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The Final Civil Rights Act

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Foreword: The Final Civil Rights Act

Derrick Bell†

I
THE ULTIMATE CIVIL RIGHTS QUESTION

The commonly held view of racial advancement as a slow but steady surge forward is wrong. It is a belief sustained by long-held faith and unabashed fantasy, even though it provides a measure of civil rights progress that is more reassuring than accurate. In fact, what is deemed “progress” is cyclical rather than linear. For in this country, civil rights are gained and lost in response to economic and political developments over which African Americans exercise little or no control. As a result, advocates of racial equality appear trapped in a giant, invisible gyroscope. Even their most powerful efforts can divert that gyroscope only a few degrees from its pre-planned orientation toward dominance by whites over blacks.

The racial designations change: from slavery to segregation to equal opportunity. The society sometimes even accepts those designations that civil rights leaders urge upon it, but the subordinate status of blacks remains. The stability of that status is enhanced rather than diminished by the movement up through the class ranks of the fortunate few blacks who too quickly are deemed to have “made it.” One wonders. Is there an untried approach that will achieve gains for blacks that are real rather than illusory, permanent rather than transitory, substantive rather than sham, and realizable in the here-and-now rather than at some nebulous future date?

II
THE FINAL CIVIL RIGHTS ACT

Past Precedent as Prelude

Even as Congress and the nation debate the wisdom of reintroducing the veto-rejected Civil Rights Act of 1990,1 the Civil Rights Act of

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1964 stands in risk of de facto repeal. Its controversial public accommodation provisions were unanimously upheld in the year of its adoption, but, three decades later, the 1964 Act’s protective function has been undermined both by unenthusiastic enforcement and by judicial decisions construing its provisions ever more narrowly. In the absence of developments to reverse current conservative trends, there will be more reason for consternation than surprise, if, in the next few years, an unsympathetic Supreme Court declares the 1964 Civil Rights Act—along with its various supplemental amendments—unconstitutional as applied to racial discrimination.

In explanation of its action, the Court would likely find that civil rights statutes create impermissible categories based on race that fail to meet the strict scrutiny standard that the Court held in 1989 applied to remedial as well as invidious racial classifications. The Court then could reason that the 1964 Act was inconsistent with what it viewed as the essential “racial forgiveness” principle of the landmark decision in Brown v. Board of Education.

After all, the Court could say, the decision in Brown I did not seek to identify and punish wrongdoers, and the implementation order in Brown II did not require immediate enforcement. Rather, it recognized that delay was required, not only to permit time for the necessary major changes in Southern school policies, but also to accommodate

5. One can imagine a carefully orchestrated test case limited to a constitutional challenge to the 1964 Act’s racial provisions, with the Court finding no reason or jurisdiction to address the continued validity of provisions protecting against discrimination based on sex, national origin, or religion.
6. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-98 (1989) (plurality opinion) (strict scrutiny applied to minority set-aside program in city construction contracts). Justice Scalia’s concurrence provided a fifth vote in support of this standard of review: “strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is ‘remedial’ or ‘benign.’” Id. at 520 (Scalia, J., concurring).
9. Id.
school integration,\textsuperscript{10} which ran counter to the views and strong emotions of most Southern whites.\textsuperscript{11}

The Court might refer with approval to the views of the late Yale law professor, Alexander Bickel, who contended that any effort to enforce \textit{Brown} as a criminal law, normally enforced "forthwith and without recourse," would fail just as have Prohibition, anti-gambling statutes, most sex laws, and other laws policing morals.\textsuperscript{12} In Bickel's words: "It follows that in achieving integration, the task of the law . . . was not to punish law breakers but to diminish their number."\textsuperscript{13}

Professor Bickel's argument might prove instructive. The Court could say: "\textit{Brown} was fundamentally a call for a higher morality rather than a judicial decree authorizing Congress to influence behavior allegedly unjust to blacks." "Such behavior," the Court might continue, "merely reflected generally acknowledged differences among racial groups." Relying on this reasoning, the Court could determine that, like \textit{Brown}, laws aimed at requiring cessation of white conduct deemed harmful to blacks are hard to enforce because they seek to "police morality." The Court, while conceding that both the states and the federal government have broad powers to protect the health, safety, and welfare of their citizens, might find nothing in the Constitution to authorize regulation of what government at any particular time might deem appropriate "moral" behavior. The exercise of such authority, the Court could fear, might lead Congress to control some whites' perceptions about the humanity of some blacks. One can almost read the opinion on this point: "Whatever the good intentions of such an undertaking, the legislature clearly aimed for a spiritual result that might be urged by a religion but was beyond the reach of government coercion."

In closing, the Court would likely urge support for educational efforts designed to gain voluntary adherence to the worthy goals of the \textit{Brown} decision. It might even advise black leaders to work harder so that:

More of your people will prove themselves worthy of the many opportunities available to all Americans prepared to enter the competitive race without special subsidies or unfair advantages. Racial remedies

\textsuperscript{10.} \textit{See id.} at 301 (ordering that district courts prepare decrees to admit black children to "public schools on a racially nondiscriminatory basis with all deliberate speed").

The current Court might argue that it is not at all obvious that \textit{Brown II} requires integration, rather than desegregation. Recent grants of certiorari may invoke precisely this view of \textit{Brown II}. \textit{See}, e.g., Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989), \textit{cert. granted}, 111 S. Ct. 949 (1991).

\textsuperscript{11.} \textit{See A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS} 250 (1962) ("This is the unpalatable but undeniable fact that the principle of the integration of the races ran counter to the views and the strong emotions . . . of a majority of the people to whose way of life it was to be chiefly applicable; that is to say, most southern whites.").

\textsuperscript{12.} \textit{See id.} at 251.

\textsuperscript{13.} \textit{Id.}
sponsored by government must adhere to the free enterprise principles that are the heart of our system.

Emboldened by such a decision proclaimed by the nation’s highest Court, it is not difficult to imagine the President proposing and, after substantial debate, the Congress enacting what opponents would charge and proponents concede was “a radical new approach to the nation’s continuing tensions over racial status.”

Recognizing a Civil Right to Racial Bias

It was enacted as the Racial Preference Licensing Act of 1996. 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.”14 “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 in 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.15 The license itself was expensive,

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15. The concept of licensing undesirable conduct is not new. President Nixon in his 1971 Economic Report to Congress suggested that environmental polluters be licensed for a fee. Nixon contended: “This charge would be sufficiently high to encourage substantial control of sulphur oxide emissions, and the consequent reductions of damage to health and property should substantially exceed the control costs.” ECONOMIC REPORT OF THE PRESIDENT, H.R. Doc. No. 28, 92d Cong., 1st Sess. 119 (1971).


College football’s Fiesta Bowl authorities no doubt had a similar principle in mind when they
though not prohibitively so. After obtaining a license, the license 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.\textsuperscript{16}

License holders were required to display their licenses prominently, and to operate their businesses in accordance with the racially selective policies set forth in their licenses. 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.

Looking more closely to the Act's effect in the black community, 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 the 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 very stiff civil penalties quite like those under the RICO statutes.\textsuperscript{17}

"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

\textsuperscript{16} Congress based its authority for the Act on the commerce clause, the taxing power, and the general welfare clause of the U.S. Constitution.

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

Ms. Geneva Crenshaw
Electronic Mail Route 47-782

Dear Geneva,

My God, woman! What are you trying to do to me? I welcomed hearing from you after a years-long silence, and appreciated your help with the Foreword I am writing for the California Law Review's special issue on civil rights legislation in the 1990s. Your allegorical, racial chronicles,18 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.19 And because so many people believe that I—rather than you—wrote them, they have proved a boon to my scholarly reputation. I thank you for that.

But give me a break! The Final Civil Rights Act chronicle goes too far. You know that it has taken me years to regain some acceptance within the civil rights community since I suggested in print that civil rights lawyers who urged racial balancing remedies in all school desegregation cases were giving priority to their integration ideals over their clients' educa-

19. E.g., A Forum on Derrick Bell's Civil Rights Chronicles, 34 St. Louis U. L.J. 393 (1990); see also Forum on Professor Derrick Bell's Civil Rights Chronicles, 3 Harv. Blackletter J. 1 (1986) (commenting on chronicles published in 99 Harv. L. Rev. 4 (1985)).
Your far more 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.

I have always respected your insight on racial issues, Geneva. And your perceptions have likely grown more acute in your years away in God-knows-where. 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

Professor Derrick Bell
Harvard Law School

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? And if not me, believe yourself: After all, I have not authored everything you have published.

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.21

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.22

For example, look at the years following World War II when social conditions in the country had substantially changed. Spurred by the seeming success of a years-long, legal challenge to state-sponsored segregation in the public schools,23 civil rights groups and individual blacks mounted

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major protests sufficiently impressive and disruptive to convince Congress to enact several civil rights laws to sustain and advance the desegregation that had already been taking place.

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.24

A key illustration of this principle is the Supreme Court's 1896 decision in Plessy v. Ferguson.25 Plessy symbolized a judiciary and a society grown weary of racial remedies, and ready to sacrifice black rights for political expediency. Distorting the necessary meaning of the fourteenth amendment's equal protection guarantee, the Plessy precedent validated a torrent of Jim Crow statutes. "Separate but equal" was the judicial promise; racial subordination became the legally enforceable fact.

Now, I can hear you asking, "How do your 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 to become nearly ineffective, which encourages open violations and discourages 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 theory26—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.\textsuperscript{27}

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

Prophetically,
Geneva

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.” Though their resurrection under the aegis of your Final Civil Rights Act would usher in the racial millennium, I could not compromise my opposition to their hateful return. 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

Professor Derrick Bell

Harvard Law School

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 antedesegregation levels, I would think such a “trade” entitled to serious thought, not self-righteous dismissal.

Somehow, my friend, you must come to see things there—though only vaguely—as I perceive them here with utter clarity. You and other civil rights policymakers must realize that you have been formulating your strategies without any real assessment of the continuing importance of

\textsuperscript{27.} For a summary of Black Reparations efforts in both the 19th and 20th centuries, see D. Bell, supra note 22, § 1.13.
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. Suddenly, I was hearing a low, melodious voice saying those words. I turned, and . . .

There she was. Seated on the small couch in my study, her over six-foot-long, 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 beautiful 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 had no smart quip in response. It had been almost three years since Geneva had disappeared at the close of that climactic civil rights conference. Seeing her again made me realize how much I had missed her.

I simply stared at her for a long moment. Then, spontaneously in one movement, we both stood and I walked over toward her outstretched arms and we embraced. Finally, she whispered in my ear. "What about my chronicle?"

"Geneva. You have a one-track mind."

"My mind has as many tracks as yours does, friend. It is simply that I know how to set priorities." She sat down again. Serious. "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 soci-
ety. For twenty years, I have quoted Professor Tilden J. LeMelle’s doubt ‘[w]hether a society in which racism has been internalized and institutionalized to the point of being an essential and inherently functioning component of that society [can ever reform, particularly] a culture from whose inception racial discrimination has been a regulative force for maintaining stability and growth and for maximizing other cultural values—whether such a society of itself can even legislate (let alone enforce) public policy to combat racial discrimination is most doubtful.’

“I agree with Professor LeMelle when he asserts that ‘[a] racist culture can move to eradicate or make racism ineffective only when racism itself becomes a serious threat to the culture and its bearers.’ Most of what we call ‘civil rights progress’ can be summed up in LeMelle’s formula. I simply do not see how legalizing racist practices is any more than a particularly vicious illustration of LeMelle’s concerns and mine.”

“Of course you don’t. That’s because you don’t really want to come to grips with the real thrust of LeMelle’s statement.”

“And that is?”

“My friend. Know it! Racism is more than a group of bad white folks whose discriminatory tendencies can be controlled by well-formed laws, vigorously enforced. LeMelle is telling us that racism 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.”

I did not respond. 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.

“You know,” she added, “there is an even better analogy. In his recent book, Love’s Executioner and Other Tales of Psychotherapy, 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. In addition to denial, delusion, rationalization, and avoidance, we resort to humor. 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.’

“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 as Yalom urges that we deal 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. With this reality on the table, we can better understand the dilemma of

31. Id. at 7 (attributing quote to Woody Allen); see also E. Becker, The Denial of Death ix (1973) (“The idea of death, the fear of it, haunts the human animal like nothing else; it is the mainspring of human activity—activity designed largely to avoid the fatality of death, to overcome it by denying in some way that it is the final destiny for man.”).
32. I. Yalom, supra note 30, at 7.
33. Id. (emphasis in original).
'meaning' and come to realize, as Dr. Yalom suggests, that '[m]eaning ensues from meaningful activity . . . . In therapy, as in life, meaningfulness is a byproduct of engagement and commitment.'

"Both engagement and commitment connote service. And genuine service requires humility. We must first recognize and acknowledge (at least to ourselves) that our actions are not likely to lead to transcendent change, and that, despite our best efforts, our actions may be of more help to the system we despise than to the victims of that system we are trying to help. That realization and the dedication based on that realization can lead to policy positions and campaigns that, even when they fail to achieve their goals, will at least serve to remind the powers-that-be that there are persons like you out there who are not on their side, but rather, are determined to stand in their way.

"Here, at least, is a more realistic perspective from which to gauge the present and future worth of our race-related activities. The question is whether the activity is founded on a forthright recognition of the true character of the barriers the protestors face, and whether we have undertaken it with the humility that enables and even requires a broadening of goals."

"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.

34. Id. at 12.
35. See, e.g., Wechsler, supra note 26, at 34 (stating that "integration forces an association upon those for whom it is unpleasant or repugnant").
"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."

"Geneva, you seem to be urging us to adapt Brer Rabbit's briar patch tactics to civil rights."

"Something like that." Geneva smiled, sensing that she was winning yet another argument with her ever-skeptical friend. "When Brer Rabbit lacked power to get himself out of a bad situation, he used his wits. Captured, he didn't waste any energy asking the farmer to set him free. He didn't rely on his constitutional rights. Rather, he set about convincing Brer Fox that throwing him in the briar patch would be a fate worse than death. Of course, once Brer Fox tossed him in, Brer Rabbit easily negotiated the brambles and escaped."

"To connect up the analogy," I asked, "you think we should resist in good faith measures like the Final Civil Rights Act while, at the same time, looking for the briar-patch-like escape opportunities?"

"Exactly. 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.

"Do you understand?"

"Understanding is not my problem," I replied, "but conviction comes harder. I guess I am a Doubting Thomas, and I will not be surprised if the California Law Review editors share my doubts."

"I rather think they and many of their readers will see my point more easily than you do. They, unlike you, may not still harbor unrealized hopes of America as a racially integrated society. And they, unlike you, may be willing to look for potential gain even in the face of racial disaster. Perhaps when they accept your Foreword, you will see the merits of my Final Civil Rights Act."

"Geneva," I protested, "I don't need law review editors to give legitimacy to your far-out notions about race."

She smiled, sensing an opening in our long-running give-and-take. "Let's just say that the editors' approval will give my approach 'acceptability.'"

"In other words, you are saying that I will see its merits if the white folks think it is a good idea. I don't think that is fair."

"Don't worry, Derrick. We black women are amazingly tolerant of our men's frailties in that area."

Geneva, still smiling, had stood, ready to head toward the door when she delivered this last zinger. Bending to give me a kiss, she said,

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"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 *Foreword*. 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.