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Cynthia Elaine Tompkins*

I. INTRODUCTION

A couple of decades and some years ago, when I was a civil rights attorney in Washington D.C., I stopped by a bookstore café for a quiet lunch and to review a case file before an afternoon meeting. A book jacket of a man looking forward with intention and purpose captured my attention. The words on the cover corroborated his gaze: *Confronting Authority: Reflections of an Ardent Protester*.[1] He was Derrick Bell, a civil

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This Article reviews the history of African Americans and examines vital race and law issues. With loving gratitude and in honor of my African American ancestors, I dedicate this Article to each of them, especially my parents, William David Tompkins and Marian Evonne Neal Tompkins. They devoted their lives to pursuing justice, building community and family, and leaving their descendants an inheritance of love, courage, and resilience.

1. DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER (1994).

rights attorney, activist, law school professor, and writer. I had read several of Professor Bell's law review articles but not his autobiographical writings and had never seen his photograph before seeing the dignified cover, so I purchased the book and read it that evening. Bell's words were stunning: "Four years have passed since I announced on April 24, 1990, that I would take an unpaid leave from my position on the Harvard Law School faculty until at least one woman of color was appointed to the faculty on a permanent basis."[2]

The "ardent protester's" reflections on his decision to take unpaid leave from his prestigious law school faculty position were unmatched.[3] It is rare for one to consider, much less relinquish prestige, tenure, and income for a declaration of principled reasons. And yet, Bell was confident that Harvard Law School (HLS), like all law schools, needed tenured women of color on the faculty.[4]

Before joining the HLS faculty, Bell graduated from the University of Pittsburgh School of Law in 1957 and started his legal career as an attorney in the United States Department of Justice (DOJ) Honor Graduate program in Washington, D.C., eventually assigned to the DOJ

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2. *Id.* at 3. Bell addressed the primary reasons he chose to take unpaid leave. He describes his objection to the Harvard Law School's "refusal to hire and tenure a woman of color." *Id.* at 4. Bell notes, that the faculty had an inadequate record of hiring women of color. Since Bell's initial entry at the Harvard Law School in 1969, and despite the claims of good faith efforts to diversify the faculty, no women of color had been added to the full-time faculty as tenure or tenure track professors. *Id.*

3. No other HLS professor staged a similar protest based on what Bell considered principled reasons.

4. CONFRONTING AUTHORITY, *supra* note 1, at 4–6. Bell maintained that faculty at Harvard and other elite schools gave tenure consideration to individuals with elite backgrounds from Ivory League schools, ignoring the valuable skills that candidates with diverse backgrounds and practice experience bring to the legal academy. *Id.* Even though many students and some colleagues admired his protest, Bell lamented that his efforts may have achieved the opposite effect. He stated that when Harvard continued to hire those with elite credentials "while not guaranteeing excellence, [it generally would] serve to exclude minorities as well as ethnic and working-class whites." *Id.* at 4. Bell added additional details about the Harvard Law School faculty deliberations and hiring decisions, worth noting here:

> In the first three years after my protest began, several white men and a few white women joined the faculty, but the school did not add a single, new diverse candidate. Two tenure-track black professors, Charles Ogletree and David Wilkins, both of whom were hired as assistant professors years before, were granted tenure, and another black professor, Scott Brewer, already hired to join the law school as an assistant professor, began teaching during this period. The remaining appointments were all white men and women.

Id. at 168.

Civil Rights division.[5] His time at the DOJ was brief, as supervisors found his participation in the National Association for the Advancement of Colored People (NAACP) a conflict of interest. They asked Bell to withdraw his NAACP membership, and he refused; DOJ supervisors responded by giving him mundane work assignments and a new workstation in the hallway.[6] Bell resigned.[7]

He returned to his home state of Pennsylvania to work as the Executive Director at the city of Pittsburgh's NAACP branch office.[8] A short time later, Bell met United States Supreme Court Justice Thurgood Marshall, who was, at that time, the Director and Counsel of the Legal Defense Fund (LDF).[9] Marshall created the LDF as a civil rights organization to address racial injustice.[10] Initially, LDF was a subdivision of the NAACP, but since 1957, it has been a separate organization.[11] Marshall offered Bell a job at the LDF New York office.[12] Bell accepted the position and said he spent "six exciting and rewarding years" from 1960–1966, advancing the legal strategy in about 300 school desegregation cases that helped shape his scholarship when he became a law professor.[13] In 1969, when appointed to the HLS faculty, Bell was the first Black[14] male; he earned tenure two years later.[15]

For years, Bell was concerned about the lack of full-time Black women on the HLS faculty, so he challenged the Dean and faculty's explanations for the Law School's failure to appoint tenured women of color.[16] In 1981,

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5. THE DERRICK BELL READER 4 (Richard Delgado & Jean Stefancic, eds. 2005); *see About Biography of Professor Derrick Bell*, DERRICK BELL OFFICIAL SITE (Apr. 5, 2023), https://professorderrickbell.com/about/.

6. *About Biography of Professor Derrick Bell*, *supra* note 5.

7. *Id.*

8. *Id.*

9. *Id.*; *see* Derrick Bell New York University Archive Papers, M 138_No 21 Folder 49, page 68; *see also Thurgood Marshall: LDF Founder and President and Director-Counsel, 1940–1961,* LEGAL DEF. FUND (Apr. 5, 2023), https://www.naacpldf.org/about-us/history/thurgood-marshall/ (discussing Justice Marshall's professional background as founder and director-counsel of LDF).

10. *History: We are the Country's First and Foremost Civil and Human Rights Law Firm*, LEGAL DEF. FUND (Apr. 5, 2023), https://www.naacpldf.org/about-us/history/full/.

11. *Id.*

12. DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 3 (2004).

13. THE DERRICK BELL READER, *supra* note 5, at 4–5; SILENT COVENANTS, supra note 12, at 3, *see generally* Derrick Bell Papers *supra* note 9, at 68, M 138_No 21 Folder 49.

14. All references to race, "Black" and "White," will be capitalized in this Article except when used in quoted material.

15. THE DERRICK BELL READER, *supra* note 5, at 6.

16. *See* CONFRONTING AUTHORITY, *supra* note 1, at 42–80.

he resigned, leaving the school for a few years to serve as Dean at the University of Oregon Law School (OLS).[17] Bell's departure left HLS with no tenured faculty of color and a gap in the curriculum with no one prepared to teach his Constitutional Law and Minority Issues course. Black law students protested the curriculum gap and wanted the HLS to, in their words, "Desegregate Now!" and employ full-time tenured Black faculty.[18] Their protests grew after the Dean responded with an explanation that the students considered commonly offered by organizations that fail to effectively recruit, hire, and retain diverse people of color: the Dean noted an insufficient pool of qualified or willing applicants.[19]

When Bell began serving as Dean of the OLS, most of the student body was Asian American.[20] He served as the OLS dean for five years.[21] Still, with no Asian American faculty, Bell wanted to hire an Asian American woman, but the faculty voted against a candidate he considered well-qualified.[22] Bell said he found their decision untenable, so he resigned, asserting the need to follow the dictates of his conscience.[23] He taught a constitutional law course at Stanford Law School and then returned to HLS.[24] Still, his time there again rested on whether the faculty would shatter the glass ceiling and appoint a permanent woman of color.

After two years back at HLS, nearly two decades since he first joined the faculty, Bell remained concerned that his and student protests of the Law School's failure to hire women of color had not resulted in any faculty appointments.[25] So, he decided to leave the school again; this time, he

17. THE DERRICK BELL READER, *supra* note 5, at 9; CONFRONTING AUTHORITY, *supra* note 1, at 44. Bell expressed his surprise to discover that Oregon, although not considered one of the elite schools, like Harvard and other elite schools, had similar hiring practices. He stated: "Oregon, too, was apprehensive about hiring applicants with impressive experience in practice or teaching at other schools unless they also had earned high grades at a prestigious law school. Never mind that many of them had more modest credentials." *Id.* at 44–45.

18. Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward,* 43 CONN. L. REV. 1253, 1268 (2011); *see* CONFRONTING AUTHORITY, *supra* note 1, at 72–73.

19. THE DERRICK BELL READER, *supra* note 5, at 12; Crenshaw, *supra* note 18, at 1268.

20. CONFRONTING AUTHORITY, *supra* note 1, at 45.

21. DERRICK BELL, ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH 3 (2002).

22. *Id.* at 3–4; THE DERRICK BELL READER, *supra* note 5, at 10.

23. *See* ETHICAL AMBITION, *supra* note 21, at 3–4; THE DERRICK BELL READER, *supra* note 5, at 10; *see* CONFRONTING AUTHORITY, *supra* note 1, at 95.

24. THE DERRICK BELL READER, *supra* note 5, at 10–11.

25. *Id.* at 12.

went without pay for two years in a bold protest.[26] Nothing changed. The faculty hired no women of color during his absence.[27] Therefore, Bell said, "I refused to return, citing the school's failure to act on my protest, Harvard dismissed me and forfeited my tenured position."[28] He accepted a visiting professor job at New York University law school and taught there as a visiting law professor until he died in 2011.[29] Bell had decided he could live without the prestigious tenure appointment at the HLS. He wrote:

> Leaving jobs and engaging in other activities to protest what I felt was wrong did not destroy my career. To the contrary, those actions, while not always easy to take, enriched my life and provided me with the perhaps unrealistic but no less satisfying sense that I was doing God's work.[30]

Publicity surrounding Bell's protests raised awareness throughout the legal academy of the benefits students gain from a faculty that includes tenured women of color with legal practice experience and distinct backgrounds. Bell believed women of color bring to law schools perspectives and experiences from communities of color, enhancing students' legal education and better preparing them to represent people from different backgrounds.[31] His protests and influence were widespread. Countless scholars recognize Bell's immense contributions

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26. *Id.*; ETHICAL AMBITION, *supra* note 21, at 4.

27. *See* Crenshaw, *supra* note 18, at 1269–70.

28. ETHICAL AMBITION, *supra* note 21, at 4. Bell called the University's decision to dismiss him from the faculty "a draconian result;" he believed a different decision would have been issued for a professor the University wanted to retain. CONFRONTING AUTHORITY, *supra* note 1, at 99. Bell considered these factors implicit in the University's deliberations:

> Had the case involved a professor whom they really did not wish to lose, the University would certainly have found some strategy that would have avoided the draconian result in my case. The problem, quite simply, is that to the people applying the rules, the interests and values of blacks and other outsiders seldom merit priority in the absence of a crisis or when nonrecognition of such interests is cost free.

Id.

In 1998, Lani Guinier became the first Black female tenured at Harvard Law School. Brett Milano, *In Memoriam: Lani Guinier 1950–2022*, HARV. L. BULL. (Jan. 7, 2022), https://hls.harvard.edu/today/in-memoriam-lani-guinier-1950-2022/.

29. THE DERRICK BELL READER, *supra* note 5, at 13; Jelani Cobb, *The Man Behind Critical Race Theory*, THE NEW YORKER (Sept. 13, 2021), https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory.

30. ETHICAL AMBITION, *supra* note 21, at 4.

31. *See* Derrick Bell New York University Archive Papers, M 138_No 21 Folder 49, page 64.

to their success in the legal academy.[32] Angela Onwuachi-Willig,[33] Dean of the Boston University School of Law, an expert in Critical Race Theory, prolific scholar and professor of law, and among many other outstanding accolades, founder of the Lutie A. Lytle Black Women Law Faculty Workshop, assisting women in gaining tenure at law schools throughout the United States, said this about Bell:

> In the end, Professor Bell taught us—meaning the many professors of color who followed him into the academy—how "to have the nerve" to both survive and thrive in our institutions as teachers, scholars, and citizens, and he did so with just his deep belief in our true belonging in academia. Over and over in his career, he displayed that belief by walking away from privilege, power, and prestige in academia when other law professors failed to hold his same strong belief in our belonging on law school faculties and instead refused to extend to candidates of color any offers for tenure-track or tenured employment.[34]

During his four-decade career in the legal academy, Bell wrote over 100 law review articles and ten books.[35] When he finished his work and journey on earth, some may have assumed that his bold scholarly viewpoints and research findings would diminish in importance, but nothing could be further from the truth. Bell's civil rights counsel, activism, teaching, and, significantly, his critical race scholarship are remembered and cited extensively within and outside the legal academy.[36] He studied and examined issues of racial justice and racism. He is best known for his research and writing, examining systemic racism and concluding that racism is permanent in the United States and institutionalized in law.[37]

Bell's dedication to developing scholarship that addressed critical race theories was opposed and criticized.[38] Public resistance has been extreme recently (2020–2023), with critics and opponents categorizing most teaching about race and the relationship to law, systemic racism, racial

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32. *See Tributes in Memory of Professor Derrick Bell*, DERRICK BELL OFFICIAL SITE (Apr. 5, 2023), https://professorderrickbell.com/tributes/.

33. *Angela Onwuachi-Willig, Biography*, BOS. UNIV. SCH. OF L. (Apr. 4, 2023), https://www.bu.edu/law/profile/angela-onwuachi-willig/.

34. Angela Onwuachi-Willig, *On Derrick Bell As Pioneer and Teacher: Teaching Us How to Have the Nerve*, 36 SEATTLE UNIV. L. REV. xlii, xlvi (2013).

35. THE DERRICK BELL READER, *supra* note 5, at 14.

36. *See generally Derrick Bell*, HEIN ONLINE (Apr. 4, 2023), https://heinonline.org/HOL/AuthorProfile?search_name=Bell%2C+Derrick&collection=journals&base=js.

37. *Id.*

38. *See infra* Part II C.

justice, and race history as Critical Race Theory (CRT),[39] despite CRT's origination and general application primarily for law students in the legal academy.[40] Educators and scholars argue that the criticisms marginalize teaching and aim to deter academics from writing about the necessary topic of American race history, racial justice, and the relationship between race and law.[41]

What is systemic racism, and is it the same as structural racism? Cambridge Dictionary defines systemic racism as "policies and practices that exist throughout a whole society or organization, and that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race."[42] Similarly, structural racism includes: "Laws, rules, or official policies in a society that result in and support a continued unfair advantage to some people and unfair or harmful treatment of others based on race."[43]

What is Critical Race Theory? Professor Derrick Bell provided this definition: "[C]ritical race theory is a body of legal scholarship . . . a majority of whose members are both existentially people of color and ideologically committed to the struggle against racism, particularly as

39. *Id.* (discussing the extensive 2020–2023 opposition to CRT education and educators).

40. Professor Kimberlé Crenshaw has often been mentioned as the professor who named the theory Critical Race Theory; Neil Gotanda and Stephanie Phillips, who helped Crenshaw organize the first CRT workshop, have also been noted as originators of the theory's name. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxvii (Kimberlé Crenshaw et al., eds. 1995). CRT originated in law schools in the mid-1980s. Despite scholars citing Crenshaw and other scholars who planned the first CRT workshop as the scholars who named the theory, many, including Crenshaw, believe Professor Derrick Bell is the first scholar to write critical race theories and the most influential person who has written about CRT.

41. *See* Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-censoring*, WASH. POST (Feb. 4, 2022), https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/; Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting A Chill On Their Lessons*, NPR WUNC (May 28, 2021), https://www.npr.org/2021/05/28/1000537206/teachers-laws-banning-critical-race-theory-are-leading-to-self-censorship; *See also* Daniel Golden, *Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching*, PROPUBLICA (Jan. 3, 2023), https://www.propublica.org/article/desantis-critical-race-theory-florida-college-professors (discussing the difficulties of teaching various racial topics in colleges and universities).

42. *Systemic racism*, CAMBRIDGE DICTIONARY (Apr. 5, 2023), https://dictionary.cambridge.org/us/dictionary/english/systemic-racism.

43. *Structural racism*, CAMBRIDGE DICTIONARY (Apr. 5, 2023), https://dictionary.cambridge.org/us/dictionary/english/structural-racism (last visited Apr. 5, 2023).

institutionalized in and by law."[44] Bell also declared, "[t]hose critical race theorists who are white are usually cognizant of and committed to the overthrow of their own racial privilege."[45]

This Article discusses Critical Race Theory. It is vital to consider the origin and founder's intent to understand an area of scholarship that has developed over forty or more years. Many, if not most, critical race theorists credit Derrick Bell as the professor who founded or inspired Critical Race Theory.[46] As discussed, Bell served as lead civil rights attorney in over 300 civil rights school desegregation cases.[47] Then, he taught law courses for over forty years, examined race and law topics, and wrote numerous law review articles and books.[48] He also made innumerable speeches, and as a scholar, he studied the root causes of racism and patterns of discrimination.[49] Bell's work as a civil rights attorney and law professor mainly focused on race and law issues impacting Black people in America.[50] Part II, A and B examine CRT by studying two of Derrick Bell's earliest law review articles that address critical race issues, written before legal scholars officially named the area of study Critical Race Theory. The articles discuss essential issues of race in school desegregation litigation following the landmark Supreme Court of the United States decisions in *Brown v. Board of Education I and II*.[51]

Over time, Bell's assessment of history, the Nation's laws, civil rights litigation experiences, research findings, and observations led him to conclude that school desegregation may not have been the best result for Black families.[52] Additionally, he concluded that legal counsels' litigation

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44. Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 898 (1995).

45. *Id*.

46. As addressed, many, if not most, critical race theorists recognize Bell as the professor who inspired or founded CRT. Given this distinction, this Article addresses Bell's scholarship as the founder of Critical Race Theory.

47. THE DERRICK BELL READER, *supra* note 5, at 5.

48. *See generally,* Derrick Bell, HEIN ONLINE, *supra* note 36 (the recent Hein Online source notes 6,210 incidents of Bell's articles being accessed in the past twelve months, and his articles have been cited 3,762 times in the last five plus years).

49. *Id.*

50. *Id.*

51. 347 U.S. 483 (1954) (*Brown I*). Brown v. Board of Education II was decided the next year, ordering school officials to "admit [students] to public schools on a . . . nondiscriminatory basis with all deliberate speed." Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (*Brown II*).

52. *See generally* Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, 85 YALE L.J. 470, 514-516 (1976) (discussing the civil rights lawyer's litigation goals and distinct wishes of Black parents, also suggesting Bell's concerns about the conflicting litigation goals).

aims contradicted Black parents' educational goals for their children.[53] He also maintained White people only give up rights if it is in their interest, a practice that Bell called "Interest Convergence," also called "Material Determinism."[54] Part II A and B evaluate Bell's conclusions, reasoning, and assessments on these and other points and observe the conflicting narratives opposing his critical race scholarship.

Part II C addresses Bell's conclusions that racism is systemic and permanently institutionalized in the laws of the United States of America and observes critics' opposing views. Additionally, Part II C considers how, why, and when the recent opposition (2020–2023) to CRT began. Further, the discussion describes criticisms that CRT is Marxist and that educators should not teach or include CRT textbook material and writings in school curricula. Part II C also observes complaints that CRT is the antithesis of a Christian worldview.

A vital point is worth noting: The controversy surrounding teaching race history and racial justice issues in secondary schools, colleges, and universities—currently described by most critics as the catchall phrase "CRT"—deserves observation and study.[55] However, given the voluminous topics concerning CRT, this Article's discussions will mainly consider Bell's critical race theories developed for law school pedagogy and scholarship and how recent criticisms could impact legal education. Therefore, as the examination unfolds, this Article does not review whether educators should teach CRT in secondary schools, colleges, and universities.

The study aims to draw attention to the legal academy and fundamental questions, including whether law schools should remove CRT founder Derrick Bell's critical race scholarship from courses because of criticisms of his theories. If law schools exclude Bell's scholarship, CRT courses, and other scholars' writings addressing CRT or systemic racism, will that harm law students' legal education? And since CRT critics seem to categorize education on systemic racism and disparities as CRT, if those topics, many addressing constitutional law questions, are removed from law school class discussions, will law students be adequately trained as future attorneys, judges, and policymakers to address vital race law issues or effectively serve as legal professionals?

Part II's review does not engage opposing views as a contentious debate, as this Article declines an argument for or against CRT. Winning

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53. *Id.*

54. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); *see* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 9 (2001).

55. *See supra* note 40.

a dispute on conflicting viewpoints, including whether America is presently systemically racist or whether CRT is Marxist, seems less meaningful than examining the origin and tenets of CRT, opponents' conflicting views, and discussing potential outcomes if law professors remove topics categorized by critics as CRT from law school class discussions. Part II raises vital questions and observes incompatible viewpoints of CRT, and Part III considers the law school dilemma: outcomes awaiting law professors if they aim to remove case law and scholarship that evaluates critical race and law issues and all influences of CRT and founder Derrick Bell from law school curricula.

II. DERRICK BELL'S CRITICAL RACE SCHOLARSHIP AND CONFLICTING CRITICS' VIEWPOINTS

Derrick Bell's assessment of American race history and scholarship informed his conclusion that "Black people are the magical faces at the bottom of society's well."[56] African Americans' history of racial injustice in the United States of America has been complex and long-lasting. From the seventeenth to mid-nineteenth centuries, 246 years, White enslavers oppressed millions of African Americans on plantations. Then, after slavery ended in 1865, the formerly enslaved people endured another century of discrimination, racism, and vigilante attacks from citizens groups that included the Ku Klux Klan in the Southern States.[57] And many enslaved descendants, by 1910, began migrating to northern States and other areas outside the South and encountered widespread prejudice, poverty, and redlined neighborhoods that marked areas with large populations of Black people to taint Black residents as unqualified for mortgages.[58]

For centuries, federal and state laws, including the Fugitive Slave Act[59] and several Supreme Court of the United States cases, most notably *Dred Scott v. Sandford,*[60] and *Plessy v. Ferguson,*[61] upheld racism and discrimination and failed to provide adequate protection of the law against the inequality and marginalization African Americans

56. *See* DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL (1992).

57. *See generally* Cynthia E. Tompkins, *Title VII at 50: The Landmark Law has Significantly Impacted Relationships in the Workplace and Society, but Title VII has not Reached its True Potential*, 89 ST. JOHN'S L. REV. 693 (2015) (discussing the history of African Americans).

58. *Id.* at 766; The Great Migration (1910-1970) National Archives, https://www.archives.gov/research/african-americans/migrations/great-migration (last visited May 12, 2023).

59. Act of Sept. 18, 1850, 9 Stat. 462 (1850).

60. 60 U.S. 393 (1857).

61. 163 U.S. 537 (1896).

endured.[62] Legal segregation, known as Jim Crow, was prevalent throughout the South, including in workplaces, public accommodations, and housing, continuing in public schools until 1954.[63] The Jim Crow legal segregation in schools ended when the United States Supreme Court decided *Brown v. Board of Education I and II*.[64] Still, for years, many Southern State officials failed to follow the court's mandate of desegregation in *Brown* "with all deliberate speed." In 1964, President Johnson signed the Civil Rights Act[65] and Voting Rights Act in 1965[66] after a decade of civil rights protests and marches, ending legal Jim Crow segregation in areas including employment and public accommodations. The Voting Rights Act sought to remove state-imposed barriers preventing and deterring African Americans from enjoying voting privileges, and since 1965 vast disparities in income, education, health care, and other areas have existed between Black and White people.[67]

It is worth pausing to contemplate the brief synopsis of African American history chronicled here and not debate; instead, consider this question: does the historical summary confirm the following point or leave it in dispute? The United States of America has a long, egregious history of systemic, structural racism involving harmful, unfair treatment and discrimination against Black people based on race through permissive laws, policies, and practices.

Beyond the Nation's race history, as Professor Derrick Bell considered the future, he never changed his view.[68] Until he died in 2011, he maintained that the United States of America would remain permanently racist.[69] Most critical race theorists consider Bell, as Professor Kimberlé Crenshaw notes, "an early Critical Race Theorist," even before Crenshaw and other critical race theorists named the

62. Tompkins, *supra* note 57, at 737–42, 762–66.

63. *Id.* at 768.

64. Tompkins, *supra* note 57, at 761–762, 770–771; *Brown I*, 347 U.S. 483 (1954); *Brown II*, 349 U.S. 294 (1955).

65. Pub. L. 88-352, 78 Stat. 241 (1964).

66. Pub. L. 89-110, 79 Stat. 437 (1965).

67. *Id.*; *see* Tompkins, *supra* note 57, at 776–93.

68. *See generally* Linda Greenhouse, *The End of Racism, and Other Fables*, NY TIMES ARCHIVES (June 4, 2000), https://archive.nytimes.com/www.nytimes.com/books/00/06/04/specials/bell-well.html (reviewing Bell's book *Faces At the Bottom of the Well*. Although Bell first began publicizing the view in 1992, in subsequent interviews and after his death, in the 2018 publication of the book, Professor Michelle Alexander's Foreword continued to present and discuss Bell's view of racism's permanence in America).

69. *Id.*

theory.[70] Bell also pioneered narrative storytelling and allegory in the legal academy.[71] He said creative writing was his preferred style, and applying first-person dialogue in his stories disarmed readers.[72] He used storytelling to reach people and convey views to those with diverse perspectives, believing readers find it easier to listen and evaluate different viewpoints in stories than those posited by scholars examining issues in general academic papers. [73] He created Geneva Crenshaw, an alter-ego, to address race relations discussions, themes, and dialogues.[74]

In 1985, the Harvard Law Review (HLR) editorial board invited Bell to write the forward to its Supreme Court edition.[75] HLR editors had never deviated from the standard approach of publishing a complex legal analysis of the United States Supreme Court's jurisprudence in the law review's annual Supreme Court issue. However, Bell did not prefer the usual analytical structure of analyzing a critical Court case. Instead, as he explained:

> I wanted to examine from a new perspective—beyond even the most exacting exegesis of case decisions—the civil rights movement since 1954 and the Brown school decision: that is to explain or justify what has happened, or not happened, and how black people (or some of us) feel about it.[76]

Bell was delighted when the board accepted his suggestion to forego the traditional approach and instead write in an allegorical storytelling style for the law review submission.[77] He believed the stories would prompt law students and all who read his writings to engage in complex conversations and address essential race issues and laws.[78] Bell wanted readers of the prestigious HLR to grasp the actual substance of the civil rights movement and centuries of backlash against African Americans' civil and human rights, as he noted:

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70. Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1348 (2002).

71. THE DERRICK BELL READER, *supra* note 5, at 14; *see Who's Afraid of Critical Race Theory*, *supra* note 44, at 899; *see generally*, DERRICK A. BELL, AND WE ARE NOT SAVED (1987); FACES AT THE BOTTOM OF THE WELL, *supra* note 56.

72. *Who's Afraid of Critical Race Theory*, *supra* note 44, at 902.

73. *Id. See generally* AND WE ARE NOT SAVED, *supra* note 71; FACES AT THE BOTTOM OF THE WELL, *supra* note 56.

74. AND WE ARE NOT SAVED, *supra* note 71, at xi.

75. *Id.*

76. *Id.*

77. *Id.* at xii.

78. THE DERRICK BELL READER, *supra* note 5, at 14.

> The movement is a spiritual manifestation of the continuing faith of a people who have never truly gained their rights in a nation committed by its basic law to the freedom of all. For my foreword, then, I sought a method of expression adequate to the phenomenon of rights gained, then lost, then gained again—a phenomenon that continues to surprise even though the cyclical experience of blacks in this country predates the Constitution by more than one hundred years.[79]

After the HLR Supreme Court edition, Bell included storytelling and Geneva Crenshaw (Bell's alter-ego) in several books and articles, making it easier to draw readers to the story of race and his critical themes like the permanence of racism.[80] Bell's writings were engaging, using his scholarship to raise awareness and education on significant race law issues. He hoped to improve American society by addressing difficult questions that some found divisive.[81] For years, Bell seemed to be one of the few in the legal academy who offered an interrogating approach to scholarship that questioned and delivered a bold critique of the law.[82] Bell's scholarship examined systemic racism and concluded that racism is a normal part of society in the United States.[83] His theories critiqued civil rights laws, which he generally deemed ineffective in ensuring equality beyond extreme, egregious forms of discrimination.[84] He used unique terminology like "Interest Convergence" to describe his critical racial theories.[85]

Like many scholars he inspired, Bell lamented the decrease and stalled progress in civil rights remedies and racial justice in the first couple of decades after the civil rights movement.[86] He recognized that most critical race theorists examining racism and its intersection with the law are people of color.[87] Still, as indicated, Bell also noted, "[t]hose critical race theorists who are white are usually committed to the overthrow of their own racial privilege."[88]

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79. AND WE ARE NOT SAVED, *supra* note 71, at xi.

80. *Id.*; FACES AT THE BOTTOM OF THE WELL, *supra* note 56.

81. *See Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 54 (including a bold interrogating critique of the *Brown* decision).

82. *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 40; *Who's Afraid of Critical Race Theory?*, *supra* note 44, at 888–902 (1995).

83. Janel George, *A Lesson on Critical Race Theory*, AM. BAR ASSOC. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

84. *Id.*

85. *Id.*

86. The DERRICK BELL READER, *supra* note 5, at 8.

87. *Id.* at 69; *Who's Afraid of Critical Race Theory?*, *supra* note 44, at 898.

88. *Id.*

What is racial privilege? Was Bell correct? Does the rule of law contribute to systemic structures of racial inequality, and how has it impacted these structures? Is racism permanent in the United States of America? Bell said he raised these questions, and other critical race theorists and race and law scholars maintain they pose similar questions, including, "is America currently systemically racist?" to advance teaching and scholarship about race, history, law, and justice in America to improve society.[89] Bell considered whether racism is institutionalized in and by law and questioned relaxed civil rights and patterns of discrimination that he believed pushed the country back, not forward.[90] Two of Bell's influential law review articles, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*[91] and *Brown v. Board of Education and the Interest Convergence Dilemma*,[92] set the framework and model for scholars raising and studying critical questions about race.[93]

A. Examining Derrick Bell's Seminal Article, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation

Bell attained a large readership in the legal academy, especially among scholars who became critical race theorists after the questions and findings explored in his law review articles inspired them, significantly his early articles critiquing the *Brown* court decision.[94] In *Brown I*, Chief Justice Earl Warren opined that *Plessy's* "separate but equal" facilities were inherently unequal.[95] The Court reasoned that segregated public education facilities based on race instilled a sense of inferiority that hugely affected African American children's education and personal growth.[96] In *Brown II*, the Supreme Court ordered local courts and school boards to carry forth school desegregation plans and initiatives "with all deliberate speed."[97]

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89. AND WE ARE NOT SAVED, *supra* note 71, at 4–5.

90. *Id.* at 5.

91. *Serving Two Masters*, *supra* note 52.

92. *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 54.

93. *Serving Two Masters*, *supra* note 52, at 514–15; *Brown v. Board of Education and the Interest-Convergence Dilemma*, supra note 54.

94. *Serving Two Masters*, *supra* note 52; *Brown v. Board of Education and the Interest Convergence Dilemma*, *supra* note 54.

95. *Brown I*, 347 U.S. 483, 495 (1954).

96. *Id.* at 494.

97. *Brown II*, 349 U.S. 294, 301 (1955).

For the first decade after the Supreme Court of the United States issued its rulings in *Brown I* and *II*, requiring desegregation of public schools with "all deliberate speed," school district officials either refused or were slow to address the court's order.[98] The NAACP local branches in various jurisdictions aligned with the Legal Defense Fund (LDF) lawyers who initiated litigation in several cases to address obstructive delays and other pertinent issues.[99] Bell served as counsel for the LDF in over 300 school desegregation cases from 1960-1966.[100] Given Bell's extensive civil rights work on school desegregation cases, it is not surprising that he chose to apply his knowledge to write about the *Brown* case and school desegregation after he joined the legal academy.

As an HLS professor of law, Bell began raising critical race questions and wrote about the *Brown I* decision and *Brown II* desegregation court order. His article, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* described Black parents' increasing frustrations with busing at some point after the *Brown II* court ruling to desegregate schools with all deliberate speed.[101] Despite Black parents' initial agreement with the LDF desegregation litigation plan that included busing students to schools to desegregate, circumstances changed in subsequent years.[102] They did not want the desegregation efforts any longer.[103] The LDF, however, implemented its initiative for over a decade. The parents' disagreement with the court-ordered plan, and the LDF's legal strategy created what Bell recognized as a potential ethical issue for the lawyers handling the school desegregation cases.[104] To describe the problem, Bell quoted the Bible: "No servant can serve two masters: for either he will hate the one and love the other; or else he will hold to one, and despise the other."[105] Bell explained parents' goals for their children did not merge with integrationist ideals.[106] In other words, the LDF aimed for integration regardless of situations that might reduce rather than enhance the quality of students' education. Before Bell's critique, Professor Herbert

98. *Serving Two Masters*, *supra* note 52, at 474.

99. *Id.* at 475–76.

100. See discussion *supra*, addressing Bell; he was hired by Justice Thurgood Marshal, the then-Director-Counsel of the LDF, before joining the HLS faculty.

101. *See Serving Two Masters*, *supra* note 52, at 489.

102. *Id.*

103. *Id.*; *see also* THE DERRICK BELL READER, *supra* note 5, at 7.

104. *Serving Two Masters*, *supra* note 52, at 472.

105. *Id.* at 472 (quoting *Matthew* 6:24).

106. *Serving Two Masters*, *supra* note 52, at 492.

Wechsler critiqued the Court's decision.[107] Bell's paper evaluates Wechsler's arguments and offers his additional views.[108]

Moreover, Bell maintained the drastic court-ordered desegregation, largely busing, was not effectively integrating many schools, given the reaction of numerous White parents who, among other steps taken, began sending their children to private schools.[109] In Bell's words, "[c]ivil rights lawyers were misguided in requiring racial balance of each school's student population as the measure of compliance and the guarantee of effective schooling."[110] His solution would have been, in some instances, for the goal to shift from "integrated idealism" to providing a higher quality of education for Black students.[111]

These consequences, among others, concerned Bell: White parents who refused to allow their children to attend schools with Black children fled to the suburbs; they often formed private schools, and Black teachers frequently lost jobs when their schools closed.[112] Additionally, busing children had complications, including the psychological impact of carrying Black children to White schools, where they generally confronted an unwelcome classroom of teachers and students.[113] These reasons made Bell raise questions and criticize the celebrated *Brown* decision.[114] And they led to what he described as an eventual divergence of interests in school desegregation.[115] Bell eventually stated, "school desegregation has in large part failed."[116]

The criticisms, especially his contention that the *Brown* decision was potentially a failure, cost Bell a few friends, and he gained critics as many scholars and legal practitioners celebrated the Court's decision, applauding what appeared to be progress on African Americans' civil rights.[117] Notwithstanding the critiques, Bell initially ebbed and flowed

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107. *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 54, at 518.

108. *Id.*

109. *Serving Two Masters*, *supra* note 52, at 478.

110. Ryan Williams-Virden, *Is School Integration About Helping Kids of Color Learn or Propping Up Whiteness?*, EDALLIES (Mar. 2, 2018), https://edalliesmn.org/blog/school-integration-propping-whiteness/.

111. SILENT COVENANTS, *supra* note 12, at 4.

112. *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 54, at 530.

113. SILENT COVENANTS, *supra* note 12, at 88-89.

114. *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 54.

115. *Id.* at 528.

116. *Id.* at 519.

117. *Id.*

in his assessment.[118] But unquestionably, he found the landmark ruling much less favorable as time passed, stating: "Even so, I continued to view *Brown* as basically a positive decision, but as the years passed, my understanding of the complexity of race in America and our efforts to remedy its injustices raised new doubts."[119]

Bell began to regret his persistence in convincing most former civil rights litigants to integrate instead of improving the quality of their children's schools, resources, and educators.[120] At first glance, to some, Bell's radical viewpoint and changed philosophy on school desegregation seemed similar to the segregationists' position on keeping Black and White people separated. However, Bell maintained he was not evaluating the matter from a racist perspective. Instead, he argued that the litigation attorneys placed liberal goals on integrating schools above Black parents, children, and the Black community's interests.[121] Bell further explained his assessment of the *Brown* legal desegregation initiatives, arguing that lawyers pursued the commitment to integration without considering all aspects, especially what was best for Black children.[122] He found the liberal desegregation reform methods increasingly problematic, arguably a significant barrier to Black communities, parents, and children gaining equality under the rule of law.

B. Derrick Bell's Interest Convergence Theory

In a subsequent article, *Brown v. Board of Education and the Interest Convergence Dilemma*, Bell continued his critique of the acclaimed *Brown* case, again drawing criticism from many scholars, legal practitioners, lay people, liberals, and conservatives.[123] He explained: "I believe that the most widely used programs mandated by the courts—'antidefiance, racial balance' plans—may in some cases be inferior to plans focusing on 'educational components,' including the creation and development of 'model' all-black schools."[124] He questioned the motivating factors or merging interests engaged when Black people obtained civil rights in the United States.[125] While Bell acknowledged that some White Americans were concerned with the moral ramifications

118. SILENT COVENANTS, *supra* note 12, at 4.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Serving Two Masters, supra* note 52.
123. *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 54.
124. *Id.* at 528.
125. *Id.* at 525.

of racial injustice, he did not believe that the issue affected the majority of White decision-makers.[126] It is helpful to observe Bell's expressions on the matter. He stated:

> I contend that the decision in *Brown* to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.[127]

Bell referred to the *Brown* "decision's value to whites" and the Court's pivot from segregation to integration, advancing civil rights as furthering White policymakers' interests, simultaneously converging with civil rights initiatives, what he described as Interest Convergence.[128] As Professor Jean Stefancic describes, "In 1954, . . . the Supreme Court unexpectedly gave them [the NAACP LDF and Black school children plaintiffs] everything they wanted. Why just then?"[129] Bell sought to answer that question in *Brown v. Board of Education and the Interest Convergence Dilemma*, which explored civil rights advances before and after the *Brown* decision.[130]

Bell argued it would be remarkable to think that the Court suddenly or spontaneously decided to distinguish right from wrong after extending only minimal rights to Black people in earlier cases for many years.[131] Therefore, he found it unbelievable that the Court would unexpectedly be sympathetic to the racism concerns raised in the 1954 *Brown* decision without being influenced by other motivating interests.[132] To support this viewpoint, he looked at the events occurring around the time of the *Brown* decision.[133] First, he observed, the United States needed to improve its image abroad, noting, "the [*Brown*] decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples."[134]

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126. *Id.*

127. *Id.* at 525.

128. *Id.*

129. DELGADO & STEFANCIC, *supra* note 54, at 18.

130. *See generally Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 54.

131. *Id.* at 524.

132. *Id.*

133. *Id.*

134. *Id.*

Bell validated his assessment of the issue surrounding America's image, noting that both litigation parties addressed the point in the *Brown* court hearings.[135] But the statement that bolstered his theory most came from the media, with Time magazine stating: "In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it [*Brown*] will come as a timely reassertion of the basic American principle that 'all men are created equal.'"[136] Moreover, Professors Richard Delgado and Jean Stefancic note in their study of Bell's work that historian Mary Dudziak's research of DOJ and U.S. Department of State records corroborated Bell's statements about the government wanting to protect America's image abroad.[137] Delgado and Stefancic address Dudziak's discovery of documents showing the government's interest.[138] Specifically, the scholars explain when the DOJ "intervened on the side of the NAACP for the first time in a major school-desegregation case," documents discovered revealed that their interest was not merely school desegregation but "improving its image in the eyes of the Third World."[139]

Bell also bolstered his Interest Convergence theory by considering the perspective of men who returned to the United States after World War II.[140] He argued that Black soldiers fought for the country and were likely expecting more opportunities and less disparate treatment upon their return home; hence the men would have expected the *Brown* decision to make the United States a more inclusive homeland.[141] He also said some White people "realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation."[142] Bell's Interest Convergence observations did not stop him from admitting that *Brown* was an important decision, albeit he maintained that the court opinion presented problems and concerns as discussed. He noted that he did not intend his "self-interest" points to diminish the landmark decision's significance.[143]

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135. *Id.*

136. *Id.* at 524.

137. DELGADO & STEFANCIC, *supra* note 54, at 19.

138. *Id.*

139. *Id.* at 19–20.

140. *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 54, at 524.

141. *Id.*

142. *Id.* at 525.

143. *Id.*

Professors Delgado and Stefancic have written extensively about Bell and his scholarship, including his Interest Convergence theory and discussions of interest divergence.[144] They note factors to which Bell did not apply much weight: "Sympathy, mercy, and evolving standards of social decency and conscience amounted to little, if anything," in Bell's examination of civil rights gains for Black people.[145] Bell maintained White policymakers initiate rights for Black people when it advances their interests.[146] But he found it unlikely they would be primarily or significantly motivated by conscience or morality, given his studies, research, and evaluation of Interest Convergence patterns.[147] Was Bell correct? Did the *Brown* decision and other civil rights advances for African Americans emerge primarily because of Interest Convergence (Black people seeking civil rights converging with the government's need to improve its image of inhumane, unequal treatment and school segregation), or did moral reasons and mercy inspire the landmark decision?

On the other hand, did both (moral reasons and Interest Convergence) motivate the *Brown* Court and encourage other landmark civil rights legislation? As Bell does, one can draw inferences about interests converging based on significant events sparking a convergence. Still, to conclusively know whether empathy or moral contemplations affect a decision-maker's thoughts and choices is beyond the abilities of human beings, as that province rests with God.[148]

However, one can evaluate the plausibility of the reasons provided by considering examples of public officials giving moral explanations and interests converging when Black people gained civil rights.[149] For example, a decade after *Brown*, President Johnson addressed the Nation before signing the Civil Rights Act of 1964, including these reasons in his detailed statement for signing the proposed legislation into law (one reason—moral):

> We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain unalienable rights. Yet many Americans do not enjoy these rights. We believe that all men

144. *See generally* DELGADO & STEFANCIC, *supra* note 54.

145. *Id.* at 18.

146. *Id.*

147. *Id.*

148. *See Proverbs* 21: 2–3, (Amplified Version) ("Every man's way is right in his own eyes, But the LORD weighs and examines the hearts [of people and their motives]. To do righteousness and justice is more acceptable to the LORD than sacrifice [for wrongs repeatedly committed].").

149. DELGADO & STEFANCIC, *supra* note 54, at 19.

> are entitled to the blessings of liberty. Yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skin. The reasons are deeply imbedded in history and tradition and the nature of man. We can understand—without rancor or hatred—how this all happened. But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.[150]

Still, Johnson's message and remarks about morality came near the end of the long movement for Black people's civil rights that lasted decades. Suppose Bell's Interest Convergence theory is considered, despite Johnson's asserted moral reasons. In that case, these factors, under Bell's view, raised policymakers' interests because of negative global attention impacting America's reputation: the assassinations of a president, his cabinet leader brother, and a civil rights movement leader, and the murder of many people. Further, segregationist hate groups bombed a church, killing four children and injuring more than twenty others.[151] Others, filled with hate, washed young children marching for their God-given rights down the streets of Birmingham using water hoses ordered by the police chief Bull Connor, all part of the events leading to a convergence of interests under Bell's Critical Race Theory.[152] And the latter incident during the Children's March for Rights, historians generally agree, was significant to getting landmark civil rights legislation proposed, passed, and signed into law.[153] The grotesque, brutal water hoses ordered by the chief law enforcement official who directed police to spray forceful water on innocent children legally protesting for their civil rights caused great outrage throughout many states (primarily northern) and internationally.[154] As the children's bruised bodies rolled down the streets of Birmingham, interests converged to stop the shameful portrayal of a Nation founded on ideals of liberty and justice.[155] Shortly after the Children's March, Congress

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150. *See The Civil Rights Act of 1964: A Long Struggle for Freedom: President Lyndon B. Johnson, Radio and Television Remarks upon Signing the Civil Rights Bill*, LIBRARY OF CONGRESS (Apr. 5, 2023), https://www.loc.gov/exhibits/civil-rights-act/multimedia/johnson-signing-remarks.html.

151. *Baptist St. Church Bombing*, FED. BUR. INVEST. (Apr. 28, 2023), https://www.fbi.gov/history/famous-cases/baptist-street-church-bombing.

152. Jeremy Gray, *Bull Connor used fire hoses, police dogs on protestors*, AL.COM (May 3, 2013), https://www.al.com/birmingham-news-stories/2013/05/bull_connor_used_fire_hoses_po.html.

153. *Id.*

154. *Id.*

155. *Id.*

passed the landmark civil rights legislation outlawing legal Jim Crow segregation.[156]

Bell also explored the shift from interest convergence to divergent or conflicting interests.[157] He observed that lower-income Whites were not the only opponents of school desegregation, as school boards were asserting significant authority to oppose effective integration initiatives.[158] Therefore, Bell discussed the dilemma of local school boards, who had historically moved to keep schools segregated, competing for control of integration plans, hampering and, in many cases, defeating the goals of the *Brown* court ruling to desegregate schools with all deliberate speed.[159]

As local school boards aggressively opposed *Brown*, courts began addressing complaints filed by the officials in various state and city jurisdictions.[160] The legal landscape shifted, making it easier for local school boards to prevail in litigation and maintain control.[161] As Bell put it, "the Court . . . increasingly erected barriers to achieving the forms of racial balance relief it earlier had approved."[162] And he addressed the challenging standards of proof required.[163] The relief granted in cases was also limited.[164]

Bell considered the fear the pivotal *Brown* decision provoked in lower-income White people.[165] He argued that they were not only fearful but also felt betrayed.[166] Bell's views were bold. Still, many found the points compelling and worthy of contemplation.[167] He explained, "The [lower-income Whites] relied, as had generations before them, on the expectation that white elites would maintain lower class whites in a societal status superior to that designated for blacks."[168] Bell's views pointed to the darker side of human beings—the need to assert power and design a hierarchy system rather than treat people with respect and dignity because of their humanity. However, Bell did not offer the

156. Pub. L. 88-352, 78 Stat. 241.

157. *Brown v. Board of Education and the Interest-Convergence Dilemma*, *supra* note 54, at 526.

158. *Id.*

159. *Id.* at 526–27.

160. *Id.* at 527.

161. *Id.* at 526.

162. *Id.* at 527.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 525.

167. *Id.*

168. *Id.* at 525–26.

viewpoint as an opinion.[169] Instead, he cited historians' research here and throughout his articles, reminding readers that historical records show "segregated schools and facilities were initially established by legislatures at the insistence of the white working class."[170]

Bell's critiques of *Brown* seemed far less appalling to his critics by the 1970s as previously convergent interests diminished and divergent interests dominated.[171] In his law review articles, he offered recommendations to meet the Court's mandate, and his proposals were considered distinct, like his critical case questions and statements.[172] Among other suggestions, he recommended that "model" all Black schools remain an option, as he found several racial balance desegregation initiatives inferior.[173]

C. Bell's Unyielding Assessment of The Systemic Permanence of Racism

Bell's *Brown* case critiques and Interest Convergence theory comprised some of his most controversial views. And when Bell published his *Race, Racism, and American Law*[174] textbook, he addressed numerous additional critical race and law topics, including the systemic permanence of racism.[175] The book is a foundational treatise for many Race and Law scholars.[176] In one of Bell's other books, Professor and best-selling author Michele Alexander wrote the foreword to the 2018 edition: "Faces at the Bottom of the Well."[177] She addressed Bell's influence on Critical Race Theory scholarship and her professional growth as a student, practitioner, and scholar.[178] A detailed look at Alexander's view of Bell is worth considering. Professor Alexander wrote:

> Few legal scholars in recent memory have had a greater impact on racial justice thought and advocacy in the United States than Derick Bell. I struggle to think of even one. Certainly no legal scholar has had a greater impact on me.
>
> As a law student, I read nearly every word Bell wrote; as a civil rights lawyer, I was haunted by his words and ultimately forced to admit the truth of them; as a law professor, I insisted that my students

169. *Id.* at 526.
170. *Id.*
171. *Id.* at 528.
172. *Id.*
173. *See id.* at 528–33.
174. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (6th ed. 2004).
175. *Id.*
176. *Id.*
177. FACES AT THE BOTTOM OF THE WELL, *supra* note 56, at ix–x.
178. *Id.*

> read the very articles and books authored by Bell that had once been assigned to me.
>
> I still have on my shelf the classic textbook entitled Race, Racism, and American Law, which Bell authored in 1971. That text became something like a bible for me when I was a law student, and I've carried it into every new work space I enter. Eventually, I wrote a book, The New Jim Crow, which would not have been possible but for Bell's scholarship and the contributions he made to the field of critical race theory—a body of legal scholarship that revolutionized what was spoken, taught, and debated in classrooms nationwide. Bell, along with other brilliant and visionary scholars, exposed the many ways in which racism is deeply embedded in our Nation's laws and institutions, including many that are intended to remedy past injustices. I hardly stand alone in being profoundly influenced by Bell's scholarship as well as his courageous commitment to telling the truth, as best he could, about the realities of race in America.[179]

Professor Michele Alexander's book, *The New Jim Crow*,[180] is considered one of the most significant writings of the twenty-first century in the field of Race and Law, examining critical race issues impacting incarceration and our criminal justice system.[181] As discussed, Alexander maintains that Bell's contributions made her book possible, and her widely read and acclaimed publication would not exist without Bell's scholarship and influence.[182] It is worth pausing to consider that point. This Article's introduction notes that Bell's impact on the legal academy and scholars is widespread. Professor Alexander's comments (indisputably the person who changed the discourse on mass incarceration) about Bell's influence on her life and scholarship corroborate the point.

Despite Bell's profound influence on countless legal scholars, most notably critical race scholars, Alexander notes that practitioners and scholars in the legal academy rarely mentioned his name in 2018 (since 2020, however, Bell's name is again well-known).[183] Many in and outside the legal academy criticized Bell's controversial theories, especially his view that "racism is permanent in the United States of America, utterly indestructible."[184] As Alexander notes, no one wants to accept what

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179. *Id.*

180. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (10th anniversary ed. 2020).

181. *Id.*

182. *Id.*

183. FACES AT THE BOTTOM OF THE WELL, *supra* note 56, at ix–x.

184. *Id.*

appeared to be a fatalistic view of racism.[185] Still, Alexander admits that she previously found Bell's conclusion on racism's permanence concerning but suggests that her fear of his view no longer perplexes her.[186] Instead, she comments: "I now understand that accepting the permanence of racism in this country does not mean accepting racism."[187] Alexander closes the book's foreword with this question: "Ask yourself if you're willing to commit yourself to the struggle for racial justice even if the battle can't ever be won."[188]

Alexander's question directs attention back to Bell's Critical Race Theory that "racism is permanent in the United States of America, utterly indestructible."[189] When Bell died in 2011, he had not relinquished his perspective of racism in America, a belief informed by his experiences, research, and observations.[190] Years before, in 1992, he widely publicized his thoughts on the subject. He appeared as a guest on Charlie Rose's television show and offered insight into why he formed his hopeless view of racism in the United States.[191] Charlie Rose asked Bell, "are we making any progress [deterring racism in America]?"[192] Consider Bell's deliberative answer:

> If you try to measure progress in traditional gains, which I think we've done since the '40s, then we're not making any progress. Civil rights is cyclical. Rights are gained in one era; lost in another. And what I will likely shock the conference and the keynote tomorrow is saying that, in my view, racism in America is permanent. It's not an aberration. It's not something that a few more laws better enforced, a more liberal Supreme Court, a better president, that it's all going to go away. Racism is more than a group of bad white folks, you see. It is built into the society. This is a society based on property ownership; it's what it's all about. That's why we got started. Most people, most white people, do not have very much property. What they substitute psychologically is a sense of identification with other white people who do have the

185. *Id.* at xviii.

186. *Id.*

187. *Id.*

188. *Id.* at xix.

189. *Id.* at ix–x.

190. *See, e.g.,* Derrick Bell, *Racism Is Here To Stay: Now What?*, 35 HOWARD L.J. 79 (1991).

191. *Derrick Bell Interview*, CHARLIE ROSE SHOW (March 27, 1992), https://charlierose.com/videos/21183.

192. *Id.*

> property. And a sense of superiority to blacks who are the designated others in this society. And this has worked for 300 years, Charlie.[193]

The dialogue between Rose and Bell in 1992 leaves little doubt that Bell's view of racism in America was not optimistic; he insisted that racism was systemic and permanent in the United States, explaining his conclusion that some find controversial and disputable.[194] The Rose interview was only one instance of Bell's discussions of systemic racism and its permanence in America. His article *Racism Is Here To Stay: Now What?*[195] set forth his views on the issue in light of American race history.[196] He argued that current conditions impacting Black people in 1991, when "considered in light of our history, more than justifies a conclusion that: Racism Is Here to Stay."[197]

Bell's viewpoint on the permanence of racism diverges from other views. Some view it as pessimistic and damaging, suggesting it undermines or downplays a picture of America's progress on racial justice issues and a hopeful outlook for the future.[198] Indeed, some scholars might refer to the 1964 civil rights legislation lawfully ending Jim Crow segregation and other laws and events addressing civil rights as proof that racism in America can diminish and eventually end. Bell disagreed with those perspectives, arguing that his life experiences and historical studies left him with an unequivocal view.[199] Bell claimed it was time for Black Americans to confront the realities of history and recognize that the cycle of racism would continue to go round and round as the systemic structure positioned those in power to give and take rights.[200]

Despite his dismal perspective, Bell did not regard his assessment, as he put it, "an invitation to ultimate despair."[201] Instead, he advised Black people to join him in accepting the permanence of racism theory and allow the realization and recognition of the status to "serve as an opportunity for new insight, more effective planning, and a more satisfying life for all of us condemned by color to a subordinate status."[202]

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193. *Id.*
194. *Id.*
195. *Racism Is Here To Stay*, *supra* note 190.
196. *Id.* at 79.
197. *Id.*
198. *Id.*
199. *Id.*
200. *See id.* at 79–80.
201. *Id.*
202. *Id.*

He added, "in this land where equality is the often-voiced ideal, property is equated with both wealth and power."[203]

Bell's permanence of racism theory, additional race and law vital concepts, and other critical race theorists' views have gained both proponents and opponents inside the legal academy. But for recent years (2020–2023), a pertinent question is why is there opposition from critics and criticisms outside the legal academy to a theory developed primarily for law school pedagogy and scholarship? And who started the recent controversy? What are the complaints? Each question is relevant to this Article's examination of conflicting viewpoints on CRT.

In the early 1960s, as discussed, when Derrick Bell worked for the LDF, he was hired by the organization's first director-counsel, Thurgood Marshall.[204] The LDF remains one of the leading civil rights organizations addressing racial justice issues. The LDF reviewed the question, "Why did Critical Race Theory suddenly come under fire [in 2020]?" Counsel at LDF concluded:

> After the historic 2020 election, which included record turnout among Black voters, states passed the strictest voting laws in decades. When millions of people took to the streets to protest police violence, states responded by passing laws criminalizing protest. Now, as individuals across the country, of all races and backgrounds, are coming to recognize the history of systemic racism and its ongoing impact, states are responding by attempting to silence discussions of these issues. The bans are part of a coordinated backlash to the realization of a true multi-racial democracy in America.[205]

In 2020, after the murder of George Floyd by former police officer Derek Chauvin, some scholars and authors outside the legal academy sought to address concerns about police misconduct against Black people.[206] Some cited CRT and other Race and Law scholarship in their writings, identifying systemic and structural patterns of racism, bias, White privilege, and anti-racism as issues needing attention.[207] CRT

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203. *See id.*

204. THE DERRICK BELL READER, *supra* note 5, at 5; *see* Cobb, *supra* note 29.

205. *Critical Race Theory: Frequently Asked Questions*, LEGAL DEF. FUND (Apr. 7, 2023), https://www.naacpldf.org/critical-race-theory-faq/?gclid=Cj0KCQjw2cWgBhDYARIsALggUhrCJ7iUZpTPy7qnZ5R0H0aeVMmkv8jad5etqhvKw-YaB0ZUBdFdmgYaApvNEALw_wcB.

206. Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory.

207. *Id.*

critics responded, and they were no longer primarily legal academicians. Several opponents, including politicians and former President Donald Trump, attacked what they categorized as CRT scholarship.[208] They objected to many tenets of what they believed was CRT, significantly assessments of the prevailing patterns of systemic racism in America.[209] Critics often name Bell and his scholarship in their broad criticisms.

Christopher Rufo, described by *The New Yorker* magazine writer Benjamin Wallace-Wells as "a conservative activist" who "invented the conflict over Critical Race Theory," brought CRT to the center of controversy.[210] As the introduction indicates, this Article declines a contentious debate for or against CRT. Hence, a study of Rufo's pursuits and aims does not debate but seeks to present relevant facts and pose pertinent questions. A relevant question is how Rufo becamethe person who started the CRT controversy after George Floyd's murder?

Before becoming a lead spokesperson and considered by various conservative-leaning officials an authority on CRT, Rufo worked as a journalist.[211] A disgruntled city employee in Seattle, Washington, sent Rufo details and slides from his office's anti-bias programs, and Rufo followed up with Freedom of Information Act (FOIA) requests for more information.[212] He wrote a magazine article describing the training topics.[213] Rufo declared that the anti-racism training endorsed "segregationism, group-based guilt, and race essentialism."[214]

After receiving more details and materials used in anti-racism training throughout different states, Rufo noticed books by historian Ibram X. Kendi and other authors.[215] In those books, he found footnotes and citations to Bell and other critical race theorists' CRT scholarship, addressing past systemic racism impacting today's laws and practices.[216] The footnote references, as Wells notes, "formed the basis for an idea" that Christopher Rufo had, and those citations to Bell's and other critical race theorists' conclusions and writings started the CRT controversy in 2020.[217]

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208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*

Rufo sought to reframe the narrative about the need for anti-racism training which had become a widespread initiative not only in police departments but in offices and schools throughout the Nation after George Floyd's murder.[218] After reviewing the footnotes and tracing them to CRT writings, Rufo pitched his idea to conservative officials.[219] Rufo told Wells, "The anti-racism seminars did not just represent a progressive view on race but that they were expressions of a distinct ideology—critical race theory—with radical roots."[220] Wells clarified: "If people were upset about the [anti-racism] seminars, Rufo wanted them also to notice 'critical race theory' operating behind the curtain."[221] To address anti-racism complaints, Wells described Rufo's objective.[222] Rufo was adamant that CRT needed to become the center of attention after discovering text in CRT's writings that he believed showed "the seed of their [CRT's] ideas in radical, often explicitly Marxist, critical-theory texts from the generation of 1968."[223]

Merriam-Webster's Dictionary defines Marxism as "the political, economic, and social principles and policies advocated by Marx."[224] Collins English Dictionary also defines Marxism as "a political philosophy based on the writings of Karl Marx which stresses the importance of the struggle between different social classes."[225] Given Rufo's numerous statements, it is clear he knew that Marxism and Marxist were provocative, negative words in many conversations that would spark many people's strong responses. With that aim, he sought to portray CRT with "radical roots" tied to Marxism.[226] Moreover, he considered how conservatives, in his view, were not winning the culture war when addressing cancel culture and other topics.[227] Hence, as Rufo described, he provided a "new language" for ideas like "political correctness" and "cancel culture," which he considered dated words that did not "translate into a political program."[228] He said he aspired to give a "new language" to "conservatives engaged in the culture war [who] had

218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Marxism*, MERRIAM-WEBSTER DICTIONARY (Apr. 7, 2023), https://www.merriam-webster.com/dictionary/Marxism.
225. *Marxism*, COLLINS ENGLISH DICTIONARY (Apr. 7, 2023), https://www.collinsdictionary.com/us/dictionary/english/marxism.
226. Wallace-Wells, *supra* note 206.
227. *Id.*
228. *Id.*

been fighting against the same progressive racial ideology since late in the Obama years, without ever being able to describe it effectively."[229]

Wells noted that Rufo wrote, "'[c]ritical race theory' is the perfect villain," and he emphasized, "the phrase 'critical race theory' connotes hostile, academic, divisive, race-obsessed, poisonous, elitist, anti-American."[230] Wells further explained that Rufo saw CRT as "a promising political weapon."[231] A careful review of Rufo's statements shows he believed he had found, in his words, "a phrase" or a slogan that he could portray, among other disparaging characterizations, as "hostile" and "race-obsessed."[232] By most accounts, Rufo succeeded in providing many, most significantly conservatives and evangelical Christians, what he defined as a "poisonous" phrase now deemed harmful to many but known throughout the Nation as "CRT" or "Critical Race Theory."[233]

Rufo's plan seemed to work at the outset. After his articles gained a wide readership with disparaging descriptions of CRT, in late 2020, Tucker Carlson gave him a more prominent platform on the *Tucker Carlson Tonight* Show.[234] Rufo used the television media to hammer what he had planned, "the phrase" Critical Race Theory in his dialogue, calling it "an existential threat to the United States."[235] He even called on the White House to order all federal agencies to end CRT training.[236] Trump heeded his call and had Chief-of-Staff Mark Meadows contact Rufo to assist with an executive order, which soon after stopped all anti-bias and anti-racism training in the federal government.[237]

So, within a short time after having an idea to make CRT a "political villain," Rufo sought to publicize his views of the theory. Critical Race Theorists found Rufo's (not a lawyer or law professor) attempts to

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229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. After President Biden was elected and sworn into office in January 2021, he swiftly reversed the diversity training Trump ban. Biden cited these reasons for the reversal:

> In the weeks ahead, I'll be reaffirming the federal government's commitment to diversity, equity and inclusion and accessibility, building on the work we started in the Obama-Biden administration. That's why I rescinded the previous administration's harmful ban on diversity and sensitivity training . . . . Unity and healing must begin with understanding and truth, not ignorance and lies.

Remarks by President Biden at Signing of an Executive Order on Racial Equity, THE WHITE HOUSE (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity/.

redefine legal scholarship that they spent decades developing and refining appalling and reckless.[238] They argue a CRT critic, among others, has sought to redefine their complex legal theory.[239]

CRT scholars maintain that the primarily conservative officials and media accepted Rufo's redefinition of CRT, and they reduced the name Critical Race Theory to essentially a phrase or slogan in 2020.[240] Since then, scholars maintain critics of CRT have deterred education and training on vital race law issues,[241] and Rufo celebrated the slowed anti-racism training. Consider Rufo's comments in March 2021:

> We have successfully frozen their brand—"critical race theory"—into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all the various cultural insanities under that brand category. The goal is to have the public read something crazy in the newspaper and immediately think "critical race theory." We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans.[242]

Critical Race theorists believe Rufo and critics have been trying to stop what they define as CRT.[243] Although Rufo denotes that after receiving correspondence from disgruntled employees, he was concerned about the effects of anti-racism training on employees in businesses and state and

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238. *See* MSNBC, *Creator Of Term 'Critical Race Theory' Kimberlé Crenshaw Explains What It Really Is*, YOUTUBE (Jun. 21, 2021), https://www.youtube.com/watch?v=n4TAQF6ocLU; *see also What Is Critical Race Theory and Why Is It Under Attack?*, THE NEW PRESS (Nov. 18, 2021), https://thenewpress.com/blog/news/what-critical-race-theory-why-it-under-attack.

239. *What Is Critical Race Theory and Why Is It Under Attack?*, *supra* note 238.

240. *See* Laura Meckler and Josh Dawsey, *Republicans, spurred by an unlikely figure, see political promise in targeting critical race theory,* THE WASHINGTON POST (June 21, 2021), https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/; *"Critical race theory" is being weaponised. What's the fuss about?* The Economist, (July 14, 2022) https://www.economist.com/interactive/united-states/2022/07/14/critical-race-theory-is-being-weaponised-whats-the-fuss-about.

241. *Id*.

242. Christopher F. Rufo (@realchrisrufo), replying to Christopher F. Rufo (@realchrisrufo) and James Lindsay (@ConceptualJames), TWITTER, (Mar. 15, 2021, 3:14 PM), https://twitter.com/realchrisrufo/status/1371540368714428416; *see* Laura Meckler & Josh Dawsey, *Republicans, spurred by an unlikely figure, see political promise in targeting critical race theory,* WASH. POST (Jun. 21, 2021), https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/.

243. Much legislation and orders have been issued in states impacting public secondary schools and colleges and workplaces. As indicated, however, this Article's focus is primarily law school education and curricula; *see* "Critical race theory" is being weaponised. What's the fuss about?, *supra* note 240.

federal agencies, CRT proponents contend that Rufo's methods used lack integrity.[244] They cite his idea to use CRT as "the perfect villain," as "a poisonous phrase," and "promising political weapon."[245] Proponents argue Rufo's reasons for seeking details about the anti-racism activity undermine the integrity and credibility of his and subsequent critics' criticisms of CRT.[246]

To proponents and scholars of CRT, the outcry and complaints against CRT are merely political weapons used to incite hostility and controversy. CRT scholars emphasize that Rufo's methods of using CRT as a "promising political weapon," "a poisonous phrase," and "perfect villain" have nothing to do with the tenets of critical race theories.[247] In March 2021, Rufo asserted an objective to "turn [CRT] toxic, as we put all the various cultural insanities under that brand category."[248] The aim has raised the concerns of many educators.[249]

As Rufo sought, recently, when people hear and read about race history, books, and curricula addressing race, many "immediately think critical race theory."[250] CRT scholars find Christopher Rufo's goal and emergence as the "knowledge expert" on CRT for mostly conservative critics, media, and public officials, including a former president, is inexplicable, given his lack of experience in the legal academy.[251] Media Matters for America, a watchdog organization, conducted a study in June 2021, finding that the Fox News Network used the phrase Critical Race Theory almost 1,300 times in three-and-a-half months in early 2021.[252]

Moreover, regarding the credibility of criticisms against CRT, leading Critical Race Theorist Kimberlé Crenshaw argues that neither she nor anyone should be surprised by opponents' objections, given historical patterns.[253] She notes: "Reform itself creates its own backlash, which reconstitutes the problem in the first place."[254] Critical Race Theorists

244. Wallace-Wells, *supra* note 206.

245. *Id.*

246. *Id.*

247. *Id.*

248. Meckler & Dawsey, *supra* note 242.

249. *See "Critical race theory" is being weaponised. What's the fuss about?*, *supra*, at note 240.

250. *Id.*

251. *Id.*

252. Jake Lahut, *Fox News has mentioned 'critical race theory' nearly 1300 times since March, according to watchdog study*, BUS. INSIDER (Jun. 15, 2021), https://www.businessinsider.com/fox-news-critical-race-theory-mentions-thousand-study-2021-6.

253. Wallace-Wells, *supra* note 206.

254. *Id.*

and CRT proponents emphasize the complaints are a backlash against the significant African American voter turnout that helped elect President Joe Biden in the 2020 election.[255] And they also cite pushback against bias training and protest following the 2020 police murder of George Floyd as consistent patterns of hostile responses, like those waged against abolitionist movement activists and writers in the nineteenth century and civil rights movement leaders in the twentieth century.[256] They argue a look back reveals slaveholders prohibited African American speech and education during slavery, generally flogging or killing enslaved and even free Black people who attempted to declare in their conversations, writings, and speeches that the institution of slavery was immoral, unchristian, and evil.[257] The backlash was severe.[258] And they cite similar complaints waged against Dr. Martin Luther King, Jr. as he led the civil rights movement in the twentieth century.[259] Like the allegation against CRT scholars, conservatives called King Marxist; while he led with a mandate of non-violence resistance and Christian principles.[260] Crenshaw and other critical race theorists maintain these historical comparisons are eerily similar to the recent pushback during times of progress and movements for African Americans' civil rights, reflecting fundamental resistance to and contempt for African American rights, speech, and scholarship.[261]

Beyond Rufo's CRT criticisms, other critics have presented various reasons for opposing CRT; their most cited reasons include a common complaint of many conservatives.[262] They argue that Bell's ideas of Interest Convergence, the permanence of racism, and other beliefs championed by CRT and its scholars, such as systemic racism, are Marxist.[263] Moreover, critics maintain Bell's scholarship and CRT contradicts biblical scripture.[264] Critics' complaints include the following perspective: "Critical race theory, an academic, now street-level philosophy, pits ethnic groups against each other in hopes of correcting historic inequalities." [265]

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255. *Id.*

256. *Id.*

257. *Id.*

258. *What Is Critical Race Theory and Why Is It Under Attack?*, *supra* note 238.

259. Wallace-Wells, *supra* note 206.

260. *What Is Critical Race Theory and Why Is It Under Attack?*, *supra* note 238.

261. *Id.*

262. *Id.*

263. *Id.*

264. Brandon Clay & Frost Smith, *Critical Race Theory in the Church*, ANSWERS IN GENESIS (Sep. 29, 2020), https://answersingenesis.org/racism/critical-race-theory-church/.

265. *Id.*

> At its foundation, critical race theory elevates sinful man's word above God's Word. Critical race theory spawns envy, division, and power struggles. No wonder there's so much unrest and chaos in the streets—it's what CRT espouses. These ideas are diametrically opposed to the biblical virtues of contentment (Philippians 4:11–12), unity (John 17:21), and humility (Colossians 3:12). And since CRT is a Marxist-motivated ideology, it is atheistic. At best, it ignores the God who made the heavens and the earth (Genesis 1:1). This is how we know critical race theory is not biblical. Instead, CRT is a false worldview.[266]

Therefore, critics have asserted the tenets of CRT do not align with Christianity.[267] But for Derrick Bell, when addressing race and law topics, he often quoted scripture, spirituals, and gospel music and referred to faith and God in his writings, though not a fundamentalist view of Christianity.[268] Other critical race theorists' writings generally have not included an in-depth examination of Christian perspectives and the African American spiritual tradition, asserting the concentration of their scholarship is to critique the nation's history of race and explore the intersection of race, racism and law.[269] Moreover, critical race theorists' writings note these points about Critical Legal Studies (CLS) and critics' views that CLS and CRT are Marxist organizations: In the early years, CLS scholars and those who would become CRT scholars discussed topics at workshops and events.[270] They maintain, however, that their most significant inspiration for CRT came from Derrick Bell's scholarship and critical race theories developed before discussions with CLS scholars who have many views distinct from CRT, and critical race theorists note inspiration they also felt from the civil rights movement.[271] Critical Race Scholar Devone Carbado offered this response when asked if CRT is Marxist:

> One easy way to answer that question is to think about the extent to which critical race theorists make deep and profound arguments

266. *Id*.

267. *Id.*

268. *See* ETHICAL AMBITION, *supra* note 21, at 75–93; AND WE ARE NOT SAVED, *supra* note 71. The title is from scripture, *Jeremiah* 8:20.

269. *See, e.g.,* Professor Brandon Paradise's review of CRT, discussing the African American Christian tradition, finding the topic unaddressed in CRT race and law scholarship. Brandon Paradise, *How Critical Race Theory Marginalizes the African American Christian Tradition*, 20 MICH. J. RACE & L. 117 (2014).

270. *What Is Critical Race Theory and Why Is It Under Attack?*, *supra* note 238; CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxvii, *supra* note 40.

271. *Id.*

> about what the Constitution needs to deliver for everyone. So, CRT is fundamentally about asking the United States to live up to justice, to live up to equality, to live up to liberty, to live up to its own aspirations. That's the fundamental project.
>
> You say equality under law is what people should experience. We say, let's realize it. You say justice is what everyone deserves. We say then let's deliver it. You say liberty should be a core feature of American democracy. We say, Amen. So part of what Critical Race Theory seeks to do is to ask the United States to live up to the very principles of democracy upon which it is founded. That's the core project. I don't see how one can conflate that project with Marxism.[272]

Despite past and present criticisms against CRT, Carbado and other scholars continue to research and write about critical race theories, and, as indicated, Bell maintained until his death that racism was permanent in the United States of America, one of the central tenets of his critical race theories.[273]

III. OUTCOMES IF LAW SCHOOLS REVISE CURRICULA IN RESPONSE TO CRITICS' COMPLAINTS ABOUT CRT

As Part II C addresses, Critical Race Theory has been a frequent topic of criticism for many conservatives, especially since 2020.[274] As the introduction indicates, winning a dispute on conflicting viewpoints (not this Article's aim), including whether America is presently systemically racist or CRT is Marxist, is less meaningful than considering Part II's vital questions and observing contradictory views to address potential outcomes and dilemmas. Part III considers results and outcomes. A dilemma awaits law schools if professors, like some secondary schools, colleges, and universities, revise class discussions and remove scholarship and textbook material on systemic racism and other essential race law topics from courses and symposia.[275]

A. The Law School Dilemma

Most race and law scholars recognize Derrick Bell as the founder and professor who inspired generations of critical race theorists.[276] He died in 2011, and as discussed, he never withdrew his viewpoints that America would remain permanently racist and that racism was institutionalized

272. *Id.*

273. FACES AT THE BOTTOM OF THE WELL, *supra* note 56, at ix–x.

274. Wallace-Wells, *supra* note 206.

275. *Id.*

276. Cobb, *supra* note 29.

by and through the law; some CRT scholars share his views.[277] Critics oppose Bell's and critical race theorists' viewpoints, as Part II C explains.[278] They argue that CRT promotes a Marxist false theory and that tenets of CRT are contrary to a Christian worldview.[279]

Critical race scholars maintain that their primary objective is to see America consistently move closer to its founding ideals of liberty and justice for all.[280] And they note that their aim was partly informed by their observations of the need for more scholarship and education on critical race issues after the decline in civil rights initiatives a few decades after the civil rights movement.[281] Over the past four decades, critical race theorists' scholarship and pedagogy have examined essential issues of race, including hundreds to nearly thousands of law review articles.[282]

Since 2020, as Part II emphasizes, many CRT critics have sought to remove teaching and works influenced by the theory from secondary and post-secondary classrooms.[283] Critics' common criticism, if not the most frequent, has been their objection to CRT's examination and discussion of systemic racism in the United States.[284] Educators and scholars teaching history, social studies, and racial justice classes counter, noting the backlash against CRT deters education of African American history and other racial justice topics.[285] They maintain that courses addressing race in America are relevant and that the history of the United States is incomplete without recognizing the African American experience and the experiences of other people of color.[286]

In law school, pedagogical education and scholarship on systemic racism in the United States of America are not limited to critical race theorists' teaching and examinations. It is an issue addressed by professors teaching Constitutional Law, Criminal Procedure, Race and the Law, and other core law school subjects.[287] Additionally, justices of

277. *Racism Is Here To Stay, supra* note 190.

278. *Infra* part I C.

279. Wallace-Wells, *supra* note 206.

280. *See generally* DELGADO & STEFANCIC, *supra* note 54.

281. *Id.*

282. *Id.*

283. Wallace-Wells, *supra* note 206.

284. The circumstances impacting the teaching of race and law courses and also Critical Race Theory classes in law schools are the primary focus of this Article, given the emphasis on Derrick Bell and the development of CRT as a law school topic.

285. Wallace-Wells, *supra* note 206.

286. *What Is Critical Race Theory and Why Is It Under Attack?*, *supra* note 238.

287. *See generally infra* discussion of law school professors teaching various United States Supreme Court cases, *The New Jim Crow*, and systemic racism in law schools.

the Supreme Court of the United States, in the Court's majority, concurring, and dissenting opinions, analyze and share their viewpoints on disparities, bias, and systemic patterns of racism.[288] Some have directly or implicitly concluded that there is systemic racism in the United States, especially in criminal justice.[289] Further, law school professors often recommend books and law review articles that examine racial justice and systemic racism as syllabi-assigned readings to enhance students' understanding of race and constitutional law issues, including tenets of CRT.[290] An American Bar Association article offers the following questions about Critical Race Theory and the law:

> Foundational questions that underlie CRT and the law include: How does the law construct race?; How has the law protected racism and upheld racial hierarchies?; How does the law reproduce racial inequality?; and How can the law be used to dismantle race, racism, and racial inequality?[291]

Should law students evaluate those and similar questions? Some law professors believe so, while others may disagree. Nevertheless, scholars of race and the law generally argue that future lawyers, policymakers, and judges need knowledge and understanding of patterns of racism and issues concerning race and its connection to the law.[292] They maintain comprehension of the topics will help prepare students to serve clients with different perspectives and benefit them as future court officers, counselors of law, public officials, and judges.[293]

So, suppose some, or any law school officials and professors, veer down the same path as several secondary schools, colleges, and universities. Some law schools might already aim to do so, limiting teaching, syllabi assigned readings, and scholarship of race and law topics, including CRT tenets. In that case, it will require omitting substantial Supreme Court of the United States textbook cases and excluding various supplemental books and law review articles from course pedagogy and reading assignments to meet critics' objective of removing CRT influences. The outcome or effect will create a dilemma, defined by Cambridge Dictionary

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288. *Id*.

289. *Id*.

290. *Id*.

291. George, *supra* note 83.

292. *See* Lauren Michele Jackson, July 27, 2021, *The Void That Critical Race Theory Was Created to Fill*, THE NEW YORKER, https://www.newyorker.com/culture/cultural-comment/the-void-that-critical-race-theory-was-created-to-fill.

293. *Id*.

as "a situation in which a difficult choice has to be made between two different things you could do."[294] In this circumstance, on the one hand, law school professors could modify vital curricula in Constitutional Law, Criminal Procedure, and Race and Law, among other fundamental courses.

Or on the other hand, they could leave the curricula unchanged to still include what critics characterize as CRT or material influenced by CRT. A review of a Supreme Court of the United States constitutional criminal procedure law decision, *Whren v. United States*,[295] is valuable to this assessment of the law school dilemma. Consider the impact on law school education if professors remove the *Whren* court opinion and similar cases from course curricula, pedagogy, and class discussions because of a concern that *Whren* case issues are CRT.

Law professors teach *Whren*, a constitutional Fourth Amendment Criminal Procedure case, in Criminal Procedure, Critical Race Theory, and Race and the Law courses to enhance students' understanding of vital racial justice issues.[296] The *Whren* case is groundbreaking, not because the Supreme Court analyzed a complex criminal procedure rule. Instead, it has become a critical United States Supreme Court case addressing racial profiling.[297] Professors Devon Carbado and Jonathan Feingold share this view of the *Whren* case's significance: "In 1996, the U.S. Supreme Court decided *Whren v. United States*—a unanimous opinion in which the Court effectively constitutionalized racial profiling. Despite its enduring consequences, *Whren* remains good law today."[298]

In *Whren*, the Supreme Court evaluated significant constitutional concerns about race and racial disparities in police stops.[299] Plainclothes vice-squad officers were on patrol in what was considered a "high drug area" of the District of Columbia.[300] "Their suspicions were aroused" by a Pathfinder SUV with temporary license plates, and young Black male occupants stopped at a stop sign with the driver looking down into the

294. *Dilemma*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/dilemma (last visited Apr. 7, 2024).

295. Whren v. United States, 517 U.S. 806 (1996).

296. *Id.*; The *Whren* decision is included in most, if not all, law school investigatory Criminal Procedure textbooks.

297. *See Whren*, 517 U.S. 806; *See* Devon W. Carbado & Jonathan Feingold, *Rewriting Whren v. United States*, 68 UCLA L. REV. 1678 (2022). Racial profiling is defined: "A practice to target individuals of a certain race for enforcement rather than on the grounds of actual suspicion." *Racial profiling*, THE LAW.COM DICTIONARY (Apr. 7, 2023), https://dictionary.thelaw.com/racial-profiling/.

298. Carbado & Feingold, *supra* note 297, at 1678.

299. *Whren*, 517 U.S. at 808.

300. *Id.*

passenger's lap.[301] The SUV was at the stop sign for over twenty seconds, which the officers found unusually long. As the officers turned around and drove toward the SUV in their unmarked police car, the driver suddenly turned right without turning on the car's signal light and sped away at, according to the officer, an "unreasonable" speed.[302] When the officers stopped the SUV, following what they cited as traffic violations, they saw passenger Whren holding "two large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands."[303] The petitioners, Whren, and the driver of the vehicle, both young Black men, were arrested and charged with violating drug laws after officers confirmed illegal drugs inside the Pathfinder SUV.[304]

At the pretrial hearing, the petitioners claimed that the officers used the traffic violation stop as a pretext to search the SUV for drugs.[305] They maintained that the officers did not have probable cause to believe or reasonable suspicion of illegal drug dealing. Instead, they argued that the officer's reason for stopping the SUV was pretextual.[306] In other words, the petitioner did not contest the traffic violation, the infractions alleged, including a minor breach of failing to signal a right turn. Their concern was the trial judge should have suppressed the drugs seized because the officer's alleged reason for approaching the SUV to address minor traffic violations was merely a pretext. They believed the officers stopped them because of their race. The petitioners, therefore, contended the officers' decisions were motivated by the fact that they were African American.[307] The Court offered this summary of the petitioners' argument:

> [A] police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, [like drug dealing] to which no probable cause or even articulable suspicion exists. Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger, they say, the Fourth Amendment test for traffic stops should be, not the normal one (applied by the Court of Appeals) of whether probable cause existed to justify the stop; but rather, whether

301. *Id.*
302. *Id.*
303. *Id.* at 808–09.
304. *Id.* at 809.
305. *Id.*
306. *Id.*
307. *Id.*

> a police officer, acting reasonably, would have made the stop for the reason given.[308]

In a unanimous Supreme Court opinion, the Court held that officers might stop a car when they have probable cause to believe a traffic violation occurred.[309] The court added the petitioners were stopped for speeding and failing to signal before turning, making the stop reasonable and subsequent discovery of evidence permissible under the Fourth Amendment of the United States Constitution.[310] Therefore, the personal motivations of the officers for stopping a car, including profiling based on a suspect's race, might be a factor. Still, it will not make the officer's stop and search unreasonable unless race is the only motivation for a traffic stop.[311]

The Court's ruling in *Whren* left the door open for police officers to profile based on race if they observe an individual committing only a minor traffic violation.[312] The result: Despite being motivated by race (racial profiling), as long as an officer has probable cause to believe the driver of a vehicle has committed a traffic violation, however minor the offense, the court will not suppress the evidence, as the police, under the *Whren* Fourth Amendment Constitutional Criminal Procedure precedent has not violated a defendant's constitutional rights.[313] The Court addressed the possible option for the petitioners to consider a Fourteenth Amendment complaint: "We of course agree with petitioners that the constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection

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308. *Id.* at 810.

309. *Id.* at 819.

310. *Id.*

311. *Id.* at 813.

312. *Id.* at 819.

313. State constitutions might provide more protection against racial profiling. In a late 2022 New York case, the Supreme Court of New York decided differently from the Supreme Court ruling in *Whren* addressing racial profiling. The Court in *People v. Jones* held:

> The exclusionary rule can be applied to a racially motivated traffic stop everywhere a police officer has probable cause to believe a traffic infraction was committed. In People v. Jones, 2022 N.Y. Slip Op 05892 (3d Dept. 2022), the Appellate Division, Third Department has held that our state Constitution provides broader protection than the federal Constitution, with respect to pretextual traffic stops.

Barry Kamins, *Exclusionary Rule Applied for the First Time to Racial Profiling*, ALM LAW.COM (Dec. 05, 2022), https://www.law.com/newyorklawjournal/2022/12/05/exclusionary-rule-applied-for-the-first-time-to-racial-profiling/?slreturn=20230228185933#:~:text=In%20People%20v.,respect%20to%20pretextual%20traffic%20stops; People v. Jones, No. 110496, 2022 N.Y. Slip Op 5892 (N.Y. App. Div. Sep. 8, 2022).

Clause, not the Fourth Amendment."[314] Still, Supreme Court jurisprudence has made the chances of success in Fourteenth Amendment selective enforcement claims unlikely in most cases, given the heavy burden of obtaining credible evidence (generally available only to the government) to meet the burden of proof.[315]

There are several issues that the court directly or implicitly addressed in *Whren*: pretext traffic stops, racial profiling, bias, and disparities are factors considered when evaluating systemic racism and whether the law is colorblind.[316] Critics of CRT reject teaching those issues, but they are central topics in the *Whren* case and other Supreme Court decisions taught in law school Criminal Procedure, Critical Race Theory, Race and Law, and other courses.[317] The Court's opinion and evaluation of factors in *Whren* allows students to analyze, among other issues, whether institutionalized in the Fourth Amendment Supreme Court of the United States precedents addressing Constitutional Law are systemic racist motivations upheld for law enforcement officers.

B. Law School Pedagogy, Class Discussions, and Scholarship Impacted If Professors Make Curricula Changes in Response to Critics' Complaints About CRT

If professors and officials seek to remove the issues addressed in *Whren* from law school classes, consider the following outcomes or causal effects that many proponents of Constitutional Criminal Procedure, African American History, Race and Law, and CRT education envision. Law students will lack essential knowledge and understanding of significant criminal procedure precedents addressing race and constitutional law questions. They would graduate from law school without receiving complete and adequate training on fundamental constitutional and race law topics. They will leave the legal academy unprepared to address several necessary bar exam topics and unequipped to understand and engage many societal racial justice issues to meet their clients' needs or address pertinent policy and law issues.

Moreover, as indicated, *Whren* is only one of the innumerable Supreme Court cases that analyzes race and law topics: racial profiling, pretextual

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314. *Whren*, 517 U.S. at 813.

315. *Id.*; *See United States v. Armstrong*, 517 U.S. 456 (1996) (Armstrong claimed selective prosecution in a claim against the government, and the burden imposed to meet his claim was nearly impossible to meet. The evidence required to prevail in a Fourteenth Amendment selective enforcement challenge against the government would present similar hurdles).

316. *See generally Whren*, 517 U.S. 806.

317. *See supra* Part II, C discussion of CRT critics' complaints.

traffic stops, bias, and disparities across racial lines are issues pertinent to assessing systemic racism and whether the law is colorblind. As addressed in Part II C, present-day critics' of CRT commonly use Critical Race Theory as a catchphrase for any *study* or *analysis* of race history, racial justice, and systemic racism.[318] Yet the Supreme Court justices, scholars of race and law, historians, professors, and countless others *study* and *analyze* systemic racism; as such, they all fall within critics' catchphrases of "CRT" or "Critical Race Theorists."[319] Thus, under CRT critics' catchall slogans, they are all in the category of critical race theorists. It is worth considering the complications of that point and the untenable causal effects of a slogan or catchall phrase that deters pedagogy, research, and references to African American history, systemic racism, and, essentially, racial justice.

The outcome: If critics aim to remove all influences or mentions of CRT from law school pedagogy, then the following statements (quoted below and made by the Supreme Court Justices) and vital cases would need to be eliminated from law school textbooks given the issues of bias, disparities, disproportionality, and racism analyzed, all pertinent to examinations of systemic racism, and all topics denounced by CRT critics. The cases represent only four of the innumerable Court decisions of Justices' analyzing and opining on factors pertinent to a review of systemic racism in the United States of America. As you review the excerpts, given the race and law issues analyzed by the Justices, which critics call "CRT," consider whether students should study the cases in law school Criminal Procedure classes or should law professors remove them from the class discourse and examinations. Also, given the Justices' reviews of CRT topics, critics must classify the statements as CRT to remain true to their catchall phrase. So are the Supreme Court Justices quoted below Critical Race Theorists (given critics' definition of writings and discussions that constitute the catchall phrase CRT), and should their ideas (influences of CRT) be removed from law school textbooks?

> **Justice Brennan, joined by Justice Marshall, and Justice Stevens: Dissenting Opinion** *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987)
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> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his

318. *Id.*

319. Wallace-Wells, *supra* note 206.

> victim was white . . . . Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks . . . . In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, . . . while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black . . . . Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim . . . . The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.[320]

Justice Sotomayor: Dissenting Opinion *Utah v. Strieff*, 579 U.S. 232, 254 (2016)

> This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, . . . many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner . . . . But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, The New Jim Crow 95–136 (2010). For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, *e.g.,* W.E.B. Du Bois, The Souls of Black Folk (1903); J. Baldwin, The Fire Next Time (1963); T. Coates, Between the World and Me (2015).[321]

Justice Gorsuch: Majority Opinion *Ramos v. Louisiana*, 140 S.Ct. 1390, 1394 (2020)

> Why do Louisiana and Oregon allow nonunanimous convictions? Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee

320. McCleskey v. Kemp, 481 U.S. 279, 321 (1987).

321. Utah v. Strieff, 579 U.S. 232, 254 (2016).

> chairman, the avowed purpose of that convention was to "establish the supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.
>
> Nor was it only the prospect of African-Americans voting that concerned the delegates. Just a week before the convention, the U. S. Senate passed a resolution calling for an investigation into whether Louisiana was systemically excluding African-Americans from juries. Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule permitting 10-to-2 verdicts in order "to ensure that African-American juror service would be meaningless."[322]

> **Justice Kavanaugh: Majority Opinion** *Flowers v. Mississippi*, 139 S.Ct. 2228, 2235 (2019)
>
> Four critical facts, taken together, require reversal. *First*, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court . . . . *Second*, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. *Third*, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. *Fourth*, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State.[323]

The Justices in *McCleskey*, *Strieff*, *Ramos*, and *Flowers* addressed various questions relevant to considering systemic racism, racial disparities, bias, and other issues in criminal justice.[324] And the earlier *Whren* case discussed racial profiling and pretextual stops, issues impacting the American people.[325] The Justices' opinions, as a historian

322. Ramos v. Louisiana, 140 S.Ct. 1390, 1394 (2020).

323. Flowers v. Mississippi, 139 S.Ct. 2228, 2235 (2019).

324. *McCleskey*, 481 U.S. 279; *Strieff*, 579 U.S. 232; *Ramos*, 140 S.Ct. 1390; *Flowers*, 139 S.Ct. 2228.

325. Whren v. United States, 517 U.S. 806 (1996).

writing about the Court states, should meet the objective of ensuring equal justice under the law for the American people:

> "EQUAL JUSTICE UNDER LAW"—These words, written above the main entrance to the Supreme Court Building, express the ultimate responsibility of the Supreme Court of the United States. The Court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution.[326]

Given the Justices' fundamental responsibility, it would be remarkable if law school professors did not find their assessments of factors relevant to equal justice and ridding society of racism pertinent for law school students to consider, despite CRT critics' objections. However, under critics' catchall phrase, professors should remove many court opinions from law school pedagogy and curricula. Beyond excluding various Justices' court opinions, consider other CRT law school reading material that critics would need to eliminate if they seek to purge the legal academy of CRT. Most notably, professors must remove all influences of founder Derrick Bell, who started scholars' Critical Race Theory examinations and their extensive volumes of scholarly articles and books.

So, suppose critics aim to take such far-reaching steps. In that case, they must first recall that Bell spent forty years developing his critical race theories in the legal academy, completing over 100 law review articles and several books.[327] He inspired more than four decades of Critical Race Theory scholars who, as stated, have completed several hundreds of CRT articles and books.[328] As discussed in Part II, and it is worth reiterating here, consider the work of Professor Michelle Alexander. She wrote *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, addressing systemic issues of mass incarceration in the United States prison system.

The Chronicle of Higher Education stated Alexander's evaluation of mass incarceration in America is one of the most influential books of the

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326. *The Court and Constitutional Interpretation*, SUPREME COURT OF THE UNITED STATES (Apr. 5, 2023), https://www.supremecourt.gov/about/constitutional.aspx; *see* Marbury v. Madison, 5 U.S. 137 (1803); McCulloch v. Maryland, 17 U.S. 316 (1819).

327. THE DERRICK BELL READER, *supra* note 5, at 14.

328. Richard Delgado, *Critical Race Theory: An Annotated Bibliography*, ALABAMA LAW SCHOLARLY COMMONS (July 4, 2012).

past 20 years.[329] As discussed earlier, Professor Alexander said, "no legal scholar has had a greater impact on me."[330] She is referring to Derrick Bell.[331] Alexander's book has reached the tenth edition of the publication.[332] The publisher, The New Press, offers this statement about *The New Jim Crow*:

> Seldom does a book have the impact of Michelle Alexander's *The New Jim Crow*. Since it was first published in 2010, it has been cited in judicial decisions and has been adopted in campus-wide and community-wide reads; it helped inspire the creation of the Marshall Project and the new $100 million Art for Justice Fund; it has been the winner of numerous prizes, including the prestigious NAACP Image Award; and it has spent nearly 250 weeks on the *New York Times* bestseller list.[333]

Considering The New Press's summary of the commendations and influence of *The New Jim Crow*, it is worth pausing again to measure Professor Derrick Bell's impact on critical race and law scholarship; influencing Professor Michelle Alexander's scholarship alone has left a global mark. Indeed, Alexander's book has been read by millions of people, selling over a million copies by 2018.[334] Most critical race theorists and race and law scholars would consider *The New Jim Crow* a classic, foundational work of critical race scholarship. In the best-selling publication, Alexander unhesitatingly explains that her examination reveals evident disparities and racism in criminal justice, so systemic in Alexander's view that she defines the problem as a new form of a Jim Crow caste system.[335] Today's CRT critics' would also unquestionably consider *The New Jim Crow* a sure example of their catchall phrase "CRT."

Critics cannot diminish the widespread global readership or aim that Alexander sought and achieved. She started a national conversation about a much-needed topic: the mass incarceration and criminalization of human beings in the United States of America, incredibly vast

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329. *Praise for* The New Jim Crow, THE NEW JIM CROW (Apr. 30, 2023), https://newjimcrow.com/praise-for-the-new-jim-crow.

330. *See* FACES AT THE BOTTOM OF THE WELL, *supra* note 56, at ix.

331. *Id.*

332. *See generally* THE NEW JIM CROW, *supra* note 180.

333. *The New Jim Crow*, NEW PRESS (Apr. 30, 2023), https://thenewpress.com/books/new-jim-crow.

334. Jonah E. Bromwich, *Why Are American Prisons So Afraid of This Book?* THE N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/new-jim-crow-book-ban-prison.html.

335. *See generally* THE NEW JIM CROW, *supra* note 180.

numbers of Black men incarcerated.[336] In *The New Jim Crow*, Professor Alexander writes:

> Arguably the most important parallel between mass incarceration and Jim Crow is that both have served to define the meaning and significance of race in America. Indeed, a primary function of any racial caste system is to define the meaning of race in its time. Slavery defined what it meant to be black (a slave), and Jim Crow defined what it meant to be black (a second-class citizen). Today mass incarceration defines the meaning of blackness in America: black people, especially black men, are criminals. That is what it means to be black.[337]

Therefore, critics may aim to remove *The New Jim Crow* from secondary and post-secondary schools. Moreover, some law school professors, Deans, and officials may seek to remove the book from legal academy pedagogy. Still, given the number of books sold and millions of people who have already read *The New Jim Crow*, critics cannot take away the book's evaluations, assessments, and influence globally and impact on Americans' minds. And that brings this Article to an additional point for consideration.

Beyond Bell's influence on Professor Michelle Alexander, as addressed in Part II and necessary to recall, before becoming a Justice of the United States Supreme Court, Justice Thurgood Marshall was the Director Counsel of the Legal Defense Fund (LDF). [338] He influenced Bell by giving him a job at the LDF and allowing him to handle civil rights litigation in over 300 school-desegregation cases.[339] Justice Marshall was the lead attorney in *Brown I* and *II*, landmark school desegregation civil rights cases.[340] And the chain of influence continues, as Bell also interacted with Supreme Court Justice Elana Kagan when she was the Supervisory Editor of the *Harvard Law Review* (HLR) in 1985.[341] Bell made this statement about Justice Kagan: "Elena Kagan [and other law review staff members] became collaborators in the challenge to express

336. *Id.*

337. *Id.* at 197.

338. *Thurgood Marshall: LDF Founder and President and Director-Counsel, 1940–1961, supra* note 9.

339. Cobb, *supra* note 29.

340. *Thurgood Marshall: LDF Founder and President and Director-Counsel*, *supra* note 9.

341. Charles J. Ogletree Jr., *Derrick Bell: Losing a Champion for Equality*, THE ROOT (Oct. 8, 2011), https://www.theroot.com/derrick-bell-losing-a-champion-for-equality-1790866232.

jurisprudential matters of significant importance in a language and format more usual in literature than in law."[342]

Should Constitutional Law class professors not teach the *Brown* case since it addresses systemic racism (legal school segregation)? And for *Brown* and all of the decisions addressed in this discussion, among many others, should law school students continue to evaluate the essential constitutional law decisions, analyzing and distinguishing relevant factors to assess areas of past and present disparities in criminal justice? After all, the general law school pedagogy is not to tell students what to think but to help them develop critical skills.

Indeed, to learn how to be analytical thinkers (not avoiders of vital topics), a review of relevant material is essential, including court cases and important books like *The New Jim Crow* and scholarship that theorists developed to critique the law and improve the justice system. Therefore, if critics seek to remove the views and any possible influences of the catchall "CRT" and founder Derrick Bell's impact, it creates a dilemma for law schools, seemingly impossible to meet. Given Bell's long civil rights practice and law professor career, the extensive body of critical race scholarship, and global influence, his legacy is entrenched in the legal academy.

IV. CONCLUSION

In Part II, readers considered a summary of African Americans' long history from slavery to Jim Crow segregation and onward. The aim was to raise awareness of the need for scholarship on race and law topics and issues. The seminal work of Professor Derrick Bell was the focus of this Article, since many consider him the founder of CRT, writing hundreds of law review articles on the topic and deemed the person who inspired generations of other legal scholars to develop critical race theories.[343]

After gaining general information about Bell's four-decade law professor career and earlier civil rights counsel, addressing over 300 school desegregation cases before he joined the legal academy, the aim was for readers to consider Bell's influence on legal education and scholarship.[344] And the Article's review of recent (2020–2023) conflicting viewpoints on CRT provided background knowledge to explain the perspectives and aid Part III's examination of potential outcomes and a dilemma that might arise from the current CRT controversy.

342. AND WE ARE NOT SAVED, *supra* note 71, at xii.

343. *Cobb supra* note 29.

344. THE DERRICK BELL READER, *supra* note 5.

This Article ends by circling back to its intention to decline a debate for or against CRT, instead aiming to present essential information and raise valid questions and points to evaluate. The examination concludes with three salient points for consideration: (1) African American history and vital studies of race and how it intersects with the law should remain in the legal academy. (2) The topics are essential for law students' education and professional growth. (3) Knowledge and understanding of vital race and law issues help law students become well-educated, competent attorneys and citizens who should aspire to improve society and move America closer to its founding ideals of "liberty" and "equal justice under law for all."