

THE LAW OF RACIAL STANDING

By Derrick Bell*

There was a Rhythm and Blues group several years ago that had a hit song, the lyric in which posed the question, "Are you ready? Are you ready?" Of course, the singers were talking about being ready for love, but the question is also an appropriate one for everyone able to get into this affair on this evening.

And so I ask, Are you ready? I am not talking about love. I am talking about trouble. You better get it together folks, because — Minister Louis Farrakhan is back on national television.

Yes, Farrakhan is back, and we bourgeois black folk will need to be ready because white America views this man as a big problem that can be solved — evidently — by making what is threatening for them a problem for us.

Personally, I am glad to see Farrakhan's return after about a two year absence from the national T.V. scene. He is very smart, super-articulate, and he is perhaps the best living example of a black man ready, willing, and able to "tell it like it is" regarding who is responsible for racism in this country. In this regard, he is easily a match for all those media marvels like Phil Donahue, Larry King, and Sam Donaldson — all of whom consider themselves very intelligent . . . certainly smarter than *any* black man. Each of these T.V. pros seems anxious to put this outspoken black man in his place. They have big staffs to do their research and prepare scripts filled to the brim with denigrating questions. They have as well film clips carefully edited to make Farrakhan look as outrageous and irresponsible as possible.

On camera, these self-appointed defenders of a society foolish enough to put them in their highly paid jobs, attack Farrakhan with a vengeance. Clearly, destruction and not discussion is their aim. But, of course, there is no contest. Minister Farrakhan, calm, cool, and collected, eats their lunch. I love it.

It does not matter whether you agree with me or not, each of you is going to have to deal with Minister Farrakhan. Or, more specifically, all of us have to deal with the media, colleagues at work, and friends anyplace — many of whom will want our view (critical if possible) of Farrakhan. And, don't make the mistake of telling a reporter ten positive things about Farrakhan and adding one criticism. The story will be headlined, (you guessed it):

* Derrick Bell is the Weld Professor of Law at Harvard Law School. This talk was delivered at the 14th Annual Barristers Scholarship Ball of the Massachusetts Black Lawyers Association in Cambridge, March 31, 1990.

"BLACK SPOKESPERSON CONDEMNS FARRAKHAN."

There is no hiding place down here — as the old spiritual put it. Farrakhan is a black Muslim, and most of us are Methodist or Episcopalians, or nothing in particular. It is not his faith we are asked to deal with. It is his race and his mouth.

Show of hands. How many of you have already received phone calls from some reporter asking whether you have heard what Farrakhan said and what *you* were going to do about it? Note, with Farrakhan, it's not what do you have to say, but what are you going to DO about what he said.

Now, on the surface, this is very strange, kind of crazy really. To use a biblical illustration, remember 1 Samuel, Chapter 17, the story of how little David killed the mighty Goliath. David left his sheep in the field, journeyed to the impending battle, and convinced King Saul of the Israelites to allow him to be their champion. They put armor on him, but it was too heavy. He took it off, and went to meet Goliath with his staff, a slingshot, and five smooth stones in his pouch.

David was not modest or shy as he told Goliath what Goliath least wanted to hear:

"This day will the LORD deliver thee into mine hand; and I will smite thee, and take thine head from thee; and I will give the carcasses of the host of the Philistines this day unto the fowls of the air, and to the wild beasts of the earth; that all the earth may know there is a God in Israel." (Verse 46)

Some of the Philistines come running, not to Farrakhan, but to any black person they can find, asking: "Did you hear what that man said about us? What are you going to do about it?"

For many people, Minister Farrakhan is a black David going one-on-one against the Philistines that bestride the land, abusing their power and generally — messing over black folk. But when Farrakhan issues his challenge, no Goliath comes forth. Rather, some of the Philistines come running, not to Farrakhan, but to any

black person they can find, asking: "Did you hear what that man said about us? What are you going to do about it?"

Now, I have been asking myself: why must I do something about Minister Farrakhan? Those he condemns are not without power, not without money, not without guns. A sad history serves as proof that they know how to use all three. Why me?

"Oh," I am told, "that man is hurting your cause." But the cause of black people has been under attack for three hundred years, not by one black man, but by the dominant white society. The suggestion that our current plight would be relieved if Farrakhan would just shut up is both naive and insults our intelligence. It also reveals more about those who would silence him than they likely want uncovered.

Remember when, a few years ago, Farrakhan was scheduled to speak in, I think, Madison Square Garden in New York City. The then mayor ordered his black staffers not to go and to speak out and denounce Farrakhan. Some did as they were told. Others, to their credit, refused to condemn and did attend. Again I ask, why them? Why me? Why us?

My friends, I think I have the answer and so does every lawyer in this room. The answer is in the law of standing. More specifically, the answer is in what I want to call "The Law of Racial Standing."

The standing doctrine requires the party who invokes the court's authority "to show that she personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."¹

Sung-Hee Suh, a third year student who co-taught my civil rights seminar last Fall, made a point in class discussion that pointed me toward this special extra-legal form of standing. She noted that while the law grants litigants standing based on their having sufficient personal interest and involvement in the issue to justify judicial cognizance, black people (while they may be able to get into court) are denied standing-type legitimacy when they discuss real world experiences with racism or attempt to give a favorable evaluation of another person of color's work.² Our statements are deemed "special pleading" and thus not entitled to serious weight. If one of us recommends a person of color for a position or for a promotion the response will all too often contain the

scarcely concealed question, "Who else likes this person?" We know *who* "who else" is.

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When, as my first lawyering job, I went to work at the Justice Department back in 1957, there were only two or three black lawyers there. One of them, Maceo Hubbard, had been there for years and taught me a lot that I had not learned in law school. "When white folks ask you for an evaluation of another black," Maceo warned me, "you have to remember one thing. However carefully you can say it, you can hurt the brother, but you can't help him."

Maceo's sage advice has contemporary significance for our question. For as I told my student Sung-Hee, while she is correct that our statements about the conditions of blacks are diluted and our recommendations of other blacks taken with a grain of salt, there is one exception to the lack of standing phenomenon. You guessed it. The exception occurs when blacks disparage blacks whose actions are upsetting whites. Suddenly, our statements are given greater value than they are worth. Thus, Thomas Sowell³ and Walter Williams⁴ gained national celebrity as experts on race based upon their willingness to minimize the effects of racism on the lowly status of blacks. The fact that most blacks dispute these assessments is mostly ignored.

Similarly, when my colleague Randy Kennedy⁵ suggested that minority scholars have no special legitimacy in writing about race, and that their scholarship, measured by traditional standards, is flawed, his criticism was given enormous attention.⁶ "Even Randy Kennedy says their writing is bad." If Randy had written a piece lauding critical race writing, his article would have gained little attention. In fact, Randy has written a half-dozen fine articles giving white folks Hell. None of them have been

1. *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982).

2. Actually, gaining legal standing has often served as a barrier for blacks seeking relief from undeniable racial abuse. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984), denying standing to black parents contending that the IRS had not carried out its obligation to deny tax-exempt status to private schools practicing discrimination based on race as approved in *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983). The court in *Allen* cites *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Rizzo v. Goode*, 423 U.S. 362 (1975); and *Los Angeles v. Lyons*, 461 U.S. 95 (1983). In all three cases plaintiffs sought injunctive relief against system-wide law enforcement practices, and were denied standing for failing to allege a specific threat of being subjected to the challenged practices.

3. Senior Fellow, the Hoover Institute. See Sowell, *AFFIRMATIVE ACTION RECONSIDERED: WAS IT NECESSARY IN ACADEMIA?* (1985), *AMERICAN ETHNIC GROUPS* (1978), *CIVIL RIGHTS: RHETORIC OR REALITY* (1984), *COMPASSION VERSUS GUILT AND OTHER ESSAYS* (1987), *CONFLICTS OF VISIONS* (1987), *ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE* (1983), *JUDICIAL ACTIVISM RECONSIDERED* (1989), *EDUCATION: ASSUMPTIONS VERSUS HISTORY: COLLECTED PAPERS* (1986), *ETHNIC AMERICA: A HISTORY* (1981), *KNOWLEDGE AND DECISIONS* (1980), *MARKETS AND MINORITIES* (1985), and *RACE AND ECONOMICS* (1975).

4. See Williams, *AMERICA: A MINORITY PERSPECTIVE* (1982), and *STATE AGAINST BLACKS* (1982).

5. Associate Professor of Law, Harvard Law School.

6. See Kennedy, *Racial Critiques of Legal Academia*, 102 *HARV. L. REV.* 1745 (1989).

covered by the New York Times.⁷

Now, I can hear some of you out there whispering. "Poor old Derrick. He has been over there too long. His racial paranoia has gotten him. He is taking a natural phenomenon of human nature and calling it racism. It must be true that Harvard destroys more black folks than bad liquor. So sad."

I hear you and, of course, I understand that when Lee Iacocca lauds Chrysler cars, we take his words with a grain of salt. But if he were to criticize Chrysler, it would be front-page news. Any laudatory statement by a person affiliated with a product or institution is viewed as to some extent, puffing. Criticism or whistle-blowing by an insider, on the other hand, wins immediate attention.

The problem is that a peoples' petitions protesting racism are a far cry from a company's product-enhancing puffery. Not only are our complaints discounted, but we are deemed not trustworthy in matters regarding race. There is a general assumption that we, unlike whites, cannot be objective on matters of race and will favor our own regardless. It is that deep-seated belief that fuels a continuing effort — despite all manner of Supreme Court decisions intended to curb the practice — to keep black people off juries in cases involving race. Black judges hearing racial cases are eyed suspiciously and, sometimes, asked to recuse themselves in favor of a white judge without those making their request even being aware of the paradox in their motions.

But criticism of blacks doing or saying things upsetting to whites when that criticism comes from other blacks is welcomed with a special glee reflective of a character trait that, were it not so common, would be diagnosed as racial schizophrenia. Our critical comments are often distorted and, when the need arises, our criticism is magnified to censor, or our condemnation used to damage or destroy careers. In the case of Minister Farrakhan, those who don't like what he says want to use our criticism to isolate, separate, and silence him, not in the eyes of his followers, but in the minds of whites who believe that the threat he represents can be defused by our responding to their plaintive plea: "Tell us it ain't so."

There is a double standard here. One need not agree at all with Farrakhan's statement about Judaism being a gutter religion to understand that Israel has sought to hide many deeds against black Africans, black Jews, and the Palestinians under the cloak of religion. Moreover, when Farrakhan attempts to explain that his statement was aimed at Israel as a state and not Judaism as a religion, his explanation is rejected out-of-hand. The attitude seems to be: "You said it, and thus you must be condemned for all time."

7. See, e.g., *Race Relations Law and the Tradition of Celebration: the Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986), *Commentary: Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986), *Colloquy: A Reply to Philip Elman*, 100 HARV. L. REV. 1938 (1987), *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

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The Reverend Jesse Jackson has experienced a similar "lifetime renunciation," notwithstanding his frequent and fervent apologies for his regrettable "Hymie and Hymie town" remarks made during his 1984 presidential campaign. I understand why a group is upset by what it deems racial or religious insults, but I doubt that I am alone in understanding why blacks who lack any real power in this society are not forgiven, while whites, including those at the highest levels of power, are pardoned. For example, many Jewish spokespeople complained bitterly when President Reagan went to Bitburg, but they do not continue to harass him everywhere he goes. No one denounced him as anti-Semitic for going. More significantly, neither President Bush nor whites who support him are called on to condemn Reagan in order to prove that they are not anti-Semitic.

One need not agree with Farrakhan that African-Americans need to separate from this country to understand that, after three hundred years of trying and not yet having the acceptance in this country that non-English speaking white immigrants have on their first day on this soil, we need to be thinking (if not yet doing) something other than singing "We Shall Overcome." Whatever his rhetorical transgressions, Minister Farrakhan and his church are giving the most disadvantaged black people reason to hope when most of the country and more than a few of us have written them off. His television hosts have given him credit for cleaning up a neighborhood in Washington,⁸ and yet they question his motives for accomplishing what few government officials have even seriously tried.

I am troubled that some Jews view Farrakhan as anti-Semitic, even if they are wrong. But I am infinitely more disturbed by my helplessness in the face of the not-so-gentle genocide going on in our inner cities. If Farrakhan, whatever his views, is able to bring inspiration to a people who have every reason for despair; if he has the ability to back up his fiery rhetoric with grass roots projects that restore pride and safety to neighborhoods the

8. The Nation of Islam and its Abundant Life Clinic received a citation from the City of Washington, D.C. for expunging Washington's Mayfair Mansions of violent crack dealing. The Nation of Islam continues to patrol the area.

nation has written off, then folks, I am for Farrakhan.

When President Lincoln was told that General Grant should be relieved of his command because of heavy drinking, Lincoln noted that Grant was the only Union Army leader able to win battles. Rather than chastise Grant, Lincoln ordered a keg of liquor sent to each of his generals. Lincoln was not advocating alcoholism; he was trying to win a war. Similarly, when we support Minister Farrakhan or at least refuse to criticize him publicly, we are not endorsing insensitive remarks, we are trying not to harm his effort to save a people. That people is ourselves.

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I notice that those whites so anxious for me to "do something" about Farrakhan are not usually those who are themselves doing anything about the racism he condemns. Of course, I recognize that Farrakhan's statements can be hurtful to many whites who are doing a great deal to fight racism and alleviate its devastation. I think it correct that Farrakhan is not talking about such individuals but about the group to which they belong and the power that all members of that group — good and bad — are able to exercise over all of us in this society because we are black and they are white.

A friend with whom I discussed Farrakhan's abilities was not moved. He said, "Even if everything you say about him is correct, he is still a bigot. Why can't I call him what I think he is?" In effect, my friend was asking, even given the perverse weight white society gives to black on black criticism, must persons of color remain silent if they strongly disagree with statements or actions by other blacks?

There is, of course, no easy answer to that question. It is clear, though, that we must be extremely sensitive to the dangers of our criticism. And, we must be candid and very cautious about the rewards this society bestows on those blacks willing to denigrate a troublesome black. To the extent we deem it necessary, our criticisms can be conveyed in private or in group sessions. Someday, such caution may be unnecessary, but some day is not yet. That day may never come unless the nation's response to the death and destruction in our inner cities moves beyond its current law and order orientation.

We know that poverty based on the unavailability of meaningful employment is the major cause of inner-city despair. But when blacks suggest racism as a major cause of the problem, our views are lost by the force of a society determined to blame black victims. Even data from respected white sources is ignored when it does not conform to the comforting image. A recent study published in the prestigious New England Journal of Medicine found that in the period from 1979 to 1980 — before AIDS,

before crack — "Black men in Harlem were less likely to reach the age of 65 than men in Bangladesh."⁹ In the period studied, 2,421 people died needlessly — that is 800 a year more beyond the number that would have died if Harlem shared the health of the nation. Twenty-two percent of the excess deaths were due to homicide and drug abuse, but most were due to undetected cancer, strokes, and heart attacks due to high blood pressure.

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You did not hear about this study? I am not surprised. There was virtually no coverage of this study in the media. In contrast, an article in the same issue questioning the value of oat bran in controlling cholesterol, received splashy coverage everywhere. Ralph Ellison's much acclaimed novel, *INVISIBLE MAN*,¹⁰ depicted a category of human beings whose suffering was so thoroughly ignored that they, and it, might as well not have existed. The only change in the thirty-eight years since *INVISIBLE MAN* was published is that the number of those suffering and ignored has increased.

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I have not talked to him, but I rather imagine that Minister Farrakhan understands the law of racial standing. He knows that condemning racism and poverty and the devastation of our communities in the abstract is inadequate and ineffective. Racism is not some great omnipotent evil in the sky that rains down disadvantage on poor black folk. Rather, racism is a resource, an entitlement, almost a property right really, by which every white person is able to gain priority and preference over people who are not white as to all things of value that are in short supply. In 1896, the Supreme Court's "separate but equal doctrine" in *Plessy v. Ferguson*¹¹ gave the law's imprimatur to that racial priority.

The *Brown*¹² decision overruled *Plessy* while (perhaps unknowingly) maintaining the concept, custom and tradition of white priority. How did this happen? *Brown* denounced segregation as an evil capable of doing irreparable damage to hearts and minds of young black children. But the decision treated the evil like some biblical plague that had descended on black children from the skies and without human intervention. The *Brown* court made no effort to identify wrongdoers or propose effective remedial steps that would aid victims at the expense of

9. The study was reported in an op-ed column: Melvin Konner, Still Invisible, and Dying, in Harlem, New York Times, February 24, 1990, at 25, c. 1.

10. Ellison, *INVISIBLE MAN*, 1952.

11. 163 U.S. 537 (1896).

12. *Brown v. Board of Education at Topeka*, 347 U.S. 483 (1954).

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those who did them harm. The court treated segregation and racism as *damnum absque injuria*.¹³

The Court's refusal to hold anyone responsible for the horrendous damage of segregation nurtured the notion that racial inequality was an Act of God, and would disappear without pain or loss to whites, who had been its direct or indirect beneficiaries. Over time, this view developed into a norm: whites *ought* not to suffer to make room for blacks in the absence of proof of discrimination so gross that the defendants can be viewed as exceptions, wrongdoers not entitled to expectations of the racial status quo.¹⁴

When we sought relief against discriminatory policies that were not racist on their face, like civil service tests, college admission standards, and trade union qualifications, but which, as administered, excluded blacks, many whites screamed foul and "reverse discrimination." That is why so many whites who claim to support civil rights oppose affirmative action and other remedies that may disadvantage so-called "innocent whites." None of this is new, but when blacks articulate the obvious, the old racial standing problem serves as an automatic jamming device and our message never gets through.

As I say, I think Minister Farrakhan understands all of this and has decided that the only way to be heard over the racial standing barrier is to place the blame for racism where it belongs. Using language that is direct, blunt, even abrasive, he forthrightly charges with evil those who do evil under the racial structure that protects them and persecutes us, that uplifts them regardless of merit, and downgrades us regardless of worth. If he is sometimes outrageous, who here will say that his words are more dangerous or more damaging than the outrages perpetrated continuously on our people?

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13. The Court may not deny that an actual harm and loss has occurred. What it holds is that the law does not recognize that harm as an injury that should be compensated. So, factual race-based harm can occur but without legal injury.

14. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), (invalidating state efforts to redraw boundaries so as to exclude all blacks from cities and thus voting in city elections); *Loving v. Virginia*, 388 U.S. 1 (1967), (striking down anti-miscegenation laws).

I am not now talking about what Bill Wilson calls "The Truly Disadvantaged," as sad as their plight is. I am talking about us and what we endure, despite our success and our status. I promised your sponsors a short talk that is almost ended, but were I to ask everyone here to come forward and testify to only one incident of racial rejection, humiliation, or hurtful insensitivity, the dance music would never start and we would be here until dawn.

Most of us work hard. We earned what we have and deserve to have a fine dinner in a beautiful setting, and to anticipate an evening of dancing at the end of a tough week. But if enjoyment is not sin, neither is a straight-talking Muslim minister who is willing to say what many of us think, while challenging the very foundations of the racism without which I am not sure this country can function.

Enjoy this evening. On Monday morning, let us all promise to consider how we might break the barrier of racial standing. Our chances of holding scholarship dinners like this for many more years may well depend on how effectively we — in our own way — are able to emulate Minister Farrakhan's work, rather than condemn his words.

