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REFORGING THE MASTER'S TOOLS: CRITICAL RACE THEORY IN THE FIRST-YEAR CURRICULUM

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ABSTRACT

This Article examines why and how critical race theory (CRT) should be taught as a mandatory component of the first-year law school curriculum. Learning the fundamentals of critical race theory is not only important to empathetically understand and serve those around you, but necessary to understand the law as it is. The law's past and future require this. This Article first makes the positive argument for critical race theory's necessity in legal education, showing that it rises above normative (albeit virtuous) justifications. It then briefly summarizes what critical race theory is by outlining its central tenets, as well as what critical race theory is not by examining the recent uproar surrounding the CRT boogeyman.

Part II explores why and how critical race theory can be taught in two doctrinal first-year courses: constitutional law and civil procedure. The courses show how easily critical race theory's tenets slot into commonly taught cases, before even considering adding new material to course requirements. Constitutional law demonstrates how interest convergence and the social construction of race play a role in the law, while civil procedure demonstrates how intersectionality and counter-storytelling can recontextualize how we view a court's ruling.

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Part III prescribes actionable solutions. The first solutions include discretionary implementation of critical race theory into syllabi by professors. It suggests more concrete solutions in the form of mandatory curriculum requirements, changes to ABA accreditation standards, and changes in NCBE Bar Exam requirements. It then surveys some existing courses to examine how such requirements can be implemented. Finally, the appendices outline the wealth of existing CRT scholarship relating to the first-year courses for reference.

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I. INTRODUCTION

A. THE LAW IS RACIST.

The law is racist. Our country's founding document nakedly enshrined racism in its text, and even with all of the progress made since the founding, the law creates, perpetuates, and allows racism today. It does this while denying it.[1] Legislatures across the country have banned critical race theory in one form or another, making it a distorted partisan talking point.[2] Yet critical race theory is essential to understanding both the history of the law and the law as it is—two indispensable facets of any respectable legal education. As I will explain, critical race theory (and related critical pedagogy) is requisite for any competent legal education. This *is* the case.

Learning critical race theory is a matter of accuracy, not just advocacy. In acknowledging the necessity of a course on race and the law, Berkeley Law's Dean Erwin Chemerinsky states as much: "No law student can be prepared to practice law in any field without an understanding of the role of race in American law, both historically and today."[3] Many scholars, practitioners, and other commentators have made compelling arguments for the introduction of CRT and critical pedagogy generally, but these arguments frequently have normative grounds. Similarly compelling arguments for the growth of clinical education—especially as it relates to social justice—have been made over the years.[4] These grounds are righteous and worth serious consideration but do not fall within the scope of this paper. "[C]linical education is only one part of the longer-term effort to train emerging social justice lawyers. The need for critical race theory to be included in students' doctrinal study alongside their experiential learning is mission-critical."[5] You simply cannot accurately learn the law without at least considering CRT in your education. My argument is positive, not normative. Professor Frances Lee Ansley articulates the importance of racial literacy in legal education beautifully:

1. *See, e.g.*, U.S. CONST. art. IV, § 2, cl. 3, (the Fugitive Slave Clause), *repealed by* U.S. CONST. amend. XIII; U.S. CONST. art. I, § 9, cl. 1 (the Slave Trade Clause) (repealed 1808).

2. PEN America has an incredibly thorough, consistently updated spreadsheet tracking the progress of anti-CRT bills across the nation. *See PEN America Index of Educational Gag Orders*, PEN AMERICA, https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870 [https://perma.cc/3K56-JWWA].

3. Andrew Cohen, *Moving Forward: Faculty Approves Race and Law Course Requirement in Order to Graduate*, BERKELEY L. (Feb. 18, 2022), https://www.law.berkeley.edu/article/faculty-approves-race-and-law-course-requirement/ [https://perma.cc/EL8G-EQ6G].

4. *See, e.g.*, Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195 (2002); Margaret B. Kwoka, *Intersecting Experiential Education and Social Justice Teaching*, 6 NE. U. L.J. 111 (2013); Dwight Aarons, *A Nuts and Bolts Approach to Teaching for Social Change: A Blueprint and a Plan of Action*, 76 TENN. L. REV. 405 (2009).

5. Zoë Polk & Seema N. Patel, *Students' Request for a Mandatory 1L Critical Race Theory Course*, E. BAY CMTY. L. CTR. (Apr. 1, 2021), https://ebclc.org/wp-content/uploads/2021/04/EBCLC-Letter-of-Support-for-CRT-Course-040121.pdf [https://perma.cc/98CJ-CRNW].

> Our canon is already an integrated one and should be consciously taught as such. American law students should not leave the law schools of the late twentieth century until they have received a thorough and explicit grounding in the role that race has played in the creation and transformation of central legal institutions. The power and burden of race, both past and present, should be seen as indispensable parts of minimal cultural and constitutional literacy for the legal practitioners and theoreticians we send forth into the bar and the world.[6]

Yet law students did leave the law schools of the late twentieth century without that literacy; we must ensure law students of the twenty-first century do not face the same fate. Ansley's 1991 essay on race in the core curriculum notes a past objection based on "the assertion that texts of appropriate quality are lacking" and that "there are inadequate resources to implement such expansion."[7] I hope that examining this paper's appendices will show how nakedly wrong that first argument is today, not to mention its incorrectness in 1991.[8] The scholarship surrounding critical race theory is voluminous and exceptional, and this is only becoming more and more true over the years. I hope that the cataloging of resources in this paper's appendices will both demonstrate that fact and assist professors, students, and organizers in implementing critical race theory in their respective curriculums.

The argument that resources—time, money, staffing, etc.—are too limited for the implementation of critical race theory also falls flat. It is undoubtedly true that law schools and professors must carefully allocate their limited time and resources to provide an optimal experience for their students. They may examine the problem as splitting focus between "the 'fundamentals,' not on peripheral 'extras'" such as critical race theory.[9] Again, critical race theory can hardly be characterized as a "peripheral extra." Racism has roots in the Constitution itself, and its tendrils still creep throughout the law today. Race is more fundamental than many other aspects we learn about the law.

The function of stare decisis requires that we face race head-on in our education more so than other disciplines. Racist laws and rulings are precedent if not repealed or overturned, giving the law a unique need to directly address racism even where it may still be pressing in other fields. In many ways, the law is both the master's tool and the master's house.[10] The powerful wield it as an oppressive tool for furthering their own interests, and it shelters them from the consequences of their oppression. Attempting to use a fundamentally unjust system to dismantle itself is futile by definition. However, we may still use CRT to understand the master's tools and the master's house as they actually are, not as they purport to be. Professor Khiara Bridges suggests we can approach legal

6. Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511, 1520 (1991).

7. *Id.* at 1519.

8. *See infra* Appendices A–H.

9. Ansley, *supra* note 6, at 1519–20 n.20.

10. Audre Lorde's famous speech speaks to many of the intersectional realities discussed at *infra* Section II.B.3. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 112 (2007).

institutions "with a mindset centered around reorganizing"; we can reorganize legal education to make it a tool that is "life affirming" rather than oppressive.[11] The master's tools may never dismantle the master's house, but we can put them to work while we endeavor towards necessary reforms and abolition on larger scales. Learning critical race theory in the first year of law school will prepare students to do this work, facing the law head-on for what it actually is and arming them to reimagine what it can be.

B. WHAT IS CRT? A BRIEF HISTORY AND THE MOMENT WE'RE IN

1. What CRT is: Definitions and Recurring Themes

What is critical race theory? Professor Dorothy A. Brown synthesizes the essence of the movement in one simple and effective question: "[W]hat does race have to do with it?"[12] It turns out, perhaps unsurprisingly, race has a great deal to do with it. "Race isn't just the elephant in the room . . . it is the room."[13] Critical race theory is all about critically examining the function of race in the law, and, although it has recurring themes, it has no perfectly established central tenets to point to.

Even without perfectly defined central tenets, foundational scholar Richard Delgado does attempt to synthesize CRT's main themes with some specificity: it is a movement centered on "studying and transforming the relationship among race, racism, and power."[14] It pushes back against traditional conceptions of law and civil rights, instead asking foundational questions about the law, its reasoning, and its history.[15] The movement first materialized in 1989 when foundational scholars such as Derrick Bell, Alan Freeman, and Richard Delgado convened with other academics for public and private workshops.[16] Its ideological underpinnings come from the critical legal studies movement and radical feminism, two movements that insufficiently addressed race in their time despite their otherwise valiant undertakings.[17] Delgado outlines five basic tenets of critical race theory with the caveat that they are not universally accepted or defined identically, given the movement's diverse offshoots: the ordinariness of racism; interest convergence (or material determinism); the "social construction" thesis; intersectionality and anti-essentialism; and the voice of color.[18]

11. Austin Chandler, *Race, Gender, Class: A Handful Worth Holding*, B.C. L. SCH. MAG. ONLINE (Oct. 7, 2021), https://lawmagazine.bc.edu/2021/10/race-gender-class-a-handful-worth-holding/ [https://perma.cc/9337-F3M6].

12. DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS 1 (3d ed. 2014).

13. Bennett Capers, *The Racial Architecture of Criminal Justice*, 74 SMU L. REV. 405, 413 (2021) (quoting from a conversation with Professor Andrew Crespo).

14. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3 (3d ed. 2017).

15. *Id.*

16. *Id.* at 4.

17. *See id.* at 5.

18. *Id.* at 8–11.

The ordinariness of racism holds that race drives ordinary interactions, that it is "the usual way society does business."[19] Interest convergence, a term coined by Professor Derrick Bell, holds that racial progress happens when the interests of the oppressed converge with the interests of the oppressors.[20] The social construction thesis defines race as a social construct—not a biological reality—that shifts over time according to power dynamics, although scholars disagree about its specific mechanics.[21] Intersectionality, coined by Professor Kimberlé Crenshaw, requires the joint examination of different identities and how they come together to influence lived experiences and legal outcomes, including race, sex, class, and sexual orientation.[22] Finally, the "voice of color" entails that people of color can frequently explain race and racism with a nuance White people cannot because of their personal experiences.[23] In this paper, I directly address how interest convergence, intersectionality, and the voice of color may be taught in the first-year legal curriculum, but for the sake of economy, I do not address the ordinariness of racism or social construction thesis in much depth.

2. What CRT Isn't: Backlash and Moving Mountains Made of Molehills

Where Delgado provides some structured clarity as to what CRT means, right-wing movements have recently distorted it into a catch-all partisan talking point for any contentious idea involving race or related progressive policies. This strawman movement began with Trump's Executive Order 13950, ironically titled "Combating Race and Sex Stereotyping."[24] Its title indicates a broad theme in the racist anti-CRT movements across the country: they hold the country's racial progress aloft in one hand while they hold a silencing finger to the mouths of advocates with the other. Dr. King's famous dream that his "little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character" is a favorite quote among anti-CRT fanatics and has been quoted in anti-CRT handbooks as well as Trump's original executive order.[25] These handbooks, of course, do not mention Dr. King's admonitions in the same speech to avoid taking "the tranquilizing drug of gradualism," to "never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality," or to never "be satisfied as long as the

19. *Id.* at 8.

20. *See id.* at 9.

21. *See id.* at 9, 20–21 (describing a difference in thought between idealists and realists (or economic determinists) as to this point).

22. *Id.* at 58; *see* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHI. LEGAL F. 139, 140, 145 (1989).

23. DELGADO & STEFANCIC, *supra* note 14, at 11.

24. Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020).

25. CITIZENS FOR RENEWING AMERICA, COMBATTING CRITICAL RACE THEORY IN YOUR COMMUNITY: AN A TO Z GUIDE ON HOW TO STOP CRITICAL RACE THEORY AND RECLAIM YOUR LOCAL SCHOOL BOARD 2, https://citizensrenewingamerica.com/issues/combatting-critical-race-theory-in-your-community/ [https://perma.cc/SHT6-F4WW].

Negro's basic mobility is from a smaller ghetto to a larger one"—themes that ring too true today.[26]

Legislators across the country have introduced and passed numerous anti-CRT bills in blatant disregard of Dr. King's warnings.[27] So far, ten states have silenced educators and state agencies by fully passing these bills.[28] Two of these laws specifically ban CRT by name, while the rest do so in more vague terms.[29] Another battle has taken place in school board meetings across the country, where parents—and even people who do not have kids at the besieged public schools—have lashed out about teachers supposedly indoctrinating their students with CRT.[30] The school board movement has received formalized support from some conservative advocacy groups, including Citizens for Renewing America and Turning Point USA.[31] This paper does not address the free speech implications of the movement against this strawman version of "critical race theory," but we stand in a unique historical position to slingshot the political will against CRT into meaningful change.

Dr. King announced that "1963 is not an end, but a beginning."[32] These legislators would see 1963 as the end of racial progress in the United States; their efforts to silence thousands of voices under the name of CRT is a vicious tool to that end. But each bill gagging discussions of racial equity under the name of CRT is a beginning, too. Counter-movements have emerged against this right-wing outlash. The African American Policy Forum (AAPF), headed by Kimberlé Crenshaw, launched the #TruthBeTold campaign to highlight the

26. Martin Luther King Jr., I Have a Dream Speech (Aug. 28, 1963) (transcript available at https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety [https://perma.cc/Q4MA-LKAR]).

27. For a detailed and continuously updated list of anti-CRT bills, see PEN AMERICA, *supra* note 2. For a condensed but still thorough alternative with handy visual aids, see Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (June 11, 2021), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 [https://perma.cc/JZ4L-256C].

28. *See* Jonathan Friedman & James Tager, *Educational Gag Orders*, PEN AMERICA, https://pen.org/report/educational-gag-orders/ [https://perma.cc/T8M6-9RRN] (noting successful anti-CRT legislation in Arizona, Arkansas, Idaho, Iowa, New Hampshire, Oklahoma, South Carolina, Tennessee, and Texas); 2021 N.D. Legis. Serv. 1st Sp. Sess. Ch. 554 (West) (formerly H.B. 1508) (entitled "Curriculum – Critical race theory – Prohibited.").

29. IDAHO CODE ANN. §§ 33-138, 33-139 (West 2021) (formerly H.B. 377) (banning tenets "often found in 'critical race theory'"); N.D. Legis. Serv. Ch. 554.

30. *See, e.g.*, Bill Zeeble, *The Texas Legislature Has Targeted Critical Race Theory, But Is It Being Taught In Public Schools?*, HOUSTON PUB. MEDIA (July 9, 2021, 7:27 AM), https://www.houstonpublicmedia.org/articles/education/2021/07/09/402708/the-texas-legislature-has-targeted-critical-race-theory-but-is-it-being-taught-in-public-schools/ [https://perma.cc/3DRF-B97F]; Mary Margaret Olohan & Kendall Tietz, *Crowds Gather With Matt Walsh to Protest Virginia School's 'Indoctrination and Psychological Abuse Of Kids'*, DAILY CALLER (Sept. 28, 2021, 10:40 PM), https://dailycaller.com/2021/09/28/matt-walsh-loudoun-county-virginia-school-critical-race-theory-transgender/ [https://perma.cc/ZL36-53RM] (describing a transphobic and anti-CRT rally around the Loudoun County school board meeting where conservative commentator Matt Walsh later spoke despite neither living in the county nor having children attending the schools).

31. *See* CITIZENS FOR RENEWING AMERICA, *supra* note 25; *The Battle To Save America's Classrooms*, TURNING POINT USA, https://www.schoolboardwatchlist.org/ [https://perma.cc/SRG9-Q845].

32. King, *supra* note 26.

importance of CRT and track the nationwide outrage against it.[33] The AAPF launched a Critical Race Theory Summer School in 2020—a five-day conference focused on critical race theory from all angles—that repeated in the summers of 2021 and 2022.[34] Howard Law School's Thurgood Marshall Civil Rights Center established a CRT hotline in partnership with the AAPF, which educators, parents, and Diversity, Equity, and Inclusion (DEI) professionals can confidentially contact for both legal and practical assistance in dealing with the anti-CRT movement.[35] And, of course, legal challenges have already arisen against the anti-CRT bills.[36] Every drop of destructive vitriol against CRT provides an opportunity to form a constructive response, building infrastructure for actually expanding the conversation around race in meaningful ways.

While the battles continue nationwide about teaching CRT where it isn't taught, we should focus on where people actually learn CRT: law schools. CRT is frequently not offered until a law student's second or third year, and when it is, it often takes the form of a small seminar course. If students are lucky enough to have the course offered at their school and get into it, they are still learning the material too late; CRT is, by definition, foundational. To make the most of its teachings, law students need to learn CRT alongside their other foundational courses.[37] I therefore turn my attention to how professors and law students can think about critical race theory in the doctrinal first-year curriculum.

II. THE DOCTRINAL FIRST-YEAR COURSES

This section will address the necessity for critical race theory in two doctrinal first-year courses: constitutional law and civil procedure. Examining these courses will provide a groundwork for teaching the CRT concepts of interest convergence, counter-storytelling, and intersectionality through cases already commonly taught in the courses. There is a strong argument to be made for teaching other cases and materials altogether, but I focus here on already-taught cases to show how CRT undergirds all of legal education. Economy necessitates that the examples provided for each course here remain limited; the appendices provide quick reference for the wealth of resources available for each course. Other scholars have done incredible work in describing how CRT can be applied in these cases, so I hope that my analyses here are only the first step of many for those interested in teaching or learning CRT in the first-year curriculum.

33. *Welcome to the #TruthBeTold Campaign*, AFR. AM. POL'Y F., https://www.aapf.org/truthbetold [https://perma.cc/6HZ3-3M73].

34. *Critical Race Theory Summer School*, AFR. AM. POL'Y F., https://www.aapf.org/crtsummerschool [https://perma.cc/SV3L-TCEK].

35. *Critical Race Theory*, HOW. UNIV. SCH. L. THURGOOD MARSHALL CIV. RTS. CTR., https://thurgoodmarshallcenter.howard.edu/issues/critical-race-theory [https://perma.cc/PD5K-BW5U].

36. *See, e.g.*, *ACLU of Oklahoma, Lawyers Committee File Lawsuit Challenging Oklahoma Classroom Censorship Bill Banning Race and Gender Discourse*, ACLU (Oct. 19, 2021), https://www.aclu.org/press-releases/aclu-aclu-oklahoma-lawyers-committee-file-lawsuit-challenging-oklahoma-classroom [https://perma.cc/9P7Q-JTBB].

37. Perhaps if legislators—many of whom are lawyers—learned CRT in their first-year courses, they would address it for what it really is.

A. INTEREST CONVERGENCE IN CONSTITUTIONAL LAW

Constitutional law is perhaps the most obvious place to begin implementing CRT given its foundational nature. The Constitution itself had—and has—multiple provisions empowering slavery, though it knew better than to say so outright. Article IV, Section 2, Clause Three of the Constitution enabled slavers to legally subjugate Black people who crossed state lines in pursuit of their natural right to freedom other sections of the Constitution purported to protect.[38] Article I, Section Nine, Clause One sheepishly outlined the timeline of legalized slave trade into the United States.[39] Both of these provisions are now stricken-through stains on the Constitution, but it still enshrines slavery in more coy terms to this day. The Thirteenth Amendment carves out legal slavery through incarceration,[40] and Black people—particularly Black men—disproportionately end up the legal slaves.[41] Our legal educations begin with the Constitution, and the Constitution began with slavery and racism. Examining the first-year constitutional law course provides an important foundation for understanding how and why critical race theory must be implemented into the curriculum.

1. The "Anticanon" and Teaching Racism Like It's Over

Unlike critical race theory, even public secondary schools will frequently teach cases from the "anticanon": those cases "whose central propositions all legitimate decisions must refute."[42] These cases form what feels like the core of constitutional law courses, or at the very least the cases every student remembers even as the fog of law school drifts from their mind. They feel so unjust or ridiculous as to be obviously incorrect, facially evil to modern sensibilities. Professor Jamal Greene cites *Dred Scott v. Sandford*,[43] *Plessy v. Ferguson*,[44] *Lochner v. New York*,[45] and *Korematsu v. United States*[46] as the "prime examples" of these anticanonical cases.[47] Examining *how* we teach the cases that we do consistently teach provides an enormous opportunity to implement CRT perspectives into both those cases and untaught cases of similar pedigree.

38. *See* U.S. CONST. art. IV, § 2, cl. 3 (the Fugitive Slave Clause), *repealed by* U.S. CONST. amend. XIII.

39. *See* U.S. CONST. art. I, § 9, cl. 1 (the Slave Trade Clause) (repealed 1808).

40. U.S. CONST. amend. XIII, § 1 (allowing "slavery [and] involuntary servitude . . . as a punishment for crime").

41. *See* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT'G PROJECT (Oct. 13, 2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/ [https://perma.cc/DCA7-HJ99]; *Criminal Justice Fact Sheet*, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, https://naacp.org/resources/criminal-justice-fact-sheet [https://perma.cc/MN6Q-KK9H]; Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE (July 27, 2020), https://www.prisonpolicy.org/blog/2020/07/27/disparities/ [https://perma.cc/9D35-YSXR].

42. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

43. 60 U.S. 393 (1857).

44. 163 U.S. 537 (1896).

45. 198 U.S. 45 (1905).

46. 323 U.S. 214 (1944).

47. Greene, *supra* note 42, at 380.

Teaching some anticanonical cases can lead to the lazy, enthralling, and overly simplistic conclusion that racism is, in the broadest sense, over. Of course, any sensible person does not believe that to be uniformly true, and no professor approaches the topic in such terms. But the way that we teach cases like *Dred Scott*, *Plessy*, *Korematsu*, and the actions that overruled them makes it easy to pigeonhole racism into a definition that is discrete and overt. Black people can be citizens—we wrote a whole amendment for that. Segregation is unconstitutional—of course, we know that such overt racial discrimination is wrong! Placing American citizens in concentration camps based solely on their ancestry is obviously bad. These are all overly simplistic accounts of the anticanon's takeaways, but they do not stray far from the premises anti-CRT commentators continuously cite. The lessons we should have learned from them still require recital today.[48] Everyone of sound mind and contemporary sensibilities knows that discrete, overt racism is immoral, and our legal system has gone to great lengths to address that. However, teaching critical perspectives in these cases exposes the necessary nuances that allow racism to persist more deviously in the law today.

Before diving into specific CRT examples, the question must be asked: why do we teach these cases in the first place? This is, again, a simple question with a simple answer, but it provides much-needed context for how we structure our curricula. These cases are not black letter law, and the most recent of them is nearly a century old.[49] We teach and learn these cases because they reveal profound truths about the history of our country, its citizens, and the law that governs both. These truths are absolutely necessary to understand the law as it stands today. Yet we cannot allow the simple justification for learning these cases result in a simple understanding of what they represent. Examining them through critical perspectives gives students the opportunity to understand how these cases live on even past their respective death knells.

Dred Scott and *Plessy* dealt with race in the most explicit terms imaginable.[50] *Korematsu* dealt with race through the quite thin veil of nationality and national security.[51] *Lochner* held much more subtle elements of race in the anti-immigrant sentiments that may have influenced its original decision.[52] On these terms, *Dred Scott* and *Plessy* obviously can—and do—foster explicit

48. *See, e.g.*, Jared Keller, *The Legacy of Japanese Internment Lives on in Migrant Detention*, PAC. STANDARD (June 13, 2019), https://psmag.com/ideas/the-legacy-of-japanese-internment-lives-on-in-migrant-detention [https://perma.cc/R8F2-89PC] (explaining that "the new child migrant center at Fort Sill reveals that *Korematsu* lives on not just as repudiated constitutional precedent, but as an ethico-juridical foundation for the legal system itself.")

49. *See* Korematsu v. United States, 323 U.S. 214 (1944) (the most recent case in the anticanon).

50. Justice Taney quickly begins discussing that Dred Scott was "a negro of African descent, whose ancestors were of pure African blood." Dred Scott v. Sandford, 60 U.S. 393, 400 (1857). Justice Brown similarly takes notice of the fact that Homer Plessy was "seven-eight[h]s Caucasian and one-eighth African blood." Plessy v. Ferguson, 163 U.S. 537, 541 (1896).

51. Justice Black—a former member of the Ku Klux Klan—claimed that Fred Korematsu "was not excluded from the Military Area because of hostility to him or his race," but because of the war with Japan and accompanying military urgency. *Korematsu*, 323 U.S. at 223.

52. *See* Jane Francis Nowell, *Lochner as Literature: Weighing the Paternalism of Progressivism*, 43 CAMPBELL L. REV. 115, 130 (2021).

discussions around race and the law when taught. *Korematsu* does so similarly, but its discussion may become distanced from race when the spotlight begins to drift towards ideas of military expediency and the limits of executive power. Discussions surrounding *Lochner* may never mention race at all, depending on the classroom. Yet even if race is not accepted as a predicate to the original *Lochner* outcome, it opens the door to a critical discussion about the development of Whiteness, for just one example.

The conception of who was "White" was radically different in 1905. For the longest time, even Irish people were not considered White as we understand the term today;[53] Benjamin Franklin, among many others, considered Germans like Joseph Lochner part of a different "swarthy" race, along with "Spaniards, Italians, French, Russians[,] and Swedes."[54] Jews of European ancestry are typically perceived as White today, although that has not always been (and is still not always) the case.[55] The vast majority of backgrounds that fall into the blanket categorization of Whiteness today did not always hold that status historically,[56] and that is only one of many considerations that critical race perspectives may bring to understanding the development of American law.[57] Though this Comment does not give the social construction thesis full treatment here, it and surrounding CRT perspectives on the construction of Whiteness fit cleanly into many discussions that already take place in first-year courses.

Where *Dred Scott* and *Plessy* were powerfully overruled via Constitutional amendment and Supreme Court opinion, *Lochner* was slowly chipped away at over decades, and *Korematsu* has only yet been soft-overruled in *Trump v. Hawaii*.[58] Why do we see such different lineages in these cases when they all fall into the universally reviled category of anticanon? What cases fall into the anticanon, and when do we in fact recognize them as such? In the minds of some, *Roe v. Wade* may even fall into this category.[59] Professor Greene notes four other

53. Quinn Norton, *How White People Got Made*, THE MESSAGE (Oct. 17, 2014), https://medium.com/message/how-white-people-got-made-6eeb076ade42 [https://perma.cc/A3TY-JFDJ].

54. *See, e.g.*, Matthew Yglesias, *Swarthy Germans*, THE ATL. (Feb. 4, 2008), https://www.theatlantic.com/politics/archive/2008/02/swarthy-germans/48324/ [https://perma.cc/QDG6-N7C7].

55. *See* Karen Brodkin Sacks, *How Did Jews Become White Folks?*, *in* RACE 78 (Steven Gregory & Roger Sanjek eds., 1994).

56. For an examination of the development of whiteness in early American history, see generally Neil Gotanda, Origins of Racial Categorization in Colonial Virginia: 1619–1705 (1980) (LLM thesis, Harvard Law School) (on file with author).

57. *See generally* Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000) (discussing the racialization of Chinese people in the second half of the nineteenth century).

58. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (dicta from Roberts' majority opinion seemingly overruling *Korematsu* but missing the "magic words" that would explicitly overrule it); *id.* at 2447 (Sotomayor, J., dissenting) (noting that, despite Justice Roberts seemingly overruling the case, his reasoning parallels it perfectly). Constitutional law courses should ask why Justice Roberts claimed *Korematsu* has been overruled in the court of history instead of overruling it in the court of law and, further, whether the court of history ever overruled *Korematsu* in the first place.

59. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2237 (2022) (calling *Roe* "egregiously wrong and on a collision course with the Constitution from the day it was decided," as *Plessy* was). Professor Greene notes comparisons made between *Roe* and *Dred Scott* as early as 1983. Greene, *supra* note 42, at 441.

cases that fit the anticanon's requirements of "poor legal reasoning and moral bankruptcy of a surpassingly high order"[60]: *Prigg v. Pennsylvania*,[61] *Giles v. Harris*,[62] *Gong Lum v. Rice*,[63] and *Bowers v. Hardwick*.[64] He is right to describe these cases as horrific to the same degree as the standard anticanon, yet they are not part of our same legal vocabulary.[65] What distinguishes these cases from those in the accepted anticanon is a combination of their historical context and the perceived usefulness of addressing their opinions in later cases.[66] Professor Greene's analysis of the anticanon's academic causation resembles how Professor Derrick Bell's interest convergence theory explains the original causation of the decisions themselves.[67] It thus makes sense to turn first to interest convergence theory, one of CRT's historically foundational works, to begin a limited inquiry into how we do (and don't) understand race in these cases.

2. Interest Convergence in Brown v. Board

Interest convergence, a theory created by Professor Derrick Bell, is considered one of the foundational texts of critical race theory.[68] It is frequently discussed as one of the first texts in many courses on critical race theory, and it fits perfectly—and naturally—into any course covering constitutional law.[69] *Brown v. Board* is a case so canonical that most laypeople understand its basic holding. It expressly overruled *Plessy*, one of the cases so reviled that it falls into the anticanon.[70] Yet, critical race theory perspectives rarely make it into the standard classroom discussion surrounding *Brown v. Board*. Typical analysis of *Brown v. Board* focuses intently on calling back to *Plessy*'s two dissenting theories of the colorblind constitution and unacceptable racial caste system.[71] Professor Bell's theory of interest convergence should also feature prominently

60. Greene, *supra* note 42, at 428.

61. 41 U.S. 539 (1842). For a recounting of the powerful story behind this case, see Ronald S. Sullivan Jr., *Classical Racism, Justice Story, and Margaret Morgan's Journey from Freedom to Slavery: The Story of* Prigg v. Pennsylvania, *in* RACE LAW STORIES 59 (Rachel F. Moran & Devon W. Carbado eds., 2008).

62. 189 U.S. 475 (1903).

63. 275 U.S. 78 (1927).

64. 478 U.S. 186 (1986).

65. Greene, *supra* note 42, at 434.

66. *See id.* at 460. Perhaps related to this argument, the cases accepted into the anticanon are often doctrine-creators. *Dred Scott* arguably created substantive due process and *Korematsu* was the first case addressing strict scrutiny. *See* Dred Scott v. Sanford, 60 U.S. 393 (1857); Korematsu v. United States, 323 U.S. 214 (1944). An analysis of this issue is interesting for another paper, but for now it is worth noting that the Court can be quite creative in its racism.

67. *See* Greene, *supra* note 42, at 427 (noting that the anticanon cases were not just poorly reasoned, "but that they were poorly reasoned in the service of ends that society has come to recognize as immoral.").

68. *See generally*, Derrick A. Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980).

69. *See, e.g.*, Justin Hansford, Critical Race Theory Syllabus (Fall 2019) (on file with author).

70. Brown v. Board of Education, 347 U.S. 483, 494–95 (1954).

71. *See, e.g.*, NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 664 n.3 (20th ed. 2019). Interestingly, this constitutional law casebook mentions the Wechsler argument that Bell targets in his paper without making any note of Bell. *See id.* at 666 n.7.

in the conversation surrounding *Brown v. Board* since it, too, has become incredibly influential and presents a lens through which you can examine an enormous number of cases.

What is interest convergence? To put it simply, racial progress happens when the interests of the oppressed converge with the interests of the oppressor. Under an interest convergence perspective, *Brown v. Board* did not play out as it did because it was a formalistically correct opinion based on the neutral legal principle of racial inequality's injustice.[72] Rather, we saw *Brown v. Board* develop because "[r]acial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers."[73] Segregation and its evils were not news to the Court in 1954. Why, then, did it change its tune in this case?

Bell argues three points of interest convergence in *Brown v. Board*: (1) that America needed to boost its ideological image in the early Cold War; (2) that "disillusionment and anger" were mounting among Black people in America who had recently fought for worldwide liberty in World War II, yet came home only to experience oppression themselves; and (3) that White southerners realized that segregation impeded much-needed industrialization in southern states.[74]

Converging interests form the starting point for racial progress, but the stopping point for racial progress is the first instance of White inconvenience. As Bell put it, "Whites may agree in the abstract that blacks are citizens and are entitled to constitutional protection against racial discrimination, but few are willing to recognize that racial segregation is much more than a series of quaint customs that can be remedied effectively without altering the status of whites."[75] Essentially, American White people in positions of power realized that the naked contradictions in American ideology needed to be formally addressed or the entire system would begin to crumble to internal and external pressures.[76] Still though, that progress needed to limit the inconveniences it would raise as much as possible, hence the Court's tepid timeline for integration.[77] Only on these terms did power take the reins to overrule *Plessy* and its progeny.

The interest convergence analysis of *Brown v. Board* contains a great deal more insight than my quick summary reveals, but the basic point is that it can be quite easily synthesized and taught to students in a traditional first-year constitutional law course. It is a massively influential perspective on a case that is universally taught. Perhaps the argument could have been made back in 1980

72. *See* Bell, supra note 68, at 522.

73. *Id.* at 523.

74. *Id.* at 524–25.

75. *Id.* at 522.

76. Power is another important aspect of interest convergence, since the decision still evoked a great deal of outrage from lower-class White people, who also tend to share more of the oppression experienced by people of color than their more elite White counterparts. See DELGADO & STEFANCIC, *supra* note 14, at 9, for an analysis of how racism materially benefits elite White people and psychically benefits working-class White people.

77. *See* Brown v. Board of Education (*Brown II*), 349 U.S. 294, 301 (1955) (mandating only that schools must integrate "with all deliberate speed").

that Bell's approach was peripheral, but the historical development of CRT has since cemented its legacy.[78] It is a lens that can be brought to almost any case. Any professor of constitutional law can ask their class this simple question: why did the Court change its mind in 1954? Interest convergence provides a compelling and consistent answer.

Another takeaway from critical race theory and the anticanon is that hindsight is not so 20-20. The predominant perspective of Professor Wechsler that Bell challenges reveals how most scholars thought of *Brown v. Board* in terms of associational rights at the time of its decision,[79] while the "obvious neutral principle" of racial equality is a fairly recent perspective.[80] We must be as deliberate in our historical analysis as our legal analysis, and the CRT tradition values this practice greatly.

B. STORYTELLING AND INTERSECTIONALITY IN CIVIL PROCEDURE

The entire curriculum benefits from a critical race reading, but the civil procedure course is especially replete with cases that necessitate counter-storytelling due to courts' insistence on formalizing legal principles that obfuscate a case's underlying facts. Broadly speaking, civil cases may not seem to have fact patterns or consequences as immediately enthralling as their criminal counterparts. Even more severe restrictions of civil rights may pale in comparison to the threat of imprisonment, the consequences of the carceral state, and potentially even death. This makes it easy for courts to edge out the importance of their stakes by leaning on formalizations like liberty interests, for example. Yet civil cases still implicate people's finances, employment, families, civil rights, and so much more—any analysis of civil procedure must respect the gravity of these issues, and to respect that gravity, students must consider the full picture of race in the involved cases. The civil procedure course, and the case *Lassiter v. Department of Social Services* specifically, provides a powerful opportunity to learn the CRT tenets of counter-storytelling and intersectionality.[81] Learning these concepts and this case fully is necessary to understand its underlying legal theories.

1. Counter-Storytelling and Centering Experience

Counter-storytelling is one of the recurring themes of CRT; it asks that we challenge ourselves to undertake a constructive historical revisionism, to retell stories outside of the dominant cultural narratives that dictate the shape of their

78. Professor Bell's seminal article has been cited over 1,000 times according to Westlaw at the time of writing.

79. For the dominant view at the time, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959); ANDREW KOPPELMAN & TOBAIS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE?: HOW THE CASE OF BOY SCOUTS OF AMERICA V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION 1, 16–17 (2009).

80. Andrew B. Mamo, *Against Resolution: Dialogue, Demonstration, And Dispute Resolution*, 36 OHIO STATE J. ON DISP. RESOL. 251, 264 (2020) (citing Charles L. Black, Jr. *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960)).

81. *See generally* 452 U.S. 18 (1981).

first recital.[82] Professors Daniel Solorzano and Tara Yosso note storytelling as a method for emphasizing "the centrality of experiential knowledge."[83] Storytelling is not merely illustrative; in many cases, telling a story creates an experience in and of itself. Reading a story forces an empathetic experience. You necessarily measure your own experiences in evaluating the story through whatever lens you employ; even the most dismissive reading of someone's story is an act of empathy, however fleeting. To dismiss a story you need to say, in some capacity, "this is nonsense—I live in the world, or have studied the world, and it doesn't work this way at all." More accepting readings obviously engage empathy more directly. In this sense, the act of storytelling doesn't just illustrate points, although it also accomplishes that goal: storytelling actually does theoretical work itself, proving its own point about (often racialized) experiences and their significance in the legal world.

Knowledge about the stories of the people underlying the cases we study doesn't just provide necessary context about the cases' facts and postures; centralizing the knowledge gained through racial experience sheds light on the power dynamics expressed between the dominant and subordinate ideologies—and racial dynamics—of the time.[84] While I noted earlier that hindsight may sometimes be distorting as to the realities of race,[85] it still gives us the benefit of evaluating ideological themes over time if we are diligent in our analysis.[86] One of the benefits of our slow-moving legal system is that it allows us to see the larger pictures of power that play out throughout a case's lifetime. The case *Lassiter v. Department of Social Services* illustrates how we can analyze ideological and racial dynamics when the Court fails to, and we must first turn to telling its full story since the Court does not.[87]

2. Telling the Story of Abby Gail Lassiter

Law students need to learn the full story of Abby Gail Lassiter. In many condensed casebook iterations of the case, little is mentioned about the full facts of this case outside of her poverty and illiteracy. The full decision doesn't fare much better.[88] The case legally concerns whether parental rights are liberty

82. For a brief introduction to the concept, see Mateo Castelli & Luna Castelli, *Introduction to Critical Race Theory and Counter-Storytelling*, NOISE PROJECT, https://noiseproject.org/introduction-to-critical-race-theory-and-counter-storytelling/ [https://perma.cc/EJ8R-LJ7G].

83. Daniel G. Solorzano & Tara J. Yosso, *Critical Race and LatCrit Theory and Method: Counter-Storytelling*, 14 QUALITATIVE STUDS. EDUC. 471, 473 (2001).

84. *See* Barbara Jeanne Fields, *Slavery, Race, and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 109–10 (1990) (defining "ideology" as "the descriptive vocabulary of day-to-day existence, through which people make rough sense of the social reality that they live and create from day to day," including racial dynamics among many other factors); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 589, 613 (1990) (describing how gender essentialism can marginalize the experiences of Black women, even though it otherwise comes from a righteous feminist perspective).

85. *See supra* note 78 and accompanying text.

86. *See* Solorzano & Yosso, *supra* note 83, at 475.

87. *See* 452 U.S. 18 (1981).

88. *See generally id.* (the Court repeatedly indicates Lassiter's poverty in the brief summation of the facts).

interests sufficient to require a state-appointed attorney for an indigent parent.[89] What that legal language and the opinion surrounding it obfuscate is the story of a young, poor, illiterate Black woman imprisoned for a crime she likely didn't commit, left out to dry by the Department of Social Services meant to look out for her family's interests.[90] Professor Brooke D. Coleman puts the case's many silent failings into much-needed words:

> It is written without any acknowledgment of race or institutionalized racism, nor does it confront the failings of our criminal justice system. The Court also turns a blind eye to the realities of poverty . . . it is a case that finds itself at the intersection of so many "isms."[91]

The intersectional issues of this case are its most significant, yet the Court gives them no notice. What *does* the Court's official opinion say about the facts of the case? It begins chronologically: in 1975, the district court deemed Ms. Lassiter's son, William, neglected and put him in the custody of the Durham County Department of Social Services.[92] It then notes that she was convicted of murder a year later and imprisoned for a sentence of "25 to 40 years."[93] The Department of Social Services petitioned to terminate her parental rights in 1978—two years after her imprisonment. Its allegations included (1) that "she has not had any contact with the child since December of 1975"; and (2) that she

> has willfully left the child in foster care for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or without showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child.[94]

As highlighting the full story will reveal, the Court's depictions of these facts is misleading, to put it generously. One critical fact the Court mentioned is that Lassiter had retained counsel for her criminal trial and, supposedly, "never mentioned" the unrelated termination hearing to him.[95] This was enough for the court to determine that—while she was imprisoned for two years—she had "ample opportunity" to secure counsel and failed to do so "without just cause."[96] Thus, she ended up with no attorney, and her hearing followed. The problems with her hearing are numerous, explained in great detail in Professor

89. *Id.* at 31.

90. *See* Elizabeth G. Thornburg, *The Story of Lassiter: The Importance of Counsel in an Adversary System*, *in* CIVIL PROCEDURE STORIES 509, 521 (Kevin Clermont, 2d ed. 2004).

91. Brooke D. Coleman, Lassiter v. Department of Social Services: *Why is it Such a Lousy Case?*, 12 Nev. L. Rev. 591, 591–92 (2012).

92. *Lassiter*, 452 U.S. at 20.

93. *Id.* at 20.

94. *Id.* at 21.

95. *Id.* at 21.

96. *Id.* at 22.

Thornburg's article,[97] and synthesized more succinctly in Professor Coleman's.[98] The essentials that the Court did not address are as follows.

First, the Court says Abby Gail Lassiter sought no help for the termination hearing when she quite simply did.[99] This was no secret to the Court. The trial record quite explicitly describes Abby Gail's distress when she requested—and did not receive—help from the prison matron for help in her termination case.[100] She "reported [it] to the Department of Corrections Center . . . [and] [d]idn't nobody get in touch with no one."[101] She "contacted someone and told them [she] had to go to Court about this paper and didn't nobody contact no one."[102] Even though the Court saw these facts in the record, it evidently did not deem them salient enough to even mention when it decided she failed to seek counsel.

Second, Abby Gail Lassiter was convicted of murder in spite of the prosecution failing to reveal evidence of a confession at the murder scene. Abby Gail's mother, Lucille Lassiter, told a police officer at the scene, "I did it, I hope [the victim] dies."[103] This was no secret to the Court. Justice Stewart's majority makes very passive note of her tenuous murder conviction, but only in a footnote followed with no analysis of any kind.[104] Though the Court took no substantive notice of this as an explanation *for* Abby Gail's imprisonment and inability to see her son, it did consider Lucille Lassiter's confession *against* Abby Gail's claim that her son should stay with family even while Abby Gail remained imprisoned.[105] The Court tossing this confession aside in one breath and taking it seriously in the next speaks to its attitudes towards the parties in this case.

The third major problem with the case's story is Bonnie Cramer, the newly hired social worker who testified against Abby Gail Lassiter. Cramer only met Lassiter once in jail prior to the termination hearing and had no prior experience with the case.[106] She testified at the termination hearing about the contents of the department's file, which was not itself introduced into evidence.[107] Further, Cramer "had absolutely no personal knowledge of what was contained in those records."[108] The majority mentioned *nothing* about Cramer's lack of experience in its opinion, nor the unadmitted file—it only mentioned what she so ignorantly testified.[109] Yet again, this was no secret to the Court. The facts about Bonnie Cramer's scarce involvement in the case and the file not being introduced into evidence were recorded in the termination hearing's transcript and argued in the

97. *See* Thornburg, *supra* note 90, at 522–33.
98. *See* Coleman, *supra* note 91, at 592–94.
99. *See Lassiter*, 452 U.S. at 21–22; Thornburg, *supra* note 90, at 522.
100. *See* Thornburg, *supra* note 90, at 522.
101. *Id.* at 547 n.43.
102. *Id.*
103. *Id.* at 520.
104. *See Lassiter*, 452 U.S. at 20 n.1.
105. *Id.* at 33 n.8.
106. Coleman, *supra* note 91, at 593.
107. Thornburg, *supra* note 90, at 523–24.
108. Coleman, *supra* note 91, at 594.
109. *See Lassiter*, 452 U.S. at 22.

Respondent's Brief.[110] For whatever reason, the Court did not deem any of this salient enough to include in its opinion.

Any civil procedure course discussing this case needs to ask its students why the Court remained silent as—and when—it did. It should also ask students the degree to which Abby Gail Lassiter's identity as a Black woman may have influenced the Court's silence. This missing story makes the case's legal failings obvious. But the story also reveals something larger about identity and experience, which can be understood through the concept of intersectionality.

3. Intersectionality and Empathy

Kimberlé Crenshaw coined the concept of intersectionality in her seminal paper Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics.[111] The paper addresses the "tendency to treat race and gender as mutually exclusive categories of experience and analysis," when they are, in fact, deeply intertwined.[112] The intersectionality concept also incorporates other identities—such as sexuality, class, disability, and more—but its key point is that the discrimination experienced by people at the intersection of these identities is multiplicative, not additive.[113] A Black woman may experience not just race discrimination or sex discrimination, nor just "the sum of race and sex discrimination," but discrimination specifically as a Black woman at the intersection of those identities.[114]

Crenshaw begins with the Black woman as a "starting point" in order to make her concept clear.[115] The discrimination a Black woman experiences is "greater than the sum of racism and sexism"; her experiences are shaped by the "particular manner in which Black women are subordinated."[116] Abby Gail Lassiter's story played out how it did not just because she was Black, nor just because she was a woman. Her story exists because of the intersection of those identities—because she was a Black woman. Professor Coleman makes the compelling case for the Court's sexism in *Lassiter*, but only mentions Abby Gail Lassiter's Blackness in passing at the article's beginning and end.[117] To fully understand why the Court ruled as it did against Abby Gail Lassiter, her experience specifically as a Black woman must be considered. This case demonstrates the salience of intersectionality in fully understanding the law.[118]

110. *See* Thornburg, *supra* note 90, at 523–24; *See* Brief for Petitioner at 38–39, 43, Lassiter, 452 U.S. 18 (No. 79-6423).

111. *See generally* Crenshaw, *supra* note 22. Crenshaw called upon both the feminist movement and Black liberationist politics of her time to incorporate race and sex into their approaches, respectively, or else neither could achieve their goals at all. *Id.* at 166.

112. *Id.* at 139.

113. *See id.* at 140, 145 (describing classes who are "multiply-burdened" and "multiply-disadvantaged," such as Black women).

114. *Id.* at 149.

115. *Id.* at 140.

116. *Id.*

117. Coleman, *supra* note 91, at 592, 599.

118. Crenshaw focuses on three Title VII cases whose facts and holdings much more directly show the concept of intersectionality than *Lassiter*, but they do not slot cleanly into any 1L course,

Black women are held to different societal standards than White women, who tend to shape the idea of an "essential" woman even in progressive feminist circles.[119] Black women particularly face different expectations of motherhood.[120] These different standards shape their relationship with the law as well. The law has its own ideal of motherhood, which is primarily influenced by gender-essentialist standards defined by the traits of affluent, White women.[121] It "rewards the self-sacrificing, nurturing, married, white, solvent, stay-at-home, monogamous, heterosexual, female mother."[122] The Court saw very little of this essentialist standard in Abby Gail Lassiter. She purportedly did "not express[] any concern for [her son's] care and welfare,"[123] was not married to her son's father,[124] was Black,[125] insolvent,[126] and relied on welfare.[127] Professor Coleman succinctly criticizes how Abby Gail Lassiter did not meet the Court's standards of motherhood: it "held Lassiter to an impossible standard of motherhood . . . [and] showed its limited and unrealistic view of how mothers should behave."[128] She had to fight "an uphill battle to regain her halo" because the Court saw her as "a woman of loose morals, a bad mother, [and] a murderer."[129] Because of this, the Court treated her differently under the law; yet it did so without ever squarely considering these issues.

The most powerful indication of how the law can negatively view Black women comes from the mouth of the Judge Gantt, who presided over the initial termination hearing. When Abby Gail's mother made an impassioned pledge to "raise [her] right hand to God and die," testifying that Abby Gail did not leave her children in the cold without heat, the judge had one response: "it scares me to be in the same room with you."[130]

except for perhaps legislation and regulation. That course itself, though, is not uniformly taught at this point in time. *See* Crenshaw, *supra* note 22, at 141 (first citing DeGraffenreid v. General Motors Assembly Div., 413 F. Supp 142 (E.D. Mo. 1976), *aff'd in part*, *rev'd in part*, 558 F.2d 480 (8th Cir. 1977); then citing Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983); and then citing Payne v. Travenol Lab'ys, Inc., 673 F.2d 798 (5th Cir. 1982)).

119. For example, "[S]exist expectations of chastity and racist assumptions of sexual promiscuity combined to create a distinct set of issues confronting Black women." Crenshaw, *supra* note 22, at 159. *See generally* Harris, *supra* note 84.

120. *See* Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER, RACE & JUST. 257 (1999).

121. *See id.* at 258.

122. *Id.*

123. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 23 (1981).

124. *Id.* at 24 n.2; *see* Thornburg, *supra* note 90, at 534.

125. Thornburg, *supra* note 90, at 509.

126. *See Lassiter*, 452 U.S. at 22.

127. The judge at the termination hearing's findings suggest that Abby Gail relied on checks from the Aid to Families with Dependent Children (AFDC) program for at least some of her family's sustenance. *See* Thornburg, *supra* note 90, at 525. At the time of this case, the "welfare queen" was a dominant racist trope surrounding Black motherhood. *See* Bryce Covert, *The Myth of the Welfare Queen*, THE NEW REPUBLIC (July 2, 2019), https://newrepublic.com/article/154404/myth-welfare-queen [https://perma.cc/F6QX-2Y2L].

128. Coleman, *supra* note 91, at 596.

129. Thornburg, *supra* note 90, at 540.

130. *Id.* at 531 n.60.

Abby Gail and her mother feared losing their family; the judge presiding over their barebones proceeding feared them. Would Judge Gantt have responded similarly to a White woman? A woman who did not rely on welfare to take care of her children? A married woman? These questions can lead to necessary classroom discussions that show quite intimately how race and sex can factor into the law, regardless of the answers they elicit.

On the other hand, the most powerful indication of how the law can positively treat Black women comes, maybe unsurprisingly, from the trial transcripts the Court chose to ignore. When discussing how little she knew Bonnie Cramer, Abby Gail Lassiter briefly mentioned her experiences with the previous social worker on her case. "[S]he was a black lady, she said she was going to bring my baby home . . . . That's the onliest anybody that seemed like cared or had any—or cooperated along with us."[131] Just as we need to understand the multiplicative discrimination that Black women encounter, we need to understand how difficult it can be to understand their experience when it is not our own. The fact that Abby Gail felt the only other person who cared for her in this entire ordeal was the only other Black woman involved tells us volumes about how the law can care for Black women, too; we just need to begin seriously attempting to understand their experiences—and the fullness of their stories—first. The law can not only stop failing Black women but can be "life affirming" as well.[132]

This case provides an opportunity to discuss gender essentialism and its problematic relationship with race in the classroom, which also fits nicely into constitutional law discussions regarding the progression of intermediate scrutiny (although I do not discuss that in any significant detail here). But more broadly, it shows how critical it is to understand the full story of a case to understand how the law works. *Lassiter* illustrates the black-letter law of the *Mathews* test for assessing due process claims;[133] what it also illustrates, but current casebooks do not teach, is how critically race, gender, and poverty figure into that analysis. The private interest plate on the three-prong *Mathews* scale is deeply influenced by the Court's ideology and thus by race and gender.[134] Learning CRT reveals the thumbs on the scales and teaches future lawyers how to bring them back to balance.

This analysis comes through in *Lassiter* and can be applied to any due process case applying the *Mathews* test. The intersectionality and gender-essentialist analysis applies to most any case, especially those that implicate gender and race. The storytelling approach can be applied universally. Not only does teaching Abby Gail Lassiter's full story teach students the black letter law it is meant to teach more effectively, but it also teaches students the incredibly essential, near-universal analyses surrounding race and gender. Any and every civil procedure professor and student benefits from implementing the work of Professors Thornburg and Coleman surrounding *Lassiter* into the doctrinal

131. *Id.* at 528 & n.53.

132. *See* Chandler, *supra* note 11.

133. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 19 (1981) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

134. *See* Fields, *supra* note 84, at 109–10 (defining "ideology").

curriculum, as well as other CRT perspectives. Teaching the CRT tenets of storytelling and intersectionality must occur if these students are to learn the law as it actually is.

III. SOLUTIONS

Thankfully, many solutions exist for this problem, some of which can be implemented immediately, while others will take more extended periods of time and effort to accomplish. The chief problem lies in the discretionary nature of many solutions; while systemic racism is persistent and often difficult to uproot, measures to educate students about it can appear and disappear in fast-blowing political winds. I describe various forms of discretionary and mandatory curriculum implementations in law school, the latter of which are far preferable, though more difficult to achieve.

A. DISCRETIONARY CURRICULUM IMPLEMENTATION

The most obvious and intuitive solution is for professors to implement critical readings into their curriculum on their own initiative, but this obvious solution naturally presents obvious problems. Those professors who teach first-year courses can reference the wealth of existing material, which I have attempted to compile here, and supplement their curriculum with it. Likewise, those professors who author casebooks should implement more CRT materials into their works, which would incentivize more professors to teach the material and put it in front of the eyes of many students.

Professor K-Sue Park has done an incredible job surveying the history of property law casebooks and how they do—and don't—implement topics such as conquest in property, which benefits greatly from a CRT teaching.[135] Professor Chantal Thomas does similarly for the contracts case *St. Landry Loan Co. v. Avie*.[136] Professors should not only teach CRT passingly; they should follow the important work of these scholars and deliberately memorialize it into the curriculum. One recent work has eased this considerably, rewriting many famous Supreme Court decisions from explicit CRT perspectives.[137]

Where professors choose to fail their students and not implement this work, students can, as they often do today, turn to each other and build grassroots efforts. As outlined earlier, a great deal of work occurs through this method already. Many national organizations create resources to guide students in local chapters through the materials that professors won't teach them.[138] Again,

135. *See* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L. J. 1062, 1062 (2022).

136. Chantal Thomas, *Reloading the Canon: Thoughts on Critical Legal Pedagogy*, 92 U. COLO. L. REV. 955 (2021); St. Landry Loan Co. v. Avie, 147 So. 2d 725 (La. Ct. App. 1962).

137. *See generally* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW (Bennett Capers, Devon W. Carbado, R. A. Lenhardt & Angela Onwuachi-Willig eds., 2022).

138. *See, e.g.*, Erin Duncan, Austin Smith, Hannah Adams & Sharlyn Grace, *Radicalizing Curriculum*, *in* NLG RADICAL L. STUDENT MANUAL, https://www.nlg.org/wp-content/uploads/2016/03/Radicalizing-Curriculum.pdf [https://perma.cc/3VDJ-PG83];

though, without the guidance of professors, students must blindly lead the blind. This is presently a necessary but unacceptable reality. Professors must step up to teach this material even in the absence of formal requirements. And while they do so, they should advocate for their students by pushing for formal requirements as well.

B. CONCRETE CURRICULUM REQUIREMENTS

Just as professors can choose to implement critical theories into their curriculums, law school administrations can also mandate their implementation. The stickiness of this solution is offset by obvious problems, chief of which is academic freedom—one of the primary draws of professorship. Administrations mandating the implementation of critical theories into their first-year curriculums may foster resentment among professors who do not believe in the theories' significance. Professors must undertake a serious balancing of important interests to effectively teach massive courses in short stretches of time. Again, though, CRT is not "peripheral."[139] It is necessary to learn the law.[140]

If there truly is no institutional support for implementing these changes, support the student organizers who have to form the curricula themselves. If possible, leverage institutional power to create solidarity and give students a voice in the meetings they can't attend. That said, mounting political pressure in academia is critical to making the changes academia desperately needs. In addition to implementing CRT into courses at their own discretion, professors need to step up and project student voices to the administration when they can; this will give students the education they deserve and help those professors who have less leeway to make such challenges.

Administrations can less controversially create first-year courses that address race and teach CRT rather than mandate professors incorporate it into their existing courses. I argue that incorporating CRT into the existing curriculum is more impactful and long-lasting, but something is certainly better than nothing. So long as political momentum can be sustained in favor of CRT, optional courses available to 1Ls are an acceptable stopgap to mandatory courses and, eventually, full implementation into the core curriculum. Some of these course offerings do not directly address CRT and instead focus more broadly on race-related issues. These courses should teach CRT because, compared to other considerations, it factors directly into legal analysis—however relevant those

Disorientation Handbook, NAT'L LAWS. GUILD, https://www.nlg.org/wp-content/uploads/2021/06/DisO-2021-.pdf [https://perma.cc/4F9U-XY6C]; *Building for Radical Lawyering Guide*, BUILDING4RADLAWYERING, https://linktr.ee/Building4RadLawyering [https://perma.cc/W52B-8PW7]; *Alternative Curriculum Syllabus 2019-2020*, HARV. L. SCH. POL. ECON. ASS'N (Jan. 21, 2020), https://docs.google.com/document/d/1-F3SHYaR2o0Iu7kwJtpcOtlws8y9sIfBFblDjYZQ_94/edit [https://perma.cc/P94C-EDKT]; Alda Yuan, *With a Lever: A DIY Guide to Institutional Change for Racial Equity* (2021), https://drive.google.com/file/d/1OcN9hUMLzCLPsUota_BzY6dcnNmJjNUZ/view [https://perma.cc/QN78-EUUE]; *The Justice Initiative*, HARV. L. SCH. SYSTEMIC JUST. PROGRAM (Sept. 8, 2020), https://systemicjustice.org/2020/09/thejusticeinitiative1/ [https://perma.cc/C73B-FGHQ] (resource list on file with author).

139. *See* Ansley, *supra* note 6, at 1519–20 n.20.

140. *See id.* at 1520; *see also supra* Part I.A.

other considerations remain. They also serve to satisfy new ABA accreditation requirements discussed *infra*.

Some schools have already established these courses for 1Ls, although they take different forms and do not all directly call for CRT. For example, SMU briefly offered a course entitled "Systemic Racism and the Law in Dallas," in which various professors, practitioners, and local leaders came to discuss how systemic racism functions in the law and the Dallas community.[141] 1Ls could optionally take this course on a pass/fail basis, but it did not reappear as an offering after the Fall of 2020. USC Law made waves when it announced a mandatory course "Race, Racism, and the Law in 2021,"[142] but it only offers an optional modular version to first-year students.[143] It also does not seem to focus on CRT directly.[144] Colorado Law took on an "Anti-Racism and Representation Initiative,"[145] which established two anti-racist actions for 1Ls: assigning an optional summer reading of Ronald Takaki's *A Different Mirror*[146] and the creation of a 1L "Anti-Racism and Intersectionality Caucus."[147] This, too, does not have any mandatory components and does not seem to have persisted since May 2021.

Other schools have taken more concrete steps. Berkeley Law recently established a race and law course requirement for its students to graduate.[148] To fulfill this requirement, students may currently choose between four course

141. *See Dallas, Systemic Racism, and the Law*, SMU DEDMAN SCH. LAW, https://catalog.smu.edu/preview_course.php?catoid=52&coid=209862&print? [https://perma.cc/YZ6J-3AQP] (2020-2021) (syllabus on file with author). One class included a discussion led by an SMU Law student Skyler Arbuckle and then-Professor Lolita Buckner Inniss, which has since been published in an excellent law review article. *See* Lolita Buckner Inniss & Skyler Arbuckle, *Slavery and the Postbellum University: The Case of SMU*, 74 SMU L. REV. 723, 736–745 (2021).

142. Leslie Ridgeway, *USC Gould to Offer Unique Required Course Focusing on Race in Legal System*, USC GOULD SCH. LAW (Feb. 4, 2021), https://gould.usc.edu/about/news/?id=4814 [https://perma.cc/8MKE-J45P]; for news coverage around the course, see Staci Zaretsky, *Top 25 Law School to Offer Mandatory Course on Racism*, ABOVE THE L. (Mar. 12, 2021, 3:45 PM), https://abovethelaw.com/2021/03/top-25-law-school-to-offer-mandatory-course-on-racism/ [https://perma.cc/ZZ9D-9D43]; *USC One of First Schools to Make Racism Course Mandatory*, NAT'L JURIST (Mar. 9, 2021, 11:57 AM), https://nationaljurist.com/prelaw/usc-one-first-schools-make-racism-course-mandatory [https://perma.cc/Z7MT-PN3V]; Stephanie Francis Ward, *Required USC Course on Race is Expected to Help Law Students with Various Viewpoints*, ABA J. (Mar. 18, 2021, 9:11 AM), https://www.abajournal.com/web/article/required-USC-course-on-race-expected-to-help-law-students-with-various-viewpoints [https://perma.cc/C4WX-NFWJ].

143. *See 1L J.D. Course List*, USC GOULD SCH. LAW, https://mylaw2.usc.edu/resources/downloads/academics/courses/1L-JD-CourseList.pdf [https://perma.cc/N5MA-DXN3].

144. *See id.*

145. *Anti-Racism and Representation Initiative*, UNIV. COLO. L. SCH. (last updated June 28, 2021), https://www.colorado.edu/law/anti-racism-and-representation-initiative [https://perma.cc/BU4H-FSEP].

146. RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA (2d ed. 2008).

147. The Antiracism and Intersectionality Caucus, *Anti-Racism and Intersectionality Caucus Presents Findings in First Newsletter*, UNIV. COLO. L. SCH. (Apr. 21, 2021), https://www.colorado.edu/law/2021/04/21/anti-racism-and-intersectionality-caucus-presents-findings-first-newsletter [https://perma.cc/W8JV-ESYC].

148. *See* Cohen, *supra* note 3.

offerings: "Critical Theories of Law: Race, Gender, and Sexuality"; "Law, Public Health, and Police Use of Force; The Court of Public Opinion: Advocacy Outside of the Courtroom"; or "Policing Families . . . ."[149] Only the first of these four courses explicitly addresses CRT in its course description, though the others indirectly address issues in CRT.[150] It is specifically taught for 1Ls and explores "critical theories and law school pedagogy, with a focus on the 1L experience."[151] The Boston College of Law now requires its students to take "Critical Perspectives: Law, Context, and Professional Identity," which takes critical perspectives on "the role of race, gender, identity, wealth, and power in the law, in the law school, and in their own professional formation."[152] Albany Law School offers a choice of one-credit seminars for 1Ls, including "Introduction to Critical Race Theory."[153] The committee and faculty that designed it "deemed a change in the curriculum, the 1L curriculum specifically, necessary."[154]

Professors and administrators, too, realize the necessity of teaching CRT in the first-year curriculum. These courses provide a model for how other administrations may require teaching critical legal pedagogy, including CRT, to 1Ls. Making these changes happen comes down to consolidating power and political will in institutions designed to resist change—this burden typically falls on the shoulders of students.

Most of these courses were born of student organizing; administrations must take student demands seriously and quickly. The Boston College course "grew out of conversations inspired by students seeking reform."[155] The announcement of the Albany Law seminars refers vaguely to hearing "from many of [their] incoming students" as inspiration but may also have followed from student

149. *Id.*

150. *Critical Theories of Law: Race, Gender, and Sexuality (for 1Ls)*, UC BERKELEY SCH. OF L., https://www.law.berkeley.edu/php-programs/courses/coursePage.php?cID=29725&termCode=B&termYear=2022 [https://perma.cc/E247-CM3F] (expressly incorporating CRT in its course description). *See Law, Public Health, and Police Use of Force*, UC BERKELEY SCH. OF L., https://www.law.berkeley.edu/php-programs/courses/coursePage.php?cID=29750&termCode=B&termYear=2022 [https://perma.cc/MXU3-SF6M]; *The Court of Public Opinion: Advocacy Outside of the Courtroom*, UC BERKELEY SCH. OF L., https://www.law.berkeley.edu/php-programs/courses/coursePage.php?cID=29771&termCode=B&termYear=2022 [https://perma.cc/ZD7E-49UM]; *Policing Families*, UC BERKELEY SCH. OF L., https://www.law.berkeley.edu/php-programs/courses/coursePage.php?cID=29869&termCode=B&termYear=2022 [https://perma.cc/JQ4X-9FQA].

151. *Critical Theories of Law*, *supra* note 150.

152. *Required Courses*, B.C. L. SCH., https://www.bc.edu/bc-web/schools/law/academics-faculty/curriculum.html [https://perma.cc/V3YY-UVEE].

153. *Albany Law School First in NY to Offer New Students First-Semester Seminar Course Choice*, ALBANY L. SCH. (June 24, 2021), https://www.albanylaw.edu/about/news/albany-law-school-first-ny-offer-new-students-first-semester-seminar-course-choice [https://perma.cc/TU76-WGCG].

154. *Id.*

155. Vicki Sanders, *New 1L Course Stresses Inclusion*, B.C. L. SCH. MAG. ONLINE (Sept. 7, 2021), https://lawmagazine.bc.edu/2021/09/new-1l-course-stresses-inclusion/ [https://perma.cc/Y3A9-L5TJ].

pressures such as a Change.org petition filed months beforehand.[156] The Berkeley course came after two years of student and alumni organizing, beginning with a 19-page memo authored by students.[157] The diversity of student organizations that endorsed it speak to the acknowledged importance of intersectionality in these discussions.[158] Additional support came from community legal organizations like the East Bay Community Law Center, which fosters eight of Berkeley Law's clinics.[159]

This call to action is not new. Students at Berkeley advocated for similar curriculum integration following the 2014 Ferguson uprising, standing up for "discussions of race, gender, and power" as a necessary requirement in their legal education.[160] Yet these students' "call for concrete change [went] unanswered" for 8 years.[161] It should not take multiple social movements and the repeated, internationally publicized murders of Black people to provoke necessary educational requirements in law schools, the places that teach—and uphold through their teaching—the laws that enable such murders to take place with impunity. The legal reforms and abolition that must take place require competently educated advocates to enact them. These issues are not peripheral; law schools make them peripheral. Administrations need to make these changes now, not after the next surge in political will or the one after that.

C. THE AMERICAN BAR ASSOCIATION AND NATIONAL CONFERENCE OF BAR EXAMINERS

1. Recent Additions and Revisions to ABA Accreditation Standards

In 2020, 150 law school deans urged the Council of the ABA Section of Legal Education and Admissions to the Bar to require every law school to provide "training and education around bias, cultural competence, and anti-racism."[162] These deans acknowledged that racism is "deeply embedded in our institutions, including in the legal profession," and that we "are in a unique moment in our

156. ALBANY L. SCH., *supra* note 153; *see* Olivia Roberts, *Integration of Critical Race Theory into Albany Law School Curriculum*, CHANGE.ORG, https://www.change.org/p/albany-law-students-integration-of-critical-race-theory-at-albany-law-school-curriculum?redirect=false [https://perma.cc/4KAF-UA5S].

157. *See* Cohen, *supra* note 3.

158. *See id.* This memorandum was endorsed by the following 14 student organizations: The Womxn of Color Collective, Muslim Student Association, La Alianza Law Student Association, South Asian Law Student Association, Middle Eastern/North African Law Student Association, The Law & Political Economy Society, Jewish Students Association at Berkeley Law, Food Justice Project, Coalition for Diversity, Law Students of African Descent, Queer Caucus, and Pilipinx Law Student Association. *Id.*

159. Polk & Patel, *supra* note 5.

160. *Id.* at 2 (quoting Memorandum from Post-Ferguson Working Group 1L Curriculum Subcommittee to Dean Sujit Choudhry, Survey of 1L Curriculum at Peer Schools and Recommendations (June 17, 2015)).

161. *Id.* (quoting August 2020 Memo to the Curriculum Committee).

162. Letter from Law School Deans to the Council of the ABA Section of Legal Education and Admissions to the Bar (July 30, 2020), https://taxprof.typepad.com/files/aba-bias-cultural-awareness-and-anti-racist-practices-education-and-training-letter-7.30.20-final.pdf [https://perma.cc/U9TM-X8ED].

history to confront [it]."[163] One hundred eighty-five deans have since signed on to the project.[164] The ABA answered their call. New revisions to Standard 303 formally require law schools to provide education on "bias, cross-cultural competency, and racism."[165] The new Standard 303(c) requires the following to address this necessity: "(c) A law school shall provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation."[166]

The ABA's commitment recognizes that law schools simply cannot provide a competent legal education without having its students grapple with the issues of bias, cross-cultural competency, and racism. But its new standard and its suggested implementation do not go far enough. Interpretations 303-7 and 303-8 provide some examples of how schools can achieve this goal but do not provide concrete requirements.[167] Interpretation 303-7 outlines four non-exhaustive examples for satisfying Standard 303(c)'s requirement: "(1) Orientation sessions for incoming students; (2) Lectures on [bias, cross-cultural competency, and racism]; (3) Courses incorporating these topics; or (4) Other educational experiences incorporating these topics."[168]

But, Interpretation 303-8 immediately notes the Standard "does not prescribe the form or content" of its requirements.[169] Such low standards simply create a checkbox for law schools to fill if they are not already seriously dedicated to addressing these topics. Law students will have no issue providing examples of awkward, quickly conducted, or even harmful sessions at their orientations dedicated to racial justice or DEI topics, forgotten in the same short period of time they were conducted.[170] A mere checkbox requirement creates the risk of further tokenizing these issues and does not necessarily encourage students to take them seriously. The ABA needs to make these new requirements concrete: Interpretation 303-7 should provide concrete examples, such as those I outline in this Comment, and Interpretation 303-8 should prescribe a certain amount of form and content to ensure that the Standard does not become trivialized. It, of

163. *Id.*

164. *See* June 2021 Comment from Various Law School Deans n.9 (June 27, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-law-school-deans.pdf [https://perma.cc/2ABM-AVE6] (citing *AALS Law Deans Antiracist Clearinghouse Project*, ASSOCIATION OF AMERICAN LAW SCHOOLS, https://www.aals.org/about/publications/antiracist-clearinghouse/ [https://perma.cc/LJ7L-KGPV]).

165. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022–2023, Standard 303(c) (AM. BAR ASS'N 2022) [hereinafter ABA STANDARDS].

166. *Id.*

167. *See id.* Interpretations 303-7, 303-8.

168. *Id.* Interpretation 303-7.

169. *Id.* Interpretation 303-8.

170. *See* Michael Poliakoff, *How Will Cornell Balance Academic Freedom And Anti-Racism?*, FORBES (June 3, 2021, 1:53 PM), https://www.forbes.com/sites/michaelpoliakoff/2021/06/03/how-will-cornell-balance-academic-freedom-and-anti-racism/?sh=3b9e2c2e2b06 [https://perma.cc/K9GE-KVC3] (in which Cornell faculty "balked at the proposal's iron fist" of a rejected proposal that would require them to merely attend "two or more hours of anti-racism training").

course, remains to be seen to what degree law schools will take these goals seriously; but decades of friction in legal education and the anecdotal knowledge of law students should make the ABA wary of such lax requirements' effects.[171]

The lax requirements here are thanks in part to unsurprising backlash from conservative legal forces.[172] The Standards Committee's memorandum recommending changes to the Council notes that "[t]he vast majority" of commenters "expressed concerns" regarding the proposed Standard 303 changes.[173] Common concerns from the commenters include the following:

> ABA overreach and interference with law school policies and curricula; imposition of certain ideology and corresponding First Amendment issues; academic freedom issues; discussion on these topics not incorporating differing perspectives; and differences in opinion on common theories that may be taught and the effectiveness of training in bias, cross-cultural competency, and racism.[174]

These concerns resemble the arguments seen in earlier Sections addressing the conservative backlash to faux-CRT[175] and more legitimate academic freedom concerns posed by potential mandatory implementation of CRT.[176] Some submitted comments parrot strawman arguments seen earlier, representing the word "[e]quity" used in revisions as a "buzzword associated with various Critical Race Theory offshoots."[177] That commenter further urged states to stop requiring graduation from ABA-accredited law schools entirely, as this Standard is supposedly yet "another instance of woke ideology being forced on the nation."[178] While some other concerns mentioned hold water—although I maintain their ultimate incorrectness—this sort of partisan posturing does not.

Fears of "overreach by the ABA" are unfounded when the ABA already prescribes similar or far more specific curriculum requirements regarding other subjects.[179] Likewise, criticisms regarding imposed ideologies as required

171. *See supra* Part III.B.

172. *See* Memorandum from the ABA Standards Committee to the Council (Aug. 16, 2021), https://taxprof.typepad.com/files/aba-council.pdf [https://perma.cc/8DZB-BN85]; *see supra* Part I.B.2.

173. Memorandum from the ABA Standards Committee to the Council, *supra* note 172, at 2.

174. *Id.*

175. *See supra* Part I.B.2.

176. *See supra* Part III.B.

177. *See* Letter from William Jacobson, Clinical Professor of Law & Director, Cornell Law Professor, to The American Bar Association (June 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-william-jacobson.pdf [https://perma.cc/2RVB-GHKQ].

178. William A. Jacobson & Johanna E. Markind, *ABA Forcing Wokeness on Law Schools*, REALCLEAR POL. (Feb. 10, 2022), https://www.realclearpolitics.com/articles/2022/02/10/aba_forcing_wokeness_on_law_schools_147166.html [https://perma.cc/4Y28-GGNQ].

179. *Yale Law School Response to May 25, 2021, Notice re Proposed Revisions to Standards 205, 206 and 303 of the ABA Standards and Rules of Procedure for Approval of Law Schools, Promulgated by the Council of the Section of Legal Education and Admissions to the Bar* 1, AM. BAR. ASS'N. 3 (June 23, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_t

"political litmus tests" for law students fall flat; taking a course does not require you to accept some ideological stance, but rather exposes you to ideas that you can accept or reject with the reasoned contemplation that marks legal education.[180] Claims that "particularly disturbing" changes to Standard 303 "attempt to institutionalize dogma" and "require students to adopt a specific world view" strain credulity.[181]

When the "number of Yale Law school's most eminent legal scholars" who penned this letter teach their doctrinal courses, do they expect students to thoughtlessly adopt their viewpoints in the same way that they claim teaching courses on racism would require students to?[182] Of course not—they expect their students to rigorously examine the views presented to them and reach a conclusion in dialogue with the texts and their peers. The pedagogical philosophy they claim will condemn 303(b)(3) and 303(c)'s requirements is totally inconsistent with the pedagogical philosophy they hopefully exercise semester after semester. This criticism disrespects law students' intelligence and maturity. Simply teaching a course that contains content does not constrain students to accept and regurgitate that content verbatim.

These authors claim the new ABA requirements will restrict the ability of students to consider different viewpoints and choose the one they find compelling, but the requirements accomplish precisely that goal.[183] Courses, lectures, or even brief orientations on racial bias will, in fact, "challenge students intellectually and provide them with the analytical capacities to think for themselves and reach their own conclusions."[184] Sheltering students from concepts criticizing the long history of racism in American law is a surefire way to deny them any such intellectual challenge, analytical opportunity, or personal growth. One conservative law student asked this simple question when addressing an anti-CRT bill in Mississippi: "Why are [legislators] so fearful of people just theorizing and just thinking"?[185] She described her school's CRT

o_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-yale-law-school.pdf [https://perma.cc/963K-EDFQ]; *see* ABA STANDARDS, *supra* note 165, Standard 304 (providing extensive requirements for clinical or other experience-based education); *see id.* Standard 302(c), 303(b) (providing standards for professional responsibility requirements which, when coupled with their Interpretations, are of roughly the same specificity as the new 303(c) requirements).

180. Letter from Ryan Ansloan, Program Officer of Foundation for Individual Rights in Education, to Scott Bales, Council Chair of ABA Section of Legal Education and Admissions to the Bar (June 28, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-fire.pdf [https://perma.cc/GA95-4LQB].

181. *See Yale Law School*, *supra* note 179, at 3–4.

182. *See* Kenneth L. Marcus, *Legal Scholars Castigate the American Bar Association's Proposed Diversity Standards*, FEDSOC BLOG (July 1, 2021), https://fedsoc.org/commentary/fedsoc-blog/legal-scholars-castigate-the-american-bar-association-s-proposed-diversity-standards [https://perma.cc/A3Y6-A2HA].

183. *See id.*

184. *See Yale Law School*, *supra* note 179, at 4.

185. Katherine Fung, *Conservative Student Calls CRT Class 'Most Impactful' Course She's Taken*, NEWSWEEK (Feb. 3, 2022, 3:39 PM), https://www.newsweek.com/conservative-student-calls-crt-class-most-impactful-course-shes-taken-1675975 [https://perma.cc/DLK7-AKNW].

seminar as "the most impactful and enlightening course"[186] she's ever taken, yet, after taking it, "honestly [felt] more enthused about being Republican."[187] Learning these theories only strengthens students; it does not force them into an ideological corner. This student's question should also be asked of law professors—their stated concerns would deny students the opportunity to just theorize and just think.

All of this is not to mention the Standard's vague, easy-to-meet requirements for 303(c).[188] This vagueness stems *from* these criticisms: the Standards Committee's report notes that "Interpretation 303-8 was added to specifically state that nothing in the Standard prescribes the type and content" of achieving its requirement.[189] Likewise, Interpretation 303-7 added more lax examples for 303(c)'s requirement in the form of "[g]uest lectures" and "[o]ther educational experiences."[190] These commentators do make legitimate criticisms about the Standard's vagueness—they just reach the wrong conclusion. The Standard's vagueness calls for more stringent requirements, not its deletion. Creating a requirement implementing CRT into the first-year curriculum—or at least making it an available option—eases this problem considerably. Students need to understand CRT to understand the law. But students do not need to accept it.

Fortunately, the ABA still has time and ability to make Standard 303 meaningful without needing to undertake substantive revisions to the Standard or its Interpretations (though it should still make those more stringent, too). The ABA is requiring schools to "have a plan in place by the fall of 2022" to fully implement Standard 303(c) by the fall of 2023.[191] It should use that time to informally ensure that law schools' plans are more than just lip service, both by critically evaluating the submitted plans and providing more significant guidance before the fall 2023 deadline for implementation arrives. Law schools can and should implement critical race theory into the 1L curriculum to fulfill Standard 303(c)(1). The previous sections provide concrete examples of how schools can achieve that goal, and the ABA should ensure law schools fulfill Standard 303 with similarly rigorous approaches rather than superficial compliance.

186. *Id.*

187. Giselle Rhoden, Nick Valencia & Jade Gordon, *A Look Inside Mississippi's Only Critical Race Theory Class and an Unlikely Ally*, CNN (Feb. 11, 2022, 10:22 PM), https://www.cnn.com/2022/02/11/us/mississippi-critical-race-theory-law-class/index.html [https://perma.cc/Q5MQ-QVRZ].

188. *See* ABA STANDARDS, *supra* note 165, Interpretation 303-3.

189. *See* Memorandum from the ABA Standards Committee to the Council, *supra* note 172, at 2.

190. *Id.* at 7.

191. Neil W. Hamilton & Louis D. Bilionis, *Revised ABA Standards 303(b) and (c) and the Formation of a Lawyer's Professional Identity, Part 1: Understanding the New Requirements*, NALP (May 2022), https://www.nalp.org/revised-aba-standards-part1 [https://perma.cc/B8E4-LYAN] (reporting the comments of William Adams, the managing director of the ABA Section of Legal Education and Admissions to the Bar).

2. Pre-Existing ABA Standards

In addition to fulfilling the explicit requirements of Standard 303(c), implementing CRT into the 1L curriculum is—and has been—necessary to effectuate the basic tenets found in other ABA Standards. Standard 301 establishes the objectives of legal education programs as follows:

"(a) A law school shall maintain a rigorous program of legal education that prepares its students upon graduation, for admission to the bar and for *effective, ethical, and responsible* participation as members of the legal profession.

(b) A law school shall establish and publish learning outcomes designed to achieve these objectives."[192]

You cannot become an "effective, ethical, and responsible" member of the legal profession without at least grappling with the concepts covered by CRT.[193] The addition of Standard 303(c) reflects this reality, but it bears repeating that such requirements should have already been considered essential to existing standards. Likewise, the learning outcomes must include CRT to effectuate Standard 301(b). Standard 302, defining learning outcomes, carves out curriculum requirements for professional responsibility, legal writing, and an understanding of the "substantive and procedural law."[194] I have made the case that you cannot understand the substantive and procedural law without considering CRT; Standard 303(c) has begun to recognize that truth.[195]

Interpretation 303-6 recognizes that learning "cross-cultural competency" in the pursuit of eliminating "bias, discrimination, and racism in the law" also factors into the professional responsibility requirement of Standard 303(a).[196] In addition to the 1L curriculum, professors teaching courses on professional responsibility should additionally implement CRT perspectives to meet the requirements of Standards 303(a)(1) and 303(c)(2), although the contours of that course are not within the scope of this Comment. For example, the new Albany Law 1L seminar Intro to Critical Race Theory cited that it satisfies the "competency and professional values" Bar requirement even before these updated ABA standards.[197]

The ABA has taken much-needed steps in addressing the needs of the 1L curriculum, but it should more explicitly include CRT as a requirement in its Standard or, at the very least, a suggestion in its Interpretation. Learning critical race theory as part of the 1L curriculum fulfills the implicit requirements of Standards 301 and 302 while fulfilling the explicit requirement of Standard 303(c)(1). Professors and law schools should take the prospect of teaching CRT in the 1L curriculum seriously for competently fulfilling these requirements, even if they otherwise lack the motivation to add it into their curricula.

192. ABA STANDARDS, *supra* note 165, Standard 301 (emphasis added).
193. *Id.*
194. *Id.* Standard 302.
195. *See id.* Standard 303(c).
196. *Id.* Standard 303(a).
197. Ciji Dodds, *Intro to Critical Race Theory*, ALBANY L. SCH., https://www.albanylaw.edu/programs-courses/courses/intro-critical-race-theory [https://perma.cc/432H-JALL].

3. The NCBE and the Bar Exam

Now that the ABA has updated its standards, the National Conference of Bar Examiners (NCBE) needs to follow suit and incorporate CRT requirements into both the Multistate Bar Examination (MBE) and Uniform Bar Examination (UBE). The bar exam has racist origins and still perpetuates racist outcomes.[198] When the ABA was founded in 1878, it explicitly barred Black members until 1943 (with the exception of three accidental admissions in 1914).[199] It did not widely require the written bar exam as we know it today until the 1920s; rather, "[a]s it became clear that overt racism would no longer be allowed," the ABA had to erect other barriers to gatekeep minorities.[200] And though it no longer serves so explicitly as a racist roadblock, the bar exam still produces unacceptable racial disparities in its outcomes.[201]

This problematic history and reality call for a number of possible solutions, which potentially include abolishing the bar exam, instituting diploma privilege, or allowing apprenticeship programs, but I argue that the NCBE should at least bring its testing in line with the new ABA Standards and my proposed implementation of those Standards. This would require students to learn CRT as part of the minimal competence for becoming a lawyer, even if they may not agree with its teachings. The ABA and NCBE can mandate CRT without becoming thought police; law students famously have little issue speaking against things they don't agree with. Requiring CRT on the bar exam would only go as far as requiring students to learn it well enough to be assessed on it.

IV. CONCLUSION

The law is racist, but it—and we—need not be. We do need to be honest about its enduring, insidious history, even where its insidiousness is becoming less and less obvious. Teaching CRT throughout the first year of law school will ensure that we hone that honesty, opening up necessary discussions that are not always being had. Teaching CRT will arm law students with a fuller understanding of the law and its history, empowering them not only to be better advocates, but proper students of the law. It may too sharpen much-needed swords in the battle against dishonest legislators who attempt to silence other approaches to racial equity by scapegoating CRT.

198. *See* Valerie Strauss, *Why This Pandemic is a Good Time to Stop Forcing Prospective Lawyers to Take Bar Exams*, WASHINGTON POST (July 13, 2020, 2:45 PM), https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/ [https://perma.cc/7ZR4-7FSC].

199. *Id.*

200. *Id.*; *see* Jessica Williams, *Abolish the Bar Exam*, CAL. L. REV. BLOG (Oct. 2020), https://www.californialawreview.org/abolish-the-bar-exam/ [https://perma.cc/XKV4-EADU].

201. *See* Karen Sloan, *Racial Disparities on the Bar Exam Have Persisted for Decades. Does the Legal Profession Care?*, LAW.COM (June 24, 2021, 3:07 PM), https://www.law.com/2021/06/24/racial-disparities-on-the-bar-exam-have-persisted-for-decades-does-the-legal-profession-care/ [https://perma.cc/4896-GJPJ]; Deborah Jones Merritt, Carol L. Chomsky, Claudia Angelos & Joan W. Howarth, *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L. (July 20, 2021, 3:00 AM), https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies [https://perma.cc/HNU2-TJX4].

Teaching CRT in our first-year legal curriculums is only a starting point. CRT itself grew out of a movement that insufficiently addressed race, however righteous its other focuses.[202] The theory of intersectionality was born from the failings of the most progressive feminists and antiracists of the time to consider the full picture of discrimination.[203] Even if the first-year curriculum does incorporate CRT, other critical legal pedagogy must follow.

For now, we must utilize this moment's ferocious political winds and demand CRT be taught where it is meant to be. While we may dream of the racism necessitating these studies one day becoming moot, legal education must face them eternally. Its reliance on stare decisis means that a proper legal education can never forget, discount, or purport the end of these issues, as it has frequently attempted to. What we can—and must do—is work against racism in the law in our practice and pedagogy. To do that we must fully address race in our education. It is critical.

APPENDICES

These appendices outline the large number of existing resources that address CRT or CRT-adjacent topics relevant to the 1L curriculum. I want to note that I only consolidated these resources: credit for the vast majority of the original research, compilation, and categorization is owed to everyone at the University of Washington School of Law's Gallagher Law Library, Georgia State University College of Law's Library, Seattle University's Law's Library, and Boston College Law Library, who put together enormously useful resource lists for racial justice, critical perspectives, and the 1L curriculum.[204] I brought them together here primarily to have all of the resources in one place and to tailor the selections to this paper's goals.

APPENDIX A – GENERAL

Collection of Readings

1. CARVING OUT A HUMANITY: RACE, RIGHTS, AND REDEMPTION (Janet Dewart Bell & Vincent M. Southerland eds., 2020).
2. THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado, Emily Houh & Khiara M. Bridges eds., 2022).

202. *See* DELGADO & STEFANCIC, *supra* note 14, at 5.

203. *See* Crenshaw, *supra* note 22, at 139, 140, 145.

204. *Diversity Readings Related to First-Year Courses*, UNIV. OF WASH. GALLAGHER L. LIBR. (last updated Feb. 9, 2023, 10:16 AM), https://liblawuw.libguides.com/diversity1L [https://perma.cc/XZ7A-YQM5]; *Critical Perspectives Reading List*, SEATTLE U. L. LIBR. (Mar. 16, 2022, 7:41 A.M.), https://lawlibguides.seattleu.edu/criticalperspectives [https://perma.cc/RK5P-N8QK] ("The purpose of these sources is to ensure that critical perspectives are not separate from, but are instead fully integrated into, our first year curriculum."); *Racial Justice Resources*, GA. STATE UNIV. COLL. OF L. LIBR. (Apr. 16, 2023, 10:13 PM), https://libguides.law.gsu.edu/racialjusticeresources [https://perma.cc/3A22-YFB7]; *DEI Resources for Faculty*, BOSTON COLL. L. LIBR. (Oct. 5, 2022, 11:37 AM), https://lawguides.bc.edu/dei-curriculum [https://perma.cc/3ZXP-E7FS].

3. RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY (Emilios Christodoulidis, Ruth Dukes & Marco Goldoni eds., 2019).
4. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).
5. AFTER IDENTITY: A READER IN LAW AND CULTURE (Dan Danielsen & Karen Engle eds., 1995)
6. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2d ed. 2012).
7. CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).
8. CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002).
9. CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003).

Curriculum Adoption

10. Amy C. Gaudion, *Exploring Race and Racism in the Law School Curriculum: An Administrator's View on Adopting an Antiracist Curriculum*, 23 RUTGERS RACE & L. REV. 131 (forthcoming).
11. Harvard LPE Student Group, *Alternative Curriculum Syllabus*, LPE PROJECT (July 31, 2020), https://lpeproject.org/syllabi/harvard-lpe-syllabi/ [https://perma.cc/R5U2-DTL5] (alternative syllabus for 1L curriculum focused on justice).
12. Tonya Kowalski, *The Forgotten Sovereigns*, 36 FLA. STATE U. L. REV. 765 (2009) (curriculum suggestions).
13. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (Richard Delgado & Jean Stefancic eds., 1996) (Social Construction Thesis).
14. RACE LAW STORIES (Rachel F. Moran & Devon W. Carbado eds., 2008) (law stories).
15. Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555 (2021) (tribal law).
16. Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Making the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65 (2003) (curriculum suggestions).

Overview

17. Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011 (2009) (legal education reform).
18. Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511 (1991) (demonstrating the necessity of racial justice in 1L curriculum).
19. KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (1st ed. 2019).

20. ROY L. BROOKS, DIVERSITY JUDGMENTS: DEMOCRATIZING JUDICIAL LEGITIMACY (2022).
21. CRITICAL RACE JUDGMENTS: REWRITTEN US COURT OPINIONS ON RACE AND THE LAW (Bennett Capers, Devon W. Carbado, R.A. Lenhardt &Angela Onwuachi-Willig eds., 2022).
22. Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).
23. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (3d ed. 2017).
24. SHERRILYN IFILL, LORETTA LYNCH, BRYAN STEVENSON & ANTHONY C. THOMPSON, A PERILOUS PATH: TALKING RACE, INEQUALITY, AND THE LAW (2018).
25. ANTHONY O'DONNELL & RICHARD JOHNSTONE, DEVELOPING A CROSS-CULTURAL LAW CURRICULUM (1997).
26. FRANCISCO VALDES & STEVEN W. BENDER, LATCRIT: FROM CRITICAL LEGAL THEORY TO ACADEMIC ACTIVISM (2021).

Pedagogy

27. Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008).
28. DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS (2d ed. 2007) (casebook covering multiple 1L cases/courses from CRT perspective).
29. William A. Wise L. Libr., *Legal Instruction Resources: Anti-Racism Resources for Teaching and Learning*, UNIV. OF COLO. BOULDER (Sept. 15, 2022, 10:01 AM), https://guides-lawlibrary.colorado.edu/c.php?g=1238288&p=9062007 [https://perma.cc/VM3U-4BGS] (compilation of resources focusing on practical pedagogy when teaching antiracism in the law).
30. Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples*, 82 N.D. L. REV. 863 (2006) (pedagogy and curriculum suggestions).
31. Annette Demers, *Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011*, 39 INT'L J. LEGAL INFO. 22 (2011) (pedagogy and practice).
32. INTEGRATING DOCTRINE AND DIVERSITY: INCLUSION AND EQUITY IN THE LAW SCHOOL CLASSROOM (Nicole Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna C. B. Russell & Genevieve B. Tung eds., 2021) (collection of readings and pedagogy).
33. Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21 J.L. & POL. 1 (2005).
34. *Racial Justice Resources*, GA. STATE UNIV. COLLEGE OF L. LIBR. (Feb. 11, 2022, 1:12 PM), https://libguides.law.gsu.edu/c.php?g=1085749

[https://perma.cc/GQ52-XCBW] (pedagogical notes on teaching race and resource compilation for curriculum implementation).

35. VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER (Society of American Law Teachers & Golden Gate University School of Law eds., 2011) (collection of readings and pedagogy).
36. Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1988).

APPENDIX B – CIVIL PROCEDURE

Access to the Courts

1. Bryan Adamson, *Critical Error: Courts' Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL'Y REV. 1 (2009) (standard of review: clear error).
2. Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501 (2012).
3. Jerry Kang, Nilanjana Dashupta, Kumar Yogeeswaran & Gary Blasi, *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010) (lawyers and a "study examining whether explicit and implicit biases in favor of Whites and against Asian Americans would alter evaluation of a litigator's deposition").
4. Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989 (2004) (summary judgment).
5. Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68 (2005) (statutes of limitation).
6. Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187 (2013).
7. TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES (2009) (general access).
8. Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727 (2010).
9. Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339 (2008).
10. Kurt M. Saunders, *Race and Representation in Jury Service Selection*, 36 DUQ. L. REV. 49 (1997) (juries).
11. Debora L. Threedy, United States v. Hatahley: *A Legal Archaeology Case Study in Law and Racial Conflict*, 34 AM. INDIAN L. REV. 1 (2010).

Alternative Dispute Resolution

12. Lisa Blomgren Amsler, Alexander B. Avtgis & M. Scott Jackman, *Dispute System Design and Bias in Dispute Resolution*, 70 SMU L. REV. 913 (2017).
13. Gilat J. Bachar & Deborah R. Hensler, *Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know*, 70 SMU L. REV. 817 (2017).
14. Pat K. Chew, *Contextual Analysis in Arbitration*, 70 SMU L. REV. 837 (2017).
15. Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145 (2004).

16. Cole, Sarah Rudolph, *The Lost Promise of Arbitration*, 70 SMU L. REV. 849 (2017).
17. Charles B. Craver, *Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities?*, 70 SMU L. REV. 891 (2017).
18. Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).
19. Richard Delgado, *Alternative Dispute Resolution: A Critical Reconsideration*, 70 SMU L. REV. 595 (2017).
20. Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality*, 70 SMU L. REV. 611 (2017).
21. Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639 (2017).
22. Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681 (2017).
23. Solomon Oliver Jr., *Alternative Dispute Resolution (ADR) and Minorities in the Federal Courts*, 39 CAP. U. L. REV. 805 (2011).
24. Lu-in Wang, *Negotiating the Situation: The Reasonable Person in Context*, 14 LEWIS & CLARK L. REV. 1285 (2010).
25. Floyd D. Weatherspoon & Kendall Isaac, *Resolving Race Discrimination in Employment Disputes Through Mediation: A Win-Win for All Parties*, 5 AM. J. MEDIATION 111 (2011).
26. Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721 (2017).
27. Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765 (2017).

Class Actions

28. Bob Carlson, *Why Slavery Reparations are Good for Civil Procedure Class*, 47 ST. LOUIS U. L.J. 139 (2003).
29. Brooke D. Coleman & Elizabeth G. Porter, *Reinvigorating Commonality: Gender and Class Actions*, 92 N.Y.U. L. REV. 895 (2017).
30. Allen R. Kamp, *The History Behind* Hansberry v. Lee, 20 U.C. DAVIS L. REV. 481 (1987).
31. Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325 (2017).
32. George A. Martinez, *Race Discrimination and Human Rights Class Actions: The Virtual Exclusion of Racial Minorities from the Class Action Device*, 33 J. LEGIS. 181 (2007).
33. Jay Tidmarsh, *Parties—The Story of Hansberry: The Rise of the Modern Class Action*, *in* CIVIL PROCEDURE STORIES (Kevin M. Clermont, 2d ed. 2008).

General Civil Procedure

34. Anthony V. Alfieri, *Discovering Identity in Civil Procedure*, 83 S. CAL. L. REV. 453 (2010) (unpublished manuscript).
35. ROY L. BROOKS, CRITICAL PROCEDURE (1998).
36. Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325 (2007).
37. Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242 (2004).
38. Deseriee A. Kennedy, *Witnessing the Process: Reflections on Civil Procedure, Power, Pedagogy, and Praxis*, 32 LOY. L.A. L. REV. 753 (1999) (pedagogy).
39. VICKI LENS, POOR JUSTICE: HOW THE POOR FARE IN THE COURTS (2016).
40. Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455 (2014).
41. Darrell Miller, Suja Thomas & Brooke Coleman, *Race and the 1L Curriculum: Civil Procedure*, DUKE LAW (Nov. 9, 2020), https://law.duke.edu/video/race-and-1l-curriculum-civil-procedure [https://perma.cc/BH9J-EWCW] (discussion of racial inequity in the making and enacting of civil procedure).
42. Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143 (2021).

Injunctions

43. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989).
44. David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645 (1995).
45. David Benjamin Oppenheimer, *Martin Luther King,* Walker v. City of Birmingham, *and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791 (1993).
46. Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004).

Judges

47. Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 18 (2007) ("This article explores how and why the work of judicial clerks and staff attorneys treats 'have-nots' unequally, and suggests how 'mistakes' and 'sloppiness' in clerk and staff attorney decision[-]making and opinion-writing reinforce these effects.").
48. David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012).

49. Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91 (2012).
50. Stephen J. Choi, Mitu Gulati, Mirya Holman & Eric A. Posner, *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504 (2011).
51. SUSAN B. HAIRE & LAURA P. MOYER, DIVERSITY MATTERS: JUDICIAL POLICY MAKING IN THE U.S. COURTS OF APPEALS (Gregg Ivers & Kevin T. McGuire eds., 2015).
52. Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).
53. Judith Resnik, *Representing What? Gender, Race, Class, and the Struggle for the Identity and the Legitimacy of Courts*, 15 LAW & ETHICS HUM. RTS. 1 (2021).

Jurisdiction

54. Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915 (2012).
55. Stanton D. Krauss, *New Evidence That* Dred Scott *Was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction*, 37 CONN. L. REV. 25 (2004).
56. Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

Pleadings and Civil Rights

57. Roy L. Brooks, Conley *and* Twombly: *A Critical Race Theory Perspective*, 52 HOW. L.J. 31 (2008) (Howard Symposium).
58. Robert L. Carter, *Civil Procedure as a Vindicator of Civil Rights: The Relevance of* Conley v. Gibson *in the Era of "Plausibility Pleading,"* 52 HOW. L.J. 17 (2008) (Howard Symposium).
59. Andrew I. Gavil, *Civil Rights and Civil Procedure: The Legacy of* Conley v. Gibson, 52 HOW. L.J. 1 (2008) (Howard Symposium).
60. Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73 (2008) (Howard Symposium).
61. Shirin Sinnar, *The Lost Story of* Iqbal, 105 GEO. L.J. 379 (2017) (Pleadings and the recast story of doctrinal cases).
62. A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99 (2008) (Howard Symposium).

Procedural Due Process

63. Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329 (1992).
64. Brooke D. Coleman, Lassiter v. Department of Social Services*: Why is it Such a Lousy Case?*, 12 NEV. L.J. 591 (2012).

65. Anthony Taibi, *Politics and Due Process: The Rhetoric of Social Security Disability Law*, 1990 DUKE L.J. 913 (1990).

Rulemaking

66. Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 407 (2018).
67. Brooke D. Coleman, *The Committee That Dictates the Rules of American Courts Looks Nothing Like America—or the Federal Judiciary*, SLATE (Oct. 24, 2018, 4:03 PM), https://slate.com/news-and-politics/2018/10/john-roberts-courts-rules-rigged.html [https://perma.cc/AJ94-PZ5H].

APPENDIX C – CONSTITUTIONAL LAW

Census

1. Howard Hogan, Jennifer M. Ortman & Sandra L. Colby, *Projecting Diversity: The Methods, Results, Assumptions and Limitations of the U.S. Census Bureau's Population Projections*, 117 W. VA. L. REV. 1047 (2015).
2. Patricia Palacios Paredes, *Latinos and the Census: Responding to the Race Question*, 74 GEO. WASH. L. REV. 146 (2005).

Commerce Clause

3. Julie A. Greenberg & Marybeth Herald, *You Can't Take it With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819 (2005) (Dormant Commerce Clause).
4. Joseph R. Palmore, *The Not-So-Strange Career of Interstate Jim Crow: Race, Transportation, and the Dormant Commerce Clause, 1878–1946*, 83 VA. L. REV. 1773 (1997) (Dormant Commerce Clause).
5. Michael Schoeppner, *Legitimating Quarantine: Moral Contagions, the Commerce Clause, and the Limits of* Gibbons v. Ogden, 17 J. S. LEGAL HIST. 81 (2009) (discussing *Gibbons v. Ogden* in the context of Southern state "laws limiting the ingress of 'colored seamen' into their jurisdictions").

Enslavement

6. Paul Finkelman, *The Root of the Problem: How the Proslavery Constitution Shaped American Race Relations*, 4 BARRY L. REV. 1 (2003).
7. Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2000).
8. Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123 (2012).
9. Ronald S. Sullivan, Jr., *Classical Racism, Justice Story, and Margaret Morgan's Journey from Freedom to Slavery: The Story of* Prigg v. Pennsylvania, *in* RACE LAW STORIES 59 (Rachel F. Moran & Devon W. Carbado eds., 2008) (Fugitive Slave Clause).

Federalism

10. Akhil Reed Amar, *Race, Religion, Gender, and Interstate Federalism: Some Notes from History*, 16 QLR 19 (1996).
11. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113 (2015).
12. Paul Finkelman, *Race, Federalism, and Diplomacy: A Gentlemen's Agreement a Century Later*, 56 OSAKA U. L. REV. 1 (2009).
13. Scott W. Gaylord & Thomas J. Molony, *Individual Rights, Federalism, and the National Battle Over Bathroom Access*, 95 N.C. L. REV. 1661 (2017).

14. Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1996).
15. Samuel P. Jordan, *Federalism, Democracy, and the Challenge of Ferguson*, 59 ST. LOUIS U. L.J. 1103 (2015).
16. Calvin Massey, *Congressional Power to Regulate Sex Discrimination: The Effect of the Supreme Court's "New Federalism,"* 55 ME. L. REV. 63 (2003).
17. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).
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APPENDIX D – CONTRACTS

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APPENDIX E – CRIMINAL LAW

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APPENDIX F – LEGAL RESEARCH, WRITING AND ADVOCACY

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APPENDIX G – PROPERTY LAW

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APPENDIX H – TORTS

Bias and Disparate Outcomes

1. Alberto Bernabe, *Do Black Lives Matter? Race as a Measure of Injury in Tort Law*, 18 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 41 (2016) (analysis of race being used as a measure of injury in a specific torts case).
2. Jonathan Cardi, Valerie P. Hans & Parks, Gregory, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. CAL. L. REV. 507 (2020) (study revealing disparate outcomes for responsibility and recovery controlled for race).
3. Martha Chamallas, *Discrimination and Outrage: Exploring the Gap Between Civil Rights and Tort Recoveries*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 119 (David M. Engel & Michael McCann eds., 2009) (measure of injury).
4. Martha Chamallas & Jennifer B. Wriggins, The Measure of Injury: Race, Gender, and Tort Law (2010) (measure of injury).
5. Cristina Carmody Tilley, *The Tort of Outrage and Some Objectivity About Subjectivity*, 12 J. TORT L. 283 (2019) (Intentional Infliction of Emotional Distress and Outrage).
6. Jennifer B. Wriggins, *Whiteness, Equal Treatment, and the Valuation of Injury in Torts, 1900-1949*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 156 (David M. Engel & Michael McCann eds., 2009) (Measure of injury).
7. Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998) (bias, racial hierarchies, and racial disparities in tort outcomes).

Curriculum

8. Richard W. Bourne, *Introduction: Five Approaches to Legal Reasoning in the Classroom: Contrasting Perspectives on* O'Brien v. Cunard S.S. Co., 57 MO. L. REV. 351 (1992) (symposium on *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272 (1891)).
9. Martha Chamallas, *Race and Tort Law*, *in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado, Khiara Bridges & Emily Houh eds., forthcoming) (analysis of key cases focusing on racial discrimination; harassment and insult; stereotyping and racialized contexts; racial devaluation; and racially disparate effects).
10. Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994) (race consciousness, empathy, and the importance of narrative in Torts).
11. TORT STORIES (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (narratives of key torts cases).

12. Debora L. Threedy, United States v. Hatahley*: A Legal Archaeology Case Study in Law and Racial Conflict*, 34 AM. INDIAN L. REV. 1 (2010) (general torts).
13. Jennifer Wriggins, *Teaching Torts with a Focus on Race and Racism*, UNIV. ME. SCH. L. (Feb. 19, 2020), https://mainelaw.maine.edu/faculty/teaching-torts-with-a-focus-on-race-and-racism/ [https://perma.cc/V7ZJ-KJG5] (case suggestions for curriculum; liability insurance, race, and torts; and inaccessibility/inequality for Black people making tort claims).

Discrimination and Damages

14. Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017) (damages).
15. Dariely Rodriguez & Hope Kwiatkowski, *How Race, Ethnicity, and Gender Impact Your Life's Worth: Discrimination in Civil Damage Awards*, LAWS.' COMM. FOR C.R. UNDER L. (July 2018), https://lawyerscommittee.org/wp-content/uploads/2018/07/LC_Life27s-Worth_FINAL.pdf [https://perma.cc/6UYB-VTLW] (damages).
16. Nora Freeman Engstrom & Robert L. Rabin, *California Bars the Calculation of Tort Damages Based on Race, Gender and Ethnicity*, SLS BLOGS: LEGAL AGGREGATE (Nov. 13, 2019), https://law.stanford.edu/blog/?tax_and_terms=3691 [https://perma.cc/5PBU-QE8W] (damages).
17. Sandra F. Sperino, *Let's Pretend Discrimination is a Tort*, 75 OHIO ST. L.J. 1107 (2014) (discrimination as a tort).

Pedagogy

18. Taunya Lovell Banks, *Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 443 (1992) (Symposium on O'Brien v. Cunard S.S. Co., 154 Mass. 272 (1891)).
19. Jay M. Feinman, *The Ideology of Legal Reasoning in the Classroom*, 57 MO. L. REV. 363 (1992) (symposium on *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272 (1891)).

Tort Law as a Remedy to Racial Injustice

20. Jody D. Armour, *Toward a Tort-Based Theory of Civil Rights, Civil Liberties, and Racial Justice*, 38 LOY. L.A. L. REV. 1469 (2005) (a torts-lens on the relationship between civil rights and civil justice, an examination of reasonableness analysis with race, and the Hand formula).
21. W. Jonathan Cardi, *The Search for Racial Justice in Tort Law*, *in* CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 115 (Gregory S. Parks, Shayne Jones & W. Jonathan Cardi eds., 2008).
22. Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007) (Intentional Infliction of Emotional Distress and Outrage).

23. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (Intentional Infliction of Emotional Distress and Outrage).
24. RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND (Routledge 2018) (2004) (Intentional Infliction of Emotional Distress and Outrage).
25. MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Routledge 2018) (1993) (Intentional Infliction of Emotional Distress and Outrage).
26. Camille A. Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE L. 905 (2005) (mental health consequences of racial caste system and ability of tort law to compensate).

Tort Reform

27. Joanne Doroshow & Amy Widman, *The Racial Implications of Tort Reform*, 25 WASH. U. J.L. & POL'Y 161 (2007) (tort reform).