacrificed again in the Hayes-Tilden Compromise of 1877 to avoid another Civil War.[26]

Clarence Thomas, a black man who overcame humble beginnings and gained professional eminence by embracing the self-help ideology of those who have aided his climb, became a symbol of the crumbling of the judicial nomination process, in which conservativism is more important than professional eminence. Anita Hill, a silenced victim of alleged unwanted sexual overtures of a former supervisor and mentor, became the unwilling agent through which opponents of the nominee hoped to block President Bush's plan to stack the court with his followers.[27]

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26. DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 26-27 (2d ed. 1980). *See infra* note 33 and accompanying text.

27. Women's rights groups view the attention Hill's charges received as a much-needed pub-

Rather than face repetition of the embarrassing and trauma-filled confirmation process, the administration and the Senate likely will try to avoid another gruelling battle if a Supreme Court seat becomes vacant in the future. And as a result of the hearings' focus on the meaning of sexual harassment in the workplace, many men, particularly at the professional level, will speak with considerable thought about matters of sexuality to female colleagues and subordinates. Both reforms are much-needed. As in the Reconstruction Era, blacks will serve as the involuntary sacrifices whose victimization helps point white society and their country in the right direction.

Beyond symbolism though, the message of the Thomas appointment virtually demands that equality advocates reconsider their racial goals. This is not, as some may think, an over-reaction to a temporary set-back in the long "march to freedom" blacks have been making since far before the Emancipation Proclamation. Rather, the event is both a reminder and a warning of the vulnerability of black rights and the willingness of powerful whites to sacrifice and subvert these rights in furtherance of political or economic ends. I speak here not of some new prophetic revelation. Rather, these are frequently stated, yet seldom acknowledged truths that we continue to ignore at our peril.

What was it about our reliance on racial remedies that may have prevented us from recognizing that abstract legal rights, such as equality, could do little more than bring about the cessation of one form of discriminatory conduct that soon appeared in a more subtle though no less discriminatory form? I predict that this examination will require us to redefine goals of racial equality and opportunity to which blacks have adhered with far more simple faith than hard-headed reflection.

I would urge that we begin this review with a statement that many will wish to deny, but none can refute. It is this:

> *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. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on to adopt policies based on what I call: "Racial Realism." This mind-set or philosophy requires us to acknowledge the permanence of our*

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licizing of a form of sex discrimination recognized only recently and reluctantly by courts and society.

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.

Legal precedents we thought permanent have been overturned, distinguished, or simply ignored.[28] All too many of the black people we sought to lift through law from a subordinate status to equal opportunity, are more deeply mired in poverty and despair than they were during the "Separate but Equal" era.

Despite our successful effort to strip the law's endorsement from the hated "Jim Crow" signs, contemporary color barriers are less visible but neither less real nor less oppressive. Today, one can travel for thousands of miles across this country and never come across a public facility designated for "Colored" or "White." Indeed, the very absence of visible signs of discrimination creates an atmosphere of racial neutrality[29] that encourages whites to believe that racism is a thing of the past.

Today, blacks experiencing rejection for a job, a home, a promotion, anguish over whether race or individual failing prompted their exclusion. Either conclusion breeds frustration and eventually despair. We call ourselves African Americans, but despite centuries of struggle, none of us—no matter our prestige or position—is more than a few steps away from a racially motivated exclusion, restriction or affront.

There is little reason to be shocked at my prediction that blacks will not be accepted as equals, a status which has eluded us as a group for more than 300 years. The current condition of most blacks provides support for this position.[30] It is surely possible to use statistics to dis-

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28. *See supra* text accompanying note 11.

29. *See supra* notes 11-12 and accompanying text.

30. In cental Harlem, where 96 percent of the inhabitants are black and 41 percent live below the poverty line, the age-adjusted rate of mortality was the highest for New York City—more than double that of U.S. whites and 50 percent higher than that of U.S. blacks generally. Black men in Harlem are less likely to reach the age of 65 than men in Bangladesh. Colin McCord, M.D. & Harold P. Freeman, M.D., *Excess Mortality in Harlem*, 322 NEW ENG. J. MED. 173 (1990). While the Harlem phenomenon is extreme, it is not unique. Of 353 health areas in New York City, 54 also had twice as many deaths among people under the age of 65 as would be expected if the death rates of U.S. whites applied. All but one of these areas of high mortality were predominantly black or Hispanic.

The economist Dr. David Swinton has summarized the income and employment status of black Americans. David H. Swinton, *The Economic Status of African Americans: 'Permanent' Poverty and Inequality*, *in* THE STATE OF BLACK AMERICA 25 (1991). Both in absolute terms, and in comparison to white Americans, blacks have high unemployment rates. As of November 1990, the unemployment rate for black men was 11.5 percent, about 2.5 times the corresponding white

tort, and I do wish for revelations showing that any of the dreadful data illustrating the plight of so many black people is false or misleading. But there is little effort to discredit the shocking disparities contained in these reports. Even so, the reports have little effect on policymakers or the society in general.

Statistics and studies reflect racial conditions that transformed the "We Have a Dream" mentality of the 1960s into the trial by racial ordeal so many blacks are suffering in the 1990s. The adverse psychological effects of nonexistent opportunity are worse than the economic and social loss. As the writer, Maya Angelou, put it recently:

> In these bloody days and frightful nights when an urban warrior can find no face more despicable than his own, no ammunition more deadly than self-hate and no target more deserving of his true aim than his brother, we must wonder how we came so late and lonely to this place.[31]

As a veteran of a civil rights era that is now over, I regret the need to explain what went wrong. Clearly we need to examine what it was about our reliance on racial remedies that may have prevented us from recognizing that these legal rights could do little more than bring about the cessation of one form of discriminatory conduct that soon appeared in a more subtle though no less discriminatory form. The question is whether this examination requires us to redefine goals of racial equality and opportunity to which blacks have adhered for more than a century.

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male rate of 4.6 percent. The slightly lower rate for black women, at 10.2 percent, was 2.3 times the white rate. Black teenage unemployment was 35.8 percent, 2.6 times the white rate of 13.8 percent. *Id.* Again, these disparities have remained steady since 1970, although the degree of inequality generally increased over time. Dr. Swinton cautions that the unemployment indicator "does not take into account the lower participation, part-time workers or discouraged workers. Therefore, this indicator *understates* the black unemployment disadvantage." *Id.* at 62 (emphasis added).

Swinton explains that blacks also have low rates of employment, inferior occupational distributions, and low wages and earnings. *Id.* at 29. In 1989, black per capita income was $8,747, only about 59 percent of white per capita income of $14,896. In the aggregate, the income of the African-American population was $186 billion short of the income required for parity. This inequality has been within two percentage points of this figure every year since 1970, suggesting to Dr. Swinton that "this degree of relative inequality appears to be a permanent feature of the American economy." *Id.*

Statistically, blacks have low incomes and high poverty rates. In fact, in 1989, there were about 9.3 million black persons living in poverty. Blacks were three times more likely to have income below the poverty level than whites, a gap that has remained fairly steady since 1970. *Id.* at 42.

31. Maya Angelou, *I Dare to Hope*, N.Y. TIMES, Aug. 25, 1991, at E15.

The answer, must be a resounding "yes."

Traditional civil rights law is highly structured and founded on the belief that the Constitution was intended—at least after the Civil War Amendments—to guarantee equal rights to blacks. The belief in eventual racial justice, and the litigation and legislation based on that belief, was always dependent on the ability of believers to remain faithful to their creed of racial equality, while rejecting the contrary message of discrimination that survived their best efforts to control or eliminate it.

Despite the Realist challenge that demolished its premises, the basic formalist model of law survives, although in bankrupt form. *Bakke*, as well as numerous other decisions that thwart the use of affirmative action and set-aside programs, illustrates that notions of racial equality fit conveniently into the formalist model of jurisprudence. Thus, a judge may advocate the importance of racial equality while arriving at a decision detrimental to black Americans. In fact, racial equality can be used to keep blacks out of institutions of higher education, such as the one at issue in *Bakke*. By reasoning that race-conscious policies derogate the meaning of racial equality, a judge can manipulate the law and arrive at an outcome based upon her worldview, to the detriment of blacks seeking enrollment.

The message the formalist model conveys is that existing power relations in the real world are by definition legitimate and must go unchallenged.[32] Equality theory also necessitates such a result. Nearly every critique the Realists launched at the formalists can be hurled at advocates of liberal civil rights theory. Precedent, rights theory, and objectivity merely are formal rules that serve a covert purpose. Even in the context of equality theory, they will never vindicate the legal rights of black Americans.

Outside of the formalistic logic in racial equality cases, history should also trigger civil rights advocates to question the efficacy of equality theory. After all, it is an undeniable fact that the Constitution's Framers initially opted to protect property, including enslaved Africans in that category, through the Fifth Amendment. Those committed to racial equality also had to overlook the political motivations for the Civil War Amendments—self-interest motivations almost guaranteeing that when political needs changed, the protection provided the former slaves would not be enforced.[33] Analogize this situation with

32. Mensch, *supra* note 2, at 21.

33. Interest in protecting blacks from continued assertions of white domination in the South already had waned by the time of the Hayes-Tilden Compromise of 1877. With an eye toward

that presented in *Bakke*. Arguably the Court ruled as it did because of the anti-affirmative action rhetoric sweeping the political landscape. In conformation with past practice, protection of black rights is now predictably episodic. For these reasons, both the historic pattern and its contemporary replication require review and replacement of the now defunct, racial equality ideology.

Racism translates into a societal vulnerability of black people that few politicians—including our last two presidents—seem able to resist. And why not? The practice of using blacks as scapegoats for failed economic or political policies works every time. The effectiveness of this "racial bonding" by whites requires that blacks seek a new and more realistic goal for our civil rights activism. It is time we concede that a commitment to racial equality merely perpetuates our disempowerment. Rather, we need a mechanism to make life bearable in a society where blacks are a permanent, subordinate class.[34] Our empowerment lies in recognizing that Racial Realism may open the gateway to attaining a more meaningful status.

Some blacks already understand and act on the underlying rationale of Racial Realism. Unhappily, most black spokespersons and civil rights organizations remain committed to the ideology of racial equality. Acceptance of the Racial Realism concept would enable them to understand and respond to recurring aspects of our subordinate status. It would free them to think and plan within a context of reality rather than idealism. The reality is that blacks still suffer a disproportionately higher rate of poverty, joblessness, and insufficient health care than other ethnic populations in the United States.[35] The ideal is that law, through racial equality, can lift them out of this trap. I suggest we

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ensuring the victory of the Republican Rutherford B. Hayes in a disputed presidential election, the North was more than ready to agree to a compromise that ill-served blacks. Among other things, it promised Democrats both removal of remaining federal troops from the southern states and freedom from intervention in "political affairs" in those states. *See* BELL, *supra* note 26, at 26-27.

34. The continuing burdens of discrimination are not limited to the poorest, black Americans. A study conducted by black and white testers found that blacks were required to pay more for new cars even when blacks and whites negotiated the car purchases in similar fashion. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV L REV 817 (1991).

35. Blacks own little wealth and small amounts of business property. No significant progress is being made to improve the status of blacks and to close the gaps. Thus, the disparities in measures of economic status have persisted at roughly the same level for the last two decades, and many indicators of inequality have even drifted upward during this period. Swinton, *supra* note 30, at 29-40.

abandon this ideal and move on to a fresh, realistic approach.

Casting off the burden of equality ideology will lift the sights, providing a bird's-eye view of situations that are distorted by race. From this broadened perspective on events and problems, we can better appreciate and cope with racial subordination.

While implementing Racial Realism we must simultaneously acknowledge that our actions are not likely to lead to transcendent change and, despite our best efforts, may be of more help to the system we despise than to the victims of that system we are trying to help. Nevertheless, our realization, and the dedication based on that realization, can lead to policy positions and campaigns that are less likely to worsen conditions for those we are trying to help, and will be more likely to remind those in power that there are imaginative, unabashed risk-takers who refuse to be trammeled upon. Yet confrontation with our oppressors is not our sole reason for engaging in Racial Realism. Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight in itself has meaning and should give us hope for the future.

I am convinced that there is something real out there in America for black people. It is not, however, the romantic love of integration. It is surely not the long-sought goal of equality under law, though we must maintain the struggle against racism else the erosion of black rights will become even worse than it is now. The Racial Realism that we must seek is simply a hard-eyed view of racism as it is and our subordinate role in it. We must realize, as our slave forebears, that the struggle for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression, even if that oppression is never overcome.

A final remembrance may help make my point. The year was 1964. It was a quiet, heat-hushed evening in Harmony, a small, black community near the Mississippi Delta. Some Harmony residents, in the face of increasing white hostility, were organizing to ensure implementation of a court order mandating desegregation of their schools the next September. Walking with Mrs. Biona MacDonald, one of the organizers, up a dusty, unpaved road toward her modest home, I asked where she found the courage to continue working for civil rights in the face of intimidation that included her son losing his job in town, the local bank trying to foreclose on her mortgage, and shots fired through her living room window. "Derrick," she said slowly, seriously, "I am an old woman. I lives to harass white folks."

Mrs. MacDonald did not say she risked everything because she hoped or expected to win out over the whites who, as she well knew, held all the economic and political power, and the guns as well. Rather, she recognized that—powerless as she was—she had and intended to use courage and determination as weapons "to harass white folks." Her fight, in itself, gave her strength and empowerment in a society that relentlessly attempted to wear her down. Mrs. MacDonald did not even hint that her harassment would topple whites' well-entrenched power. Rather, her goal was defiance and its harassing effect was more potent precisely because she placed herself in confrontation with her oppressors with full knowledge of their power and willingness to use it.

Mrs. MacDonald avoided discouragement and defeat because at the point that she determined to resist her oppression, she was triumphant. Nothing the all-powerful whites could do to her would diminish her triumph. Mrs. MacDonald understood twenty-five years ago the theory that I am espousing in the 1990s for black leaders and civil rights lawyers to adopt. If you remember her story, you will understand my message.