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THE “R-WORD”: A TRIBUTE TO DERRICK BELL

*Kenneth B. Nunn**

INTRODUCTION

Recently, I traveled to a Florida resort to lecture at an attorneys’ conference. On the evening of my arrival, I stood outside of the conference hotel enjoying the (relatively) cool air before retiring to my room to work on my presentation. A White woman (who appeared to be in her late 30s) walked up to me and struck up a conversation. She wanted to know if I liked my job and whether the people I encountered at work treated me nicely. I was not particularly pleased with the interruption, but I feigned interest and answered her questions politely. During the course of our conversation, the woman informed me that she worked in hospital administration and that she saw some similarities between her work and mine. “Oh really?,” I said. “Sure,” she replied. “In most service positions people treat you like crap just because they can and they can get away with it.” I found her opinion amusing. “Maybe there *are* some similarities between her line of work and my own,” I thought.

“Do people treat you like crap?,” the woman pressed. “I bet many people who come here are real jerks.” It dawned on me that she thought I was the hotel bellman. I started hunting for a familiar face that could help me break away from this encounter. Maybe she saw me looking around or maybe she saw the frantic look on my face, but in any case the woman asked me, “What’s the matter, don’t they like it if you talk to the guests?” “I don’t know,” I replied, “but maybe I should go.” “It has been nice talking to you. Have a nice night,” I said as I turned to leave.

I was not offended by the encounter, only slightly amused. I have been mistaken for “the help”¹ before, although it has been a long time.²

* Professor of Law, University of Florida, Levin College of Law. EDITORS NOTE: Legal scholar, Derrick Bell, passed away on October 5, 2011. Professor Bell was known as a pioneer of critical race theory and was the first tenured black professor at Harvard Law School. For more information on Derrick Bell please see <http://www.nytimes.com/2011/10/06/us/derrick-bell-pioneering-harvard-law-professor-dies-at-80.html?pagewanted=all>.

1. “The help” is a term that refers to service workers, usually employees in domestic situations such as gardeners and maids. In the Southeastern United States, “the help” was most often Black. See generally KATHRYN STOCKETT, *THE HELP: A NOVEL* (2009) (describing fictional relationship of Black servants and White employers).

2. Such encounters are not uncommon. See Jan Harold Brunvand, *Racism Surpasses Humor in Cases of Mistaken Identity*, SALT LAKE CITY DESERET NEWS (May 10, 1991)

I am a Black man in my early fifties, with slightly graying, close-cropped hair. I like to think I look rather distinguished. I wondered what it was that made the woman think I was a bellman or valet on this occasion. Of course, it occurs to me that there may be bellmen who are also in their early fifties and who look distinguished, as well. On this particular occasion, I was dressed in black jeans, a white short sleeve casual shirt (think *guayabera*³) and a pair of black casual shoes. It is possible that some hotels dress their valets in similar attire, but not this one. The valets at this hotel wear a vest and tie.

The question I would like to pose here is why did the woman mistake me for the bellman? Was it an honest mistake? Or did she engage in racial stereotyping when she thought the Black man standing in front of the resort hotel must have been the valet? I do not pose this question to obtain an answer. There may not be an easy answer to explain the woman's behavior. In fact, she may not know herself what motivated her behavior, whether it was racist or not.⁴ I pose the question to make a point: no matter what the true cause of the woman's mistake may have been, the vast majority of Americans, whether White or Black, will go out of their way to avoid attributing it to race.⁵

(describing incidents where Karl Malone, Jesse Jackson and other prominent African Americans were mistaken for servants), <http://www.deseretnews.com/article/161642/RACISM-SURPASS-ES-HUMOR-IN-CASES-OF-MISTAKEN-IDENTITY.html?pg=1>. Judge A. Leon Higginbotham describes an event where African American federal judge Damon Keith was mistaken for a bellperson at Colonial Williamsburg, when present for a judge's meeting on the bicentennial of the Bill of Rights, which he chaired. A. Leon Higginbotham, *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1415-16 (1994).

3. A guayabera is a loose-fitting cotton shirt, traditionally worn in many Latin American countries. See Jenny B. Davis, *A Noble Commitment: For Hispanic Judge, Civic Duty Means Staying on the Bench*, 1 No. 46 ABA J. E-Report 8 (2002) (describing *guayabero* as a traditional Mexican shirt).

4. Indeed, several scholars have suggested that a large portion of racist behavior is unconscious. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329-345 (1987) (describing research finding discriminatory conduct frequently the result of unconscious racism); Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL. PUB. POL'Y & L. 54, 56-57 (2011) (reviewing research showing that much employment discrimination is due to unconscious motivations).

5. See Madonna G. Constantine & Derald Wing Sue, *Perceptions of Racial Microaggressions Among Black Supervisees in Cross-Racial Dyads*, 54 J. COUNSELING PSYCHOL. 142, 148 (2007) (describing reluctance of Whites to label ambiguous events as discriminatory); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1098-99 (2008) (describing reluctance of Whites to label ambiguous events as discriminatory); Derald Wing Sue et al., *Racial Microaggressions in Everyday Life*, 62 AM. PSYCHOLOGIST 271, 275, 277-79 (2007) (describing different interpretations of Whites and minorities when interpreting low-level racially antagonistic events). Combs and Combs describe the current time as the era of "racial diversionary standpatism," which is epitomized by (1) "a minimalist approach to Federal power to eliminate racism and racial discrimination;" (2) "a conciliatory disposition to the racial

An example of the American reluctance to describe White behavior toward Blacks as racially motivated can be seen in the reaction to attacks on President Obama, both during the presidential campaign and since that time. Barack Obama has been depicted as a monkey,⁶ as a Muslim masquerading as a Christian;⁷ and his citizenship⁸ has been vigorously contested. In a sharp break from decorum, a White representative from South Carolina stood up and yelled "You lie!" at the President during his State of the Union address.⁹ Yet, the characterization of these attacks as racist or racially motivated has been vigorously contested in the media.¹⁰

Shelby Steele suggested that Donald Trump's embrace of the birther movement was not racist, but effective political theater.¹¹ Steele argued that the President's supporters, who cried racism, did so solely to advance their own political cause.¹² "A president who is both Democratic and black effectively gives the infamous race card to the entire left: Attack our president and you are a racist,"¹³ Steele wrote in the *Wall Street Journal*.

The President himself has downplayed any suggestion that the events in question were in any way motivated by racism. According to White House press secretary Robert Gibbs, "The president does not believe that criticism comes based on the color of his skin."¹⁴ This is not

views and status of southerners and Whites on the whole;" (3) the move from emphasizing "the biological inferiority of African Americans" to emphasizing the inferiority of their culture; (4) "the avoidance of any direct reference to race or the abandonment of racial terminology in the discussion of racism and racial discrimination." Michael W. Combs & Gwendolyn M. Combs, *Revisiting Brown v. Board of Education: A Cultural, Historical-Legal, and Political Perspective*, 47 *How. L.J.* 627, 655-56 (2004).

6. See *N.Y. Post Apologizes for Chimp Cartoon*, L.A. TIMES (Feb. 20, 2009), <http://articles.latimes.com/2009/feb/20/nation/na-nypost20>.

7. See Isabel Macdonald & Steve Rendall, 'Secret Muslims,' *Open Bigotry: Islamophobia in the 2008 Presidential Campaign*, EXTRA! (Nov./Dec. 2008), <http://www.fair.org/index.php?page=3649>; David Waters, *Ann Coulter's Anti-Muslim Name Calling*, WASHINGTONPOST.COM (Aug. 28, 2008), http://newsweek.washingtonpost.com/onfaith/undergod/2008/08/ann_coulters_name_calling.html.

8. See Alexander Eichler, *Was the Birther Movement Always About Race?*, NAT'L J. (Apr. 28, 2011), <http://www.nationaljournal.com/dailyfray/was-the-birther-movement-always-about-race--20110428>.

9. See Kathy Kiely, *Obama Accepts Wilson's Apology for Outburst*, U.S.A. TODAY (Sept. 5, 2009), http://www.usatoday.com/news/washington/2009-09-09-obamareax_N.htm.

10. See Brad Knickerbocker, *Are Donald Trump and His Fellow "Birthers" Racist?*, CHRISTIAN SCI. MONITOR (Apr. 30, 2011), <http://www.csmonitor.com/USA/Politics/2011/0430/Are-Donald-Trump-and-his-fellow-birthers-racist>.

11. Shelby Steele, *Obama's Unspoken Re-Election Edge*, WALL ST. J. (May 25, 2011), <http://online.wsj.com/article/SB10001424052748704569404576299241421694066.html>.

12. *Id.*

13. *Id.*

14. David Saltonstall, *Jimmy Carter Gets Flak for Racism Charge Against Rep. Joe*

surprising. These days, charges of racism are rarely thought to be justified.¹⁵ Instead they are viewed as explosive, provocative, reckless, and slanderous. James Taranto, writing in the *Wall Street Journal*, had this to say about the new etiquette of (not) talking about race: “Just as racism and the expression of racially prejudiced sentiments have become taboo, the word ‘racism’ and the imputation to others of racially prejudiced sentiments are becoming taboo. As the ‘Daily Show’ reported in August: ‘The race card’s maxed out.’”¹⁶

Racism has become the “R-word,” an allegation that is so outrageous that it cannot even be spoken in public, let alone seriously addressed.¹⁷ In this brief exploration, I propose that it is exactly because racism continues to loom large in American society that talking about it has become taboo. In other words, banning the “R-word” serves a political function. It masks the failure of American society to confront the existence of racism and do something about its effects. Derrick Bell’s path breaking work can be used to show why the focus of race discourse has moved from debating over what to *do* about racism to debating over whether to *talk* about racism. What Bell discovered is that talking about race is inherently ideological. Analyzing race discourse reveals competing definitions of racism that can be deployed to achieve different ideological goals.

In the remaining portions of this Essay, I will first review two tools devised by Derrick Bell that can shed light on the way race and racism manifest in American society. Then, I will apply those tools to analyze why the discussion of racism has become taboo.

I.

Derrick A. Bell, Jr. is one of the Black pioneers of legal education. In his long academic career, he has taught at the University of Pittsburgh, Harvard, and NYU. He also served as the dean of the University of Oregon.¹⁸ Derrick Bell gives us two theoretical tools to confront the problem of racism’s invisibility. First, Professor Bell

Wilson-Even from White House, N.Y. DAILY NEWS (Sept. 17, 2009), http://articles.nydailynews.com/2009-09-17/news/17934295_1_criticism-of-president-obama-jimmy-carter-white-house.

15. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1595 (2009) (noting tendency to view pointing out racism as divisive).

16. James Taranto, *The R-Word: Rep. Jim Clyburn and the New Racial Taboo*, WALL ST. J. (May 27, 2011), <http://online.wsj.com/article/SB10001424052702304520804576349502478356580.html>.

17. See *id.*

18. For a biography of Bell, see WHEN RACE BECOMES REAL: BLACK AND WHITE WRITERS CONFRONT THEIR PERSONAL HISTORIES 334 (Bernestine Singley ed., 2002) [hereinafter WHEN RACE BECOMES REAL].

argues that racism is a permanent feature of American society.¹⁹ In this regard, he makes a break with the social thought of the civil rights movement. During the civil rights movement, it was argued that racism is the consequence of individual actors with evil intent—the racist sheriff, bigoted landlord. If these individuals would see the light, the argument went, then racism would disappear. To the contrary, Bell argued that racism is structural.²⁰ It is woven into the fabric of American society. In fact, White racism, or the belief that European people are distinctive and superior to other people, is the glue that holds American society together, given the diverse origins and backgrounds of the White majority.²¹ Changing the individual beliefs of social actors would not eliminate racism, because racism is not grounded in individual consciousness, but in a social structure that orders and replicates itself.²²

Professor Bell's second theoretical tool derives from the first. Bell contends that due to racism's structural and permanent nature, "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."²³ This proposition is known as Bell's "Interest-Convergence" thesis, and Bell used this thesis to show that civil rights advances only took place when they were beneficial to Whites as a whole and did not challenge White supremacy.²⁴ In other words, what Bell proposes is that racism is resilient as well as enduring.²⁵ Racism, as the dominant form of thought in the nation's consciousness, co-opts any new movement or ideology that might challenge its existence.²⁶ This process, in fact, occurred as

19. See DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* ix-xii, 197-200 (1992) (expressing Bell's belief that racism is a permanent feature of American society).

20. *Id.*

21. See Ian Haney López, *White Latinos*, 6 HARV. LATINO L. REV. 1, 6 (2003) (arguing that "[r]ace . . . is the scare tactic that unifies a 'white' majority behind a cohort of political leaders who primarily serve an emerging plutocracy").

22. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) (arguing racism is structural and not due to individual malice).

23. Derrick Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

24. See Justin Stec, *The Deconcentration of Poverty as an Example of Derrick Bell's Interest-Convergence Dilemma: White Neutrality Interests, Prisons, and Changing Inner Cities*, 2 NW. J.L. & SOC. POL'Y 30, 34-36 (2007) (describing interest converge as possible when White interests are implicated, assuaged, or remain silent).

25. See Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992) (arguing racial reform efforts "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").

26. See Barbara A. Schwabauer, *The Emmett Till Unsolved Civil Rights Crime Act: The Cold Case of Racism in the Criminal Justice System*, 71 OHIO ST. L.J. 653, 661-62 (2010) ("critical race theorists argue that racism is 'adaptive' and 'resilient' in that it can exist in

the civil rights movement began to gain traction in the 1960s and 1970s.²⁷

As a result of the hard work of civil rights activists, racism has become socially unacceptable in present day society. Whereas segregation era politicians would unabashedly announce their racist platforms, nowadays no politician wants to be identified as a racist, even if they are prepared to court the racist vote clandestinely.²⁸ From a White supremacist position, it is desirable that White privilege, White power, and White prestige continue, notwithstanding morphing attitudes about the acceptability of openly racist ideas. The solution?: to hide the enduring racism behind a colorblind facade. Colorblindness was initially articulated by the civil rights movement, but it was quickly adopted by the right as a means to insulate centers of power and privilege from racial change.²⁹ Advocacy for racial progress could now be characterized as just as invidious as old-style segregation.³⁰

The cooptation process that Bell outlines is what is behind the growing resistance to talking about the existence of racism, or even employing the terms “racism” or “racist.” Although racism has become socially untenable today, the effect of this has been limited by making it difficult to recognize racism when it occurs. If an idea cannot be spoken, then it cannot be identified, challenged and corrected. I take a closer look at how this cooptation process operates in the next section.

II.

What Derrick Bell’s work underscores is that there are competing definitions of racism at play surrounding the “R-word” issue. One definition is restrictive—racism, which is only identified when it results from the intentionally harmful conduct of conscious and deliberate racists. The other definition is expansive. Under this definition, racism can result from deliberate or unintended actions of persons who are either conscious or unconscious racists.³¹ The expansive definition suggests that racism’s cause is structural and that its existence is not

multiple formulations that produce racial inequities”).

27. See Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 729 (2008) (describing transformation of social norm from openly racist to non-racist through civil rights struggle).

28. *Id.*

29. See Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.—C.L. L. REV. 63, 71-76 (1993) (describing colorblind ideology).

30. *Id.*

31. Alan Freeman suggested that these two views of racism could be characterized as competing “perpetrator” and “victim” perspectives of race. See Alan D. Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1411-12 (1990).

dependant upon bad actors, but upon institutions and social practices.³² Eliminating racism, then, requires changing institutions and social practices, a far more challenging task than chasing down a few misguided individuals.

Cultural theory teaches us that the meanings of ideas like "racism" are determined through a semiotic process of consensus formation.³³ The accepted definition of "racism" results from a discursive process wherein different groups engage in struggle over the meaning of the term.³⁴ While the definition of racism is contested, the definitions favored by the state and by dominant groups have a competitive advantage. This is because "[t]he state and the dominant groups that control the state are able to articulate their definition of [racism] more frequently and with greater authority."³⁵ However, the state and dominant groups do not exercise a monopoly over idea formation, as they must use meanings that have already won social acceptance.³⁶ This is why opposition to minority positions cannot be expressed in an openly racist way today. Colorblindness has become part of the shared "consensus" of understanding.³⁷

The struggle over meaning that produces this shared consensus is rife with ideological significance, for these shared understandings can be used to exert power and control.³⁸ Statements over whether given conduct is "racist" or not "provides a way to signify, or make a statement, about the righteousness of given social behavior with a definite political content."³⁹ Thus, dominant groups seek to impose their view of what is and what is not racist on subordinate groups and subordinate groups, resist this imposition to the degree possible.⁴⁰

Although, the state and dominant groups do not have a monopoly over the production of meaning, the "competitive advantage" that they do have makes it more difficult for subordinate groups to shape the

32. *Id.*

33. See Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality*, 6 J. GENDER RACE & JUST. 381, 430 (2002) [hereinafter Nunn, *Surplus*] (describing crime as result of a "semiotic process of articulation").

34. *Id.*

35. *Id.* at 431.

36. *Id.* at 430-31.

37. See Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 761-64 (1995) [hereinafter Nunn, *Trial as Text*] for a discussion of the consensus.

38. See Nunn, *Surplus*, *supra* note 33, at 428-29 (arguing "consensus describes a relationship of power").

39. *Id.* at 429.

40. See Nunn, *Trial as Text*, *supra* note 37, at 766-67 (discussing how counter-definers offer alternatives to mainstream points of view).

consensus.⁴¹ Advocates of subordinated positions “must respond in terms pre-established by the primary definers and the privileged definitions,” in order to exert influence over the process and not be written off as radicals.⁴² Consequently, just as it is not possible for politicians today to openly adopt racist positions, it is not possible for politicians to speak out against racism too strongly. To do so would suggest that racism remains a social problem and that would run against the consensus position on race.

The suggested curb on the use of the “R-word” is designed to advance the restrictive definition of race. It is designed to suggest that racism is no longer a significant problem and that those who speak of it as if it is, are out of touch with reality. The restrictive definition of racism, which holds racism is an isolated occurrence that results from a few malevolent individuals, is the consensus position on race in the United States.⁴³ It is the position of the majority of the American public, the government and the courts.⁴⁴ It is not, however, the only position. “Counter-definers,” made up of political radicals, most people of color, and some academics and intellectuals, hold and advance another view.⁴⁵ In the fluid, discursive environment of public opinion, there is always the risk that the counter-definers could win the day (as was the case with the civil rights movement).⁴⁶ Thus, the curb on the use of the “R-word” is promoted as a kind of intellectual warfare. It is an attempt to sway the public consciousness and insulate the consensus from the destabilizing idea that race relations are not ideal.

CONCLUSION

Because of concern over the “R-word,” Americans will not talk about race. Some will not talk about race because they are satisfied with the racial status quo and do not wish to challenge it. Others will not talk about race because they do not wish to offend. All will look at an incident of disparate treatment and will consider various reasons for what happened, but they will not seriously consider racism as a potential cause. And this reluctance to confront potential incidences of

41. *Id.*

42. *Id.* at 767 (quoting STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE AND LAW AND ORDER* 64 (1978)).

43. See Freeman, *supra* note 31 and accompanying text.

44. See *id.* (arguing that the dominant position on race is the perpetrator perspective).

45. See *supra* text accompanying note 40.

46. See Nunn, *Trial as Text*, *supra* note 37, at 763-64 (describing the production of consensus as a semiotic process “in which the state has distinct advantages, although no monopoly”).

racism, correct them, or simply discuss and debate them, renders racism invisible, but it does not make it go away.

Avoiding discussions about race, racism, or racial discrimination cannot advance the interests of people who believe racism still exists, or who believe they are, or have been, the victims of racism. Not talking about racism only aids those who are satisfied with the current racial order and do not wish to see the status quo disturbed. Rather than showing that racism has diminished, the resistance to using the "R-word" shows racism's continued presence and the enduring power of White supremacy to shape our culture.

Those that want to resist racial oppression should use the "R-word." They should note racial disparities, confront racist speech, and fight racial discrimination. When they see racism, they should call it out. They should not capitulate to politically motivated efforts to hide uncomfortable realities because it is more comfortable or "politically correct" to do so. For as Derrick Bell has so astutely warned us, the battle against racism will not be won in the legislatures or the courts, it will be won in the consciousness of the people. I close with Bell's words, which I think appropriately remind us of our task:

The students who broke the back of racial segregation when they risked humiliation and physical violence with their sit-ins and other non-violent protests were manifesting the power of protecting self-worth in a righteous cause. The potential in the power that ended state-supported segregation is still there. It is up to us to unearth it.⁴⁷

47. Derrick Bell, *Epilogue*, in *WHEN RACE BECOMES REAL*, *supra* note 18, at 333.

