2018

Using the Master’s Tool to Dismantle His House: Derrick Bell, Herbert Wechsler, and Critical Legal Process

William Rhee
West Virginia University College of Law, william.rhee@mail.wvu.edu

Follow this and additional works at: https://digitalcommons.csp.edu/clr

Part of the Jurisprudence Commons, Law and Philosophy Commons, Legal Education Commons, and the Rule of Law Commons

CU Commons Citation
Available at: https://digitalcommons.csp.edu/clr/vol3/iss1/2

This Article is brought to you for free and open access by the School of Law at DigitalCommons@CSP. It has been accepted for inclusion in Concordia Law Review by an authorized editor of DigitalCommons@CSP. For more information, please contact digitalcommons@csp.edu.
ARTICLES

USING THE MASTER’S TOOL TO DISMANTLE HIS HOUSE: DERRICK BELL, HERBERT WECHSLER, AND CRITICAL LEGAL PROCESS

Will Rhee*

This Article retells the life stories of Derrick Bell, a founder of Critical Race Theory, and Herbert Wechsler, a founder of the Legal Process School, to suggest a synthesis of their often conflicting paradigms—Critical Legal Process. Critical Legal Process’s fundamental question is whether the Master’s tool, the so-called rule of law, can be considered—in the words of Wechsler’s most famous article—a genuine “neutral principle.” Can the Master’s favorite tool be repurposed to dismantle the very house it built? Can the same rule of law that was abused to build the racist Jim Crow system not only dismantle that explicitly racist system but also lessen further racism moving forward? Bell would answer “No.” Wechsler would answer with a resounding “Yes.”

Bell and Wechsler offer merging and mirror images of Critical Legal Process’s critique of the rule of law. Both famously criticized Brown v. Board of Education, the U.S. Supreme Court opinion popularly celebrated for catalyzing the dismantling of the American apartheid system. Both began their respective legal careers as insider liberal civil rights reformers. Both served as federal civil government lawyers in the U.S. Department of Justice. When asked to renounce his two-dollar membership in the National Association for the Advancement of Colored People, Bell refused and left Justice. Rejecting Bell’s uncompromising approach, Wechsler unapologetically and successfully argued Korematsu, the infamous U.S. Supreme Court case that upheld the World War II internment of Japanese-

* Professor, West Virginia University College of Law. The author thanks Joshua Weishart and Atiba Ellis for their invaluable comments; Claire Flynn Sellers and Jared Jones for their exemplary research; the Hodges Research Fund for financial support; and the Concordia Law Review for their excellent editing. This Article is based upon presentations at the West Virginia University College of Law, the Western New England University Law School September 28, 2012, “Building the Arc of Justice: The Life and Legal Thought of Derrick Bell” symposium, and the University of Pittsburgh School of Law March 27, 2014, “Challenging Authority: A Symposium in Honor of Derrick Bell.” The author is solely responsible for any errors. He welcomes questions and comments at william.rhee@mail.wvu.edu.
Although Bell later renounced his insider status to become an outsider protester who rejected the rule of law, Wechsler maintained his steadfast belief in incremental, insider liberal legal reform to improve the rule of law. Bell’s own fictitious story about a lawyer named Erika Wechsler, the daughter of a liberal civil rights law professor, and her White Citizens for Black Survival organization, proposes how Critical Legal Process could synthesize Bell’s critical deconstructive and Wechsler’s transformative reconstructive legacies of the rule of law.
INTRODUCTION

This Article retells the life stories of Derrick Bell, a founder of Critical Race Theory, and Herbert Wechsler, a founder of the Legal Process School, to suggest a synthesis of their often conflicting paradigms—Critical Legal Process. As a “Critical” movement, Critical Legal Process argues that, in every democracy, there is a privileged, ruling elite class who seeks to maintain the status quo. Audre Lorde elegantly articulated one view of this elite:

Those of us who stand outside the circle of this society’s definition of acceptable . . . those of us who have been forged in the crucible of difference . . . know that . . . the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.

Consistent with Lorde’s words, this Article shall refer to that ruling elite as the “Master.” Critical Legal Process also argues that the Master’s

---

1 Derrick Albert Bell was born on November 6, 1930, and died on October 5, 2011. The Early Years: The Making of the Intellectual and the Activist, DERRICK BELL OFFICIAL SITE, http://professorderrickbell.com/about/ (last visited Feb. 9, 2018).


3 See infra Part IV for further discussion. Critical Legal Process follows in the footsteps of other critical jurisprudential hybrids such as Critical Race Realism and Critical Race Feminism. See generally DERRICK BELL, CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing, ed., 1997); CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW (Gregory S. Parks et al. eds., 2008).

As Angela Harris astutely observed, “A beginning word of caution: essays like this one inevitably indulge in the anthropomorphic fallacy, creating a unified thinking and speaking subject where none exists.” Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 CALIF. L. REV. 741, 744 (1994). As a hybrid of critical theory and the so-called Legal Process School, Critical Legal Process assumes consensus over what constitutes critical theory and the Legal Process School. Although oversimplified, jurisprudential labels nevertheless do make theoretical concepts easier to understand and provide convenient shorthand for analysis.


5 LORDE, supra note 4.

favorite tool to reinforce its power and privilege is the rule of law—the “often used but difficult to define”\textsuperscript{7} bedrock assumption of classical liberal democracy that everyone is equally subject to an objective, fair, publicly promulgated written law.\textsuperscript{8} That written law, the “Master’s house,” is legal doctrine—the black-letter law in the books employed daily by lawmakers to keep a democracy functioning.\textsuperscript{9} Legal doctrine is what is taught in traditional law school courses and tested on the Bar examination.\textsuperscript{10}

Bell and Wechsler offer merging and mirror images of Critical Legal Process’s critique of the rule of law. Both famously criticized\textsuperscript{11} Brown v. Board of Education,\textsuperscript{12} the U.S. Supreme Court opinion still popularly celebrated as a triumph of the rule of law for catalyzing the dismantling of the American apartheid system.\textsuperscript{13} Both began their respective legal careers as insider liberal civil rights reformers.\textsuperscript{14} Both served as government lawyers in the U.S. Department of Justice (DOJ).\textsuperscript{15} When asked to renounce his $2 membership in the National Association for the Advancement of Colored People (NAACP), Bell refused and left the DOJ.\textsuperscript{16} Rejecting Bell’s uncompromising approach, Wechsler unapologetically and successfully argued Korematsu, the infamous U.S. Supreme Court case\textsuperscript{17} that upheld the World War II internment of Japanese-Americans.\textsuperscript{18}

Although Bell later renounced his insider status to become an outsider


\textsuperscript{8} Id. at 294.

\textsuperscript{9} Id.


\textsuperscript{13} See infra notes 62–64 and accompanying text.

\textsuperscript{14} See infra Parts II.A and III.A.

\textsuperscript{15} See infra notes 101–07, 268–312, and accompanying text.

\textsuperscript{16} See infra Part II.A.

\textsuperscript{17} See Korematsu v. United States, 323 U.S. 214 (1944).

\textsuperscript{18} Id.
protester who rejected the rule of law, Wechsler maintained his steadfast belief in incremental, insider liberal legal reform to improve the rule of law. Wechsler’s proudest achievement, the American Law Institute’s Model Penal Code, remains perhaps the greatest example of such incremental insider reform.

As explained in Part I, Critical Legal Process’s fundamental question remains whether the so-called rule of law can be considered—in the words of Wechsler’s most famous article—a genuine “neutral principle.” Can the Master’s favorite tool be repurposed to dismantle the very house it built? Can the same rule of law the Master used to build the racist Jim Crow system later serve to dismantle that system and lessen further racism in the future? Bell would answer “No.” Wechsler would answer with a resounding “Yes.”

In Part II, Bell’s life story chronicles how he came to believe that only the Master can control the rule of law. Although Bell agrees with Lorde that the Master’s favorite tool will never dismantle his house, Bell does so unwillingly, wistfully wishing that he could believe again in insider legal reform. Despite Bell’s uncompromising criticism of legal doctrine, his legal narratives are nevertheless full of hypothetical legal doctrine. Conceding his proposed legal doctrine’s radicalism, Bell never expected policymakers to take his hypothetical legal doctrine seriously. Instead, the primary purpose of Bell’s legal doctrine was critical deconstruction. He used this vehicle to express his views satirically, more like a thought experiment intended to help the Master see another point of view rather than to trigger genuine legal reform.

Although Wechsler agreed with Bell that the Master’s favorite tool had built the Master’s house, as explained in Part III, the clear purpose of

---

19 See infra Part II.C.
20 See infra Part III.
21 THE AM. LAW INST., MODEL PENAL CODE: OFFICIAL DRAFT AND EXPLANATORY NOTES (1965); see infra notes 422–26 and accompanying text.
22 See infra notes 422–24 and accompanying text.
23 See generally Wechsler, supra note 11.
24 See infra Parts II and III.
25 See infra Part II.B.
26 See infra notes 145–77 and accompanying text.
27 See infra notes 143–44 and accompanying text.
Wechsler’s proposed legal doctrine was the *transformative reconstruction* of flawed legal doctrine for genuine, albeit imperfect, legal reform.

Like Bell, Wechsler also authored hypothetical legal doctrine, but did so from his position as a respected legal insider. Whereas Bell’s hypothetical legal doctrine lay embedded in his fictional critical race stories, Wechsler’s hypothetical legal doctrine was published by the preeminent blue chip legal think tank, the American Law Institute (ALI). Unlike Bell, however, Wechsler not only expected the Master to take his hypothetical legal doctrine seriously, but also witnessed the Master celebrating and officially adopting it during Wechsler’s legal career.

Finally, in Part IV, this Article employs Bell’s own fanciful story about a lawyer named Erika Wechsler, the daughter of a liberal civil rights law professor, and her White Citizens for Black Survival organization, to propose how Critical Legal Process could synthesize Bell’s critical deconstructive and Weschler’s transformative reconstructive legacies of the rule of law.

I. THE MASTER’S FAVORITE TOOL IS THE RULE OF LAW

The Master’s favorite tool, the means by which privileged, entrenched elites maintain their power, is the rule of law. A democratic government uses the rule of law, backed by the government’s coercive force, to compel

---

29 Id. (emphasis added).
30 See infra Part III.
31 See infra notes 143–44 and accompanying text.
33 See infra Part III.B.
35 Id. at 93.
36 See infra Part IV.
its citizens to obey the Master’s house: legal doctrine.\(^{38}\) Citizens who do not comply face state-enforced monetary penalties, physical harm, or incarceration.\(^{39}\)

The rule of law, however, is not the only tool in the Master’s toolkit. Oligarchic and dictatorial Masters have long eschewed the rule of law for the rule of people,\(^{40}\) where the lawmaker’s unfettered personal discretion regulated human behavior.\(^{41}\) One of the supposed hallmarks of the rule of law, however, is that no one is supposed to be above the rule of law.\(^{42}\)

**A. A Tool for All or Only the Master?**

The rule of law’s claim to neutrality and objectivity that transcends, or at least cabins, a lawmaker’s individual discretion remains one of its most fundamental and appealing attributes. In the Massachusetts Constitution, John Adams famously declared “a government of laws and not of men.”\(^{43}\) Thomas Paine in *Common Sense* concurred: “For as in absolute governments the king is law, so in free countries the law *ought* to be king; and there ought to be no other.”\(^{44}\) More cynically, Antole France quipped “majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.”\(^{45}\) Today, the American Bar Association’s (ABA) Rule of Law Initiative seeks to promote the so-called rule of law throughout the world.\(^{46}\) Founded by a past ABA President,\(^{47}\) the World Justice Project annually calculates an empirical Rule of Law ranking

---

\(^{38}\) In this Article’s extended analogy, if the rule of law is the Master’s tool, that tool is used to build the Master’s house—legal doctrine.


\(^{40}\) Rhee, supra note 8, at 292 n.121.


\(^{42}\) Id.

\(^{43}\) MASS. CONST., Part The First, art. XXX.


\(^{45}\) ANTOLE FRANCE, THE RED LILY 95 (Winifred Stephens trans., 7th ed. 1922).


\(^{47}\) About Us, WORLD JUST. PROJECT, https://worldjusticeproject.org/about-us (last visited Feb. 6, 2018) (stating that the Project was “[f]ounded by William H. Neukom in 2006 as a presidential initiative of the American Bar Association . . . .”).
of nations. 48

The rule of law and its primary product, legal doctrine, are supposed to trump the rule of people. Whether or not the rule of law actually does so, however, is one of the key disagreements not only between Bell and Wechsler but also within Critical Legal Process. 49 Although Wechsler conceded that legal doctrine “is intrinsically uncertain and unclear” and “is shaped as it is applied,” 50 he nevertheless believed that legal objectivity was a worthy goal and that legal doctrine could be perfected to be more objective. 51 He claimed:

Objectivity is more or less possible for individuals and courts and agencies and people and professors and lawyers. I think a degree of objectivity is obtainable. . . . [W]e should be as objective as we can be. It is not true that objectivity is impossible, and it is not true, unfortunately, that it is ever perfectly attained. 52

Wechsler’s goal for legal doctrine was, quoting Max Radin, “[a] juster justice, a more lawful law.” 53

To Wechsler, essential to the never-ending pursuit of legal objectivity was focusing on law’s means—or process—as opposed to its ends—or motives—because such ends ultimately are subjective value choices:

[W]hat is likely to be unclear is whether the ultimate propositions in ethics and politics, those which concern ends rather than means, can reasonably be asserted as anything more than . . . personal preference. If they can only be asserted as . . . personal preference, it is impossible to evaluate law and legal activity on any other ground than their conformity to the

---

48 What is the Rule of Law?, WORLD JUST. PROJECT, https://worldjusticeproject.org/about-us/overview/what-rule-law (last visited Feb. 9, 2018). The United States was ranked 19th overall out of 113 countries. United States, WORLD JUST. PROJECT: RULE OF LAW INDEX 2017-2018, http://data.worldjusticeproject.org/#/groups/USA (last visited Feb. 6, 2018). For fundamental rights, the United States was ranked 26th out of 113 countries. Id.
49 See infra notes 143–46, 333–54, and accompanying text.
52 Id.
personal desires of the individual who makes the judgment.\textsuperscript{54} In opposition, Bell ultimately rejected Wechsler’s means–ends distinction as a false dichotomy. To Bell, legal doctrine’s ends were what really mattered. As a Critical Race Theorist,\textsuperscript{55} Bell ignored Wechsler’s still-popular view that legal doctrine “should be objective and not take sides” by asserting that “racism is both wrong and the greatest barrier to

\textsuperscript{54} JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES 5 (1940). Wechsler and his co-author Michael also favorably quoted economist Paul Sweezy to assert that arguing over subjective ends was counterproductive: “Underlying conceptions of good and evil, it has been frequently observed, do not constitute a fruitful subject of controversy. These are matters of taste which it is best to leave for the individual to work out for himself as best he can.” Id. at 5 n.5. (quoting Paul M. Sweezy, Leviathan and the People, 53 HARV. L. REV. 1064, 1064 (1940) (book review)). Wechsler considered Jerome Michael, another Professor at Columbia Law School, an extremely influential mentor. Silber & Miller, supra note 51, at 863. Michael had taught Wechsler as a law student. Id. Wechsler and Michael co-authored Criminal Law and Its Administration, one of the most influential American criminal law casebooks. Louis B. Schwartz, The Wechslerian Revolution in Criminal Law and Administration, 78 COLUM. L. REV. 1159, 1159 (1978). In his memorial to his “anti-positivist” friend a year before Brown was decided, Wechsler articulated Michael’s belief that principles could transcend legal doctrine and that legal knowledge was significant only if it brought true understanding:

For . . . Michael was above all else a man of principle . . . and he devoted a large portion of his energy to the refinement and articulation of the principles that he avowed . . . [He believed that] practice when it is unprincipled is not alone incompetent—it is anarchical; that principle or theory is, in this dimension, the communicable formulation of what practice is about: its ends and means, its possibilities and difficulties, all grasped through understanding the processes involved . . . At all events, he . . . [knew] that what law needs is more and better theory: for its making, for its application, for its teaching and its practice.

. . .

[H]is vision of a legal subject had a scope far wider than the statement and arrangement of existing law . . . and if the statement was confined to formal rules he thought it very close to useless information. Such knowledge had significance for him only if it was accompanied by understanding. And understanding meant a deep appreciation of the problems that it is law’s function to solve, the ends that should be sought in their solution and the means that are adapted to such ends.


\textsuperscript{55} Starting with the Critical Legal Studies movement, many critical jurisprudential movements have critiqued legal doctrine’s indeterminacy or masqueraded enforcement of the status quo. See, e.g., MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 46–60 (1988).
realization of the nation’s often pledged but seldom realized ideals.”

By their actions, if not by their words, both Bell and Wechsler opposed the Jim Crow apartheid system as racist and evil.

B. Building the Master’s House.

As the legal doctrine of Jim Crow segregation demonstrated, and both Bell and Wechsler agreed, the rule of law has indisputably been used in the United States to build the white supremacist Master’s house. As early as 1934, Wechsler condemned the so-called rule of law’s acquiescence to the unaccountable white mob lynchings of blacks. Three years later, he helped represent a black Communist criminal defendant in front of the U.S. Supreme Court. Bell called Wechsler “a frequent advocate for civil rights causes.” Bell of course dedicated his entire life to opposing the explicit and implicit racism he saw in legal doctrine.

C. Dismantling the Master’s House?

Despite their well-documented opposition to Jim Crow apartheid, both Bell and Wechsler nonetheless dared criticize that heroic legal talisman, Brown v. Board of Education, lionized in an avalanche of scholarship and

57 See generally Herbert Wechsler, Book Review 44 YALE L.J. 191 (1934) (reviewing JAMES HARMON CHADBORN, LYNCHING AND THE LAW (1933) & ARTHUR FRANKLIN RAPER, THE TRAGEDY OF LYNCHING (1933)). Even in 1934, Wechsler believed that law reform could and must improve blacks’ Jim Crow oppression:

But the negro who succumbs to his terror must acquiesce in all the other injustices perpetrated on his race, a result which should be abhorrent to the dominant citizens of a civilized state. Whether he succumbs or not, it is difficult to call him unreasonable if he embraces the conviction, shared by many of his fellows, that his road to justice reaches beyond existing governmental institutions. . . . It can be dispelled only by the creation of a more abundant life for the negro . . . to make possible such a life is the job of government.

Id. at 192 (footnote omitted).
58 See generally Herndon v. Georgia, 295 U.S. 441 (1935); see also supra notes 267–68 and accompanying text.
59 Bell, supra note 11, at 519.
popular acclaim. More than sixty years later, Brown is still credited with symbolically, if not substantively, dismantling the Master’s Jim Crow house. Whereas Wechsler essentially criticized Brown for placing ends over means, Bell criticized Brown because it reinforced the false belief that the rule of law or any other means could ever change the United States’ permanently racist ends.

After becoming disillusioned with the rule of law’s unfulfilled promises, Bell came to agree with Lorde that the rule of law could never be used to dismantle the Master’s house. Like many critical jurisprudential movements, Bell concluded that the rule of law was the Master’s favorite tool precisely because its powerful myth of neutrality, objectivity, and legalism cleverly camouflaged the Master’s actual oppression. One of Bell’s seminar students summarized Lorde’s point so well that Bell later published it. She articulated a “self-protectionism” theory, wherein the Master “structure[s] distribution of power and resources to protect [his] own social status and control.” This self-protectionism theory, she posited, is at the heart of many forms of discrimination, including racism. Bell’s most famous manifestation of the self-protection theory is his pessimistic Racial Realism Rule:

[R]acism is not going to go away. Rather, racism is an integral, permanent, and indestructible component of this society. Because this is true . . . [b]lack people will never achieve full

294 (1955).


64 Id.

65 Wechsler, supra note 11, at 26–27.

66 Bell, supra note 11, at 519.

67 See Rhee, supra note 8, at 292.

68 Id.


70 Id. at 1048.

71 Id.
equality in this country. . . . Even those . . . successful [efforts] will produce no more than temporary “peaks of progress,” short-lived [periods of improved conditions] that slide into irrelevance as racial patterns adapt in ways that maintain white dominance.  

Bell’s permanent racism thesis predictably “provoked cries of outrage and condemnation as being too cynical.” Although these skeptics considered Bell’s radical deconstruction unpersuasive, they might still be receptive to Wechsler’s transformative reconstruction. By accepting racism’s permanence, Bell finds transformative reconstruction of legal doctrine to be impossible. His critical deconstruction of legal doctrine, however, might improve black conditions, remind the Master that blacks are willing to fight, and provide blacks with meaning and hope through future struggle.

---


73 THE DERRICK BELL READER 8 (Richard Delgado & Jean Stefancic eds., 2005).

74 See supra note 28 and accompanying text.


While implementing Racial Realism we must simultaneously acknowledge that our actions are not likely to lead to transcendent change and, despite our best efforts, may be of more help to the system we despise than to the victims of that system we are trying to help. Nevertheless, our realization, and the dedication based on that realization, can lead to policy positions and campaigns that are less likely to worsen conditions for those we are trying to help, and will be more likely to remind those in power that there are imaginative, unabashed risk-takers who refuse to be trammeled upon. Yet confrontation with our oppressors is not our sole reason for engaging in Racial Realism. Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight in itself has meaning and should give us hope for the
II. DERRICK BELL’S CRITICAL DECONSTRUCTION OF LEGAL DOCTRINE

“Bell has pioneered at least three areas of scholarship: critical race theory, narrative scholarship, and economic-determinist analysis of racial history.”

Throughout his legal career, Derrick Bell had a tragic romance with the Master’s tool—the rule of law—and the Master’s house, legal doctrine. As a young law student and crusading civil rights lawyer, Bell accepted classical liberalism’s faith in the rule of law. Like many civil rights lawyers of his time, he initially considered Brown v. Board of Education to be the rule of law’s penultimate triumph. But as he attempted to enforce Brown’s legal doctrine upon recalcitrant, defiant school districts, Bell became a disillusioned liberal. In the end, he saw the rule of law as an abuser that took far more than it could give.

Ultimately, Bell walked away from the rule of law. He abandoned incremental, insider legal reform as hopeless and instead embraced his longstanding role as the perpetual outsider protester. Nevertheless, as Bell admitted in interviews and demonstrated in his narrative dialogues with supernatural civil rights lawyer Geneva Crenshaw, he continued to yearn for the rule of law.

Through hypothetical legal doctrine, Bell had his cake and ate it too. As legal doctrine, it humored his continuing infatuation with the rule of law. As a thought experiment, it also allowed him hypothetically to assume an explicit acknowledgment of American racism and American white self-

future.

Id.


77 See infra Part II.A.

78 See infra Part II.A.

79 See infra Part II.A; see also DERRICK BELL READER, supra note 73, at 4 (stating that “Brown remained Holy Writ”).

80 See infra notes 142–46 and accompanying text.

81 See Rhee, supra note 8, at 292.

82 See infra Part II.C.

83 Geneva Crenshaw represents the many strong black women Bell has known throughout his life. DERRICK BELL, AFROLANTICA LEGACIES 83 (1998). See also infra note 160 and accompanying text.

84 See infra Part II.B.
protectionism,85 which Bell himself admitted was unlikely in real life.86 Finally, Bell’s hypothetical legal doctrine remains a masterful example of Critical Legal Process’s critical deconstruction of legal doctrine.87

A. Disillusioned Classical Liberal to Outsider Protester

Bell entered the University of Pittsburgh School of Law in 1954,88 the year the U.S. Supreme Court issued its celebrated Brown I opinion.89 He graduated in 1957, the only black student in his 140-student class and one of only three black students in the entire school.90 Before law school, he had literally soldiered for the United States as an Air Force lieutenant from 1952–54.91 While a law student, he was an associate editor of the University of Pittsburgh Law Review.92 Richard Thornburgh, future Republican Attorney General and Governor of Pennsylvania, was one of Bell’s fellow editors.93 Despite their ideological differences, they remained cordial for the rest of their lives.94

All of Bell’s early articles exhibited masterful analysis of legal doctrine.95 Throughout law school, he believed “that the Brown decision marked the beginning of the end of Jim Crow oppression in all its myriad forms.”96 Bell submitted so much writing on racial issues that the Law Review’s faculty advisor asked him whether he wanted to change the Law

85 See infra notes 154–87 and accompanying text.
86 See, e.g., Eric Ilhyung Lee, Nomination of Derrick A. Bell, Jr. to be an Associate Justice of the Supreme Court of the United States: The Chronicles of a Civil Rights Activist, 22 OHIO N.U. L. REV. 363 (1995) (imagining how the U.S. Senate would react to Bell’s hypothetical legal doctrine during Supreme Court confirmation hearings); see also infra notes 153–54 and accompanying text.
87 See Bell, supra note 28 and accompanying text.
88 See DERRICK BELL OFFICIAL SITE, supra note 1.
90 See DERRICK BELL OFFICIAL SITE, supra note 1.
91 See Id.
92 Janet Dewart Bell, In Memory of Professor Derrick Bell, 36 SEATTLE U. L. REV. i, i (2013).
93 Id.
94 Id.
95 See generally Derrick A. Bell, Jr., The Girard Will Case—a Charitable Trust Faces the Fourteenth Amendment, 18 U. PITT. L. REV. 620 (1957); Derrick A. Bell, Jr., Pennsylvania Fair Employment Practice Act, 17 U. PITT. L. REV. 438 (1956); T. Oscar Smith & Derrick A. Bell, The Conscientious-Objector Program—A Search for Sincerity, 19 U. PITT. L. REV. 695 (1958).
Review’s name to the University of Pittsburgh Civil Rights Journal.97

Upon meeting his hero, the first black federal judge, Judge William H. Hastie, Bell told Hastie that he wanted to become a civil rights lawyer.98 Reflecting the naïveté of early civil rights advocates still reveling in Brown, Hastie replied, “Son, I am afraid that you were born fifteen years too late to have a career in civil rights.”99 After Brown’s issuance, Bell’s future NAACP boss Thurgood Marshall reportedly said that it would take about five years to implement Brown and that all racial segregation would be eliminated by 1963.100 “For the first decade of my legal career,” wrote Bell, “I, like most civil professionals, believed with an almost religious passion that the Brown decision was the equivalent of the Holy Grail of racial justice.”101

Despite Judge Hastie’s admonition, Bell became a civil rights lawyer out of law school.102 Selected for the prestigious DOJ Honors Program, he transferred a year later to the new Civil Rights Division.103 In a formalist move, of which Herbert Wechsler might approve,104 Bell’s superiors asked Bell to end his $2 NAACP membership.105 His superiors probably recognized that the NAACP was a private advocacy organization that was often a party in Civil Rights Division cases. Because Bell, as a DOJ attorney, represented the United States’ interests—and not any particular interest group—in federal court, Bell’s superiors presumably and understandably believed such membership would appear to be a conflict of interest, indicative of a possible lack of neutrality or objectivity.106 Even though the DOJ and NAACP had often worked together in early civil rights cases, they would go on to oppose each other in federal court in the future.107

97 Id.
98 Id. at 3.
99 Id.
101 BELL, supra note 96, at 3.
102 Id.
103 See DERRICK BELL OFFICIAL SITE, supra note 1.
104 See infra Part III.B.
105 DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER 18 (1994).
106 Id.
Wechsler probably would have cancelled his membership to maintain the formal appearance of neutrality. Because of his penchant for not inquiring into motives or specific circumstances when determining neutrality, Wechsler might analogize Bell’s NAACP membership to another DOJ attorney’s membership in a white supremacist organization. To Bell, however, motives and circumstances mattered. Starting a pugnacious pattern of protest that would characterize his entire legal career, Bell refused to cancel his NAACP membership. As a result, Bell’s supervisors moved Bell’s desk out of his office into the hallway and reduced his caseload. Rather than renounce his NAACP membership, Bell resigned from the DOJ.

After leaving the DOJ, Bell worked for the local Pittsburgh chapter of the NAACP. Thurgood Marshall, then-Director of the NAACP Legal Defense Fund (LDF), met Bell in Pittsburgh. Having heard about Bell’s DOJ resignation, Marshall offered Bell a job to work with him at the LDF. Bell “accepted on the spot.” From 1960 to 1966, Bell supervised more than 300 LDF school desegregation cases. At the LDF, he worked with Medgar Evers (up until his murder), Thurgood Marshall, Jack Greenberg, Robert Carter, and Constance Baker Motley.

Foreshadowing his future identity as a perpetual protester, in 1961, Bell mistakenly made a public telephone call in a whites-only railroad station waiting room in Jackson, Mississippi. White police officers arrested him and put him in jail overnight. Fortunately, a local black lawyer bailed him out.

---

108 See Wechsler, supra note 50.
109 For example, with his Race, Racism, and American Law casebook, Bell rejected “the view that law school texts should be objective and not take sides. Rather, the book’s point of departure is that racism is both wrong and the greatest barrier to realization of the nation’s often pledged but seldom realized ideals.” Bell & Radice, supra note 56.
110 See infra Part II.C.
111 Derrick Bell Official Site, supra note 1.
112 Id.
113 Id.
114 Id.
115 Id.
116 Id.
117 Id.
118 Id.
119 Derrick Bell, Ethical Ambition: Living a Life of Meaning and Worth 30 (2002).
120 Id.
out the next day.\textsuperscript{121} When Bell returned to LDF headquarters in New York, Thurgood Marshall prophetically lectured Bell: “Damn, boy, the black folks down South need good lawyering. They don’t need dead heroes. They got plenty of them already. Understand? \textit{Do your protesting in the courtroom, not in the railroad station.”}\textsuperscript{122}

From 1966 to 1968, Bell continued his school desegregation work as Deputy Director, Office of Civil Rights, U.S. Department of Health, Education, and Welfare (the institutional precursor to the U.S. Department of Education).\textsuperscript{123} Bell started teaching law in 1969, when he began to reflect on and write about his school desegregation practice experience.\textsuperscript{124} He became the first Executive Director of the Western Center on Law and Poverty at the University of Southern California Law School.\textsuperscript{125} With the race riots after Dr. Martin Luther King, Jr.’s assassination in 1968, progressive law schools scrambled to hire black faculty.\textsuperscript{126} In 1969, Harvard Law School hired Bell to be, as Bell recounted the dean’s words, “the first, but not the last black” faculty member.\textsuperscript{127}

At that time, Bell admitted that he remained a classical liberal, but a disillusioned one:

\begin{quote}
By this point, my enthusiasm for gaining compliance with \textit{Brown} through court orders requiring the balancing of races for each school had waned with experience. \textit{Brown} remained Holy Writ, but I now felt we were misreading its message. As happens all too often in religion, disciples lose sight of the basic truths amid all the doctrines that tend to stifle those truths rather than nourish them.\textsuperscript{128}
\end{quote}

With the benefit of time and space as a law professor to reflect on his desegregation practice experience, Bell turned away from his classical liberal roots. Of Bell’s many publications, two in particular illustrate his about-face from the classical liberal rule of law. In the first article, \textit{Serving Two Masters:}

\begin{thebibliography}{99}
\bibitem{121} Id.
\bibitem{122} Id. at 31 (emphasis added).
\bibitem{123} DERRICK BELL OFFICIAL SITE, supra note 1.
\bibitem{124} Id.
\bibitem{125} Id.
\bibitem{126} DERRICK BELL READER, supra note 73, at 5–6.
\bibitem{127} Id. at 6.
\bibitem{128} BELL, supra note 96, at 4.
\end{thebibliography}
Integration Ideals and Client Interests in School Desegregation Litigation, Bell attacked a classical liberal rule of law stronghold, public interest litigation, by accusing public interest legal organizations like the LDF of suffering from a conflict of interest in impact litigation. Because public interest legal organizations ultimately want to change the law, the would-be law reformers’ objectives might be different than their actual clients’ objectives. While impact litigators might want a particular outcome to set-up the next lawsuit, their clients might prefer more pedestrian relief that better improves their lives but does not provide the desired legal precedent.

In a published response to Bell’s article, LDF General Counsel Nathaniel Jones was furious. He characterized Bell’s “indictment of civil rights lawyers (and the NAACP)” as claiming that “civil rights lawyers have failed adequately to represent the interests of children in segregated schools and thus violated their ethical responsibilities to their clients.” Jones concluded that Bell’s article lacked “analytical and factual precision” and “comprehensiveness.”

Although Bell had alienated many of his former civil rights colleagues with his first article, his second article ignited a firestorm of opprobrium because, like Wechsler before him, Bell dared attack the sanctity of Brown. In Brown v. Board of Education and the Interest-Convergence Dilemma, Bell first articulated what would later be known as the Interest-Convergence Thesis.

The Interest-Convergence Thesis was Bell’s attempt to meet Wechsler’s challenge, to articulate Brown’s neutral principle, and to explain “on a positivistic level—how the world is.” The Interest-Convergence Thesis has been applied to a variety of different contexts, including other

---

130 Id. at 477–78.
131 Id. at 471–72.
133 Id. at 381.
134 See generally Bell, supra note 11; see also Kevin Hopkins, Back to Afrolantica: A Legacy of (Black) Perseverance?, 24 N.Y.U. REV. L. & SOC. CHANGE 447, 466 (1998) (“No matter how justified by the racial injustices they are intended to remedy, civil rights policies, including affirmative action, are implemented for blacks only when they further interests of whites.”).
135 Bell, supra note 11, at 523.
minority race rights, non-Christian religious rights, educational reform, pension reform, animal rights, domestic violence, concentrated poverty, and the war on terror. A more generic statement of the Thesis might be: a capitalist democracy adopts legal doctrine with the express purpose to assist marginalized people only if such doctrine actually furthers the Master’s interests.

With his published criticism of Brown and his claim that racism is a permanent part of American society, Bell had become disillusioned with the liberal ideal of the rule of law. Bell later wrote about how traditional rule-of-law civil rights lawsuits were actually counterproductive:

We learned the hard way that commitment to white dominance could both survive official segregation and gain in effectiveness under the equal opportunity standard we civil rights lawyers had urged on courts and the country. . . . Thus, rather than eliminate racial discrimination, civil rights laws have only driven it underground, where it flourishes even more effectively. Given the intransigence of discrimination, civil rights campaigns aimed at changing the rules, without affecting the underlying status quo, have proved counterproductive even when their original goals were achieved.

Although Bell had stopped his earlier romance with the Master’s rule of law and the Master’s house, legal doctrine, he remained ambivalent. Ironically, his pining for the rule of law and legal doctrine manifested itself not in court filings or official legal doctrine but rather through his outsider narrative scholarship.

B. Lingering Legal Doctrinalist

Despite his well-established mistrust of the rule of law and legal doctrine, Bell nevertheless created hypothetical legal doctrine in his narrative stories. He concluded that the rule of law “seeks to convey an objectivity that may exist in theory but is impossible in the real world.” Likewise, Bell

---

137 Bell, supra note 11, at 522–23.
138 BELL, supra note 105, at 149–50 (emphasis added).
139 BELL & RADICE, supra note 56, at 11.
considered legal doctrine extremely indeterminate, asserting that the “instability and malleability of legal doctrine renders certainty a myth and stare decisis a fiction.”

Yet when writing his modern-day race-law parables, Bell decided to continue to explore rule-of-law and legal doctrinal themes. Many of his narrative stories involved dialogues between Bell and his supernatural former civil rights colleague Geneva Crenshaw, named in honor of “many black women [Bell had] known and learned from during [his] life.” Bell explained that in spite of his skepticism, in his stories, Derrick Bell the character would continue to represent the classical liberal rule-of-law position, a position Crenshaw was happy to undermine:

[Geneva Crenshaw] has strange, really sort of superhuman, powers of insight with regard to race. I, as the narrator dealing with her, take a more conventional civil-rights lawyer approach: “We need to continue following litigation,” and she tells me that’s crazy. . . . [I]t reflects the ambivalence that—that I feel and I think that a lot of blacks feel. We’re in this transitional era, in which I can’t claim that I’ve totally lost my sense that the answer is one more lawsuit and—and one more traditional effort to get civil-rights legislation passed.

Bell therefore created hypothetical legal doctrine to implement his racism-is-permanent neutral principle. He recognized that policymakers might not listen to him or care about his doctrinal proposals. Like the biblical prophet Jeremiah, Bell’s hypothetical legal doctrine served as a jeremiad “calling for the nation to repent.” Here are some examples of

140 Id. at 14.
141 BELL, supra note 83, at 83.
142 Interview by Brian Lamb with Derrick Bell, Author (Nov. 15, 1992), http://www.booknotes.org/Watch/34630-1/Derrick-Bell.aspx.
143 See, e.g., BELL, supra note 83, at 33–35 (acknowledging that “it sure is tough trying to resist oppression with words and ideas” and that “it’s hard to imagine how more of our writings can halt or even hinder the hostile forces arrayed against our people.”).
144 Bell’s exchange with Geneva Crenshaw in Faces at the Bottom of the Well: The Permanence of Racism demonstrated his awareness:

“In other words,” I [Bell] suggested when she looked up, “we’re a race of Jeremiahs, prophets calling for the nation to repent.” “Exactly!” Geneva said. “And you know what nations do to their prophets?” “I do. About the least dire fate for a prophet is that one preaches, and no one listens; that
Bell’s critical deconstructionist legal doctrine (with brief explanations):

- **Interest-Convergence Thesis.** As previously explained, this thesis assumes that the U.S. legal system will adopt legal doctrine ostensibly to remedy black injustice only when such doctrine would also further white interests.

- **Revisionist Brown opinion (What Brown Should Have Said).** Nine famed academics were asked the following: “How would you have written the Brown opinion in 1954, if you knew then what you know now about the subsequent history of the country and the progress of race relations in the past half century?” The nine academics simulated the U.S. Supreme Court. Not surprisingly, Justice Bell authored a dissenting opinion because the “Court’s long-overdue findings that Negroes are harmed by racial segregation is, regrettably, unaccompanied by an understanding of the economic, political, and psychological advantages whites gain because of that harm.”

- **Racial Fortuity Corollary.** Bell later expanded his Interest-Convergence Thesis to cover minority groups more broadly where racial minorities are only incidental or fortuitous third-party beneficiaries of racial policies, without the ability to enforce those policies.

- **Racial Preference Licensing Act (RPLA) (the Final Civil Rights Act).** With the RPLA, the United States, according to Bell, would finally acknowledge the reality of de facto discrimination against blacks by

  one risks all to speak the truth, and nobody cares.”


145 See supra notes 134–35 and accompanying text.
146 Hopkins, *supra* note 134.
147 WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION ix (Jack Balkin et al. eds., 2002).
148 *Id.* at 185.
149 BELL, *supra* note 96, at 69–70.
allowing “all employers, proprietors of public facilities, and owners and managers of dwelling places” actual license to discriminate against blacks by paying a fee and a quarterly tax. The RPLA’s proceeds would be placed in an “‘equality fund’ used to underwrite black businesses, offer no-interest mortgage loans for black home buyers, and provide scholarships for black students seeking college and vocational education.” Bell worked out a burden-shifting proof scheme for discrimination claims against RPLA license holders and even authored a racially realistic presidential signing statement.

- **Freedom of Employment Act.** This federal law would “ban[] all affirmative action programs” and “assume[] that all persons who, because of their race or ethnicity, were actual or potential beneficiaries of affirmative action policies obtained the positions they now hold unfairly.”

- **Ultimate Voting Rights Act.** The No Taxation Without Representation Voter Bill would create a special Voter Travel Fund from half of campaign contributions to cover voting-related travel expenses and mandate that racial minorities would be able “to elect representatives of their choice in numbers equal to their portion of the population eligible to vote.”

- **Rules of Race Relations Law.** Another restatement of the Interest-Convergence Thesis and Racial Realism Rule into two Rules. The first Rule of Race Relations Law is as follows:

  Racial remedies are the outward manifestations of unspoken and perhaps unconscious conclusions that such remedies—if adopted—will secure, advance, or at least not harm the

---

151 Id. at 600–02.
152 Id. at 601.
153 Id. at 601–02.
155 Id.
157 Id. at 86.
158 Id. at 87.
159 DERRICK BELL READER, supra note 73, at 48.
160 See Bell, supra note 11, at 519. See also supra notes 134–35 and accompanying text.
interests of whites in power.\textsuperscript{162}

The second Rule is stated thus:

The benefits to blacks of civil rights policies are often symbolic rather than substantive, and when the crisis that prompted their enactment ends, they will infrequently be enforced for blacks, though in altered interpretations they may serve the needs of whites.\textsuperscript{163}

- **Black Reparations Foundation.**\textsuperscript{164} The richest white man in the world would establish the Black Reparations Foundation, “whose simple purpose is to bring economic justice today to the least fortunate of those black people whose forebears were refused such justice after the Civil War.”\textsuperscript{165} With anonymous contributions from other wealthy individuals, the privately-funded Foundation would disperse over $25 billion (over $5 trillion in 2017 dollars) in grants to all American blacks “based on free-enterprise models in which monthly payments are a percentage of currently earned income . . . carefully calibrated to reward enterprise and discourage sloth.”\textsuperscript{166}

- **Racial Toleration Laws.**\textsuperscript{167} These state laws would “severely restrict[]—and, in some states, ban[] outright—public teaching that promoted racial hatred by focusing on the past strife between blacks and whites. Penalties [would be] severe for leading or participating in unauthorized public healing sessions, or for publicly wearing what the law termed ‘symbols of racial hatred.’”\textsuperscript{168}

- **Quality of Education Model Desegregation Plan.** Perhaps Bell’s most explicitly practical work was published in 1980 when Bell was Dean of the University of Oregon Law School in an anthology he edited, *Shades of Brown: New Perspectives on School Desegregation.*\textsuperscript{169} He explicitly

\textsuperscript{162} Derrick Bell Reader, *supra* note 73, at 49.
\textsuperscript{163} Id. at 49.
\textsuperscript{165} Bell, *supra* note 156, at 125.
\textsuperscript{166} Id. at 128.
\textsuperscript{167} Derrick Bell, *Foreword: The Civil Rights Chronicles (Supreme Court 1984 Term)*, 99 Harv. L. Rev. 4, 71 (1985).
\textsuperscript{168} Id.
\textsuperscript{169} See Derrick Bell, *A Model Alternative Desegregation Plan: Black Schools and Accepted*
stated that his audience was black parents whose children attended all-black schools and judges supervising school districts under court desegregation orders with all-black schools.\textsuperscript{170} Echoing his later dissent in a rewriting of the \textit{Brown} opinion,\textsuperscript{171} Bell’s model plan explicitly stated that its purpose should be “to bring minority schools up to the academic standards of mainly white schools in the district.”\textsuperscript{172} He also included summaries and citations of federal case law to prepare legal arguments in support of such plans.\textsuperscript{173}

- \textit{Race, Racism, and American Law Casebook}.\textsuperscript{174} Bell first authored this unconventional constitutional law casebook in 1973.\textsuperscript{175} The casebook used published legal doctrine, commentary, and hypothetical legal doctrine to explore Bell’s long-time belief in the permanency of U.S. racism.\textsuperscript{176} As Bell explained:

  [His casebook’s] approach was unorthodox, particularly in its departure from the view that law school texts should be objective and not take sides. Rather, the book’s point of departure is that racism is both wrong and the greatest barrier to realization of the nation’s often pledged but seldom realized ideals. The challenge of the book and for those who adopt it to teach courses on racial discrimination is to explore the history of racism, examine its current methods of functioning, and perhaps grasp the factors contributing to its resilience to reform.\textsuperscript{177}

It is not surprising that Bell wrote all of this hypothetical legal doctrine outside of the traditional legal system. Even after he left his civil rights practice to become a law professor, Bell remained a perpetual outsider–protester in the Academy.

C. \textit{Perpetual Outsider Protester}

When Bell chose to resign from the DOJ rather than renounce his $2
NAACP membership, he set the tone for the rest of his legal career. As a legal academic, he tried unsuccessfully to be an insider incrementalist and subsequently embraced his outsider protester role. Like Gandhi178 and Martin Luther King, Jr.179 before him, Bell understood that when seeking to change society, the rule of law was a clumsy and unreliable tool.

Like Gandhi and King, Bell understood that public protest could be a much more effective tool to change perceived unjust policies for two reasons. First, public protest put the contested policy under public scrutiny and forced the Master to justify the policy publically.180 Moreover, if the protester happened to be a visible member of the community, as Bell’s hero Hastie was during World War II as the highest black War Department official181 and as Bell was as the first black tenured professor at Harvard Law School and the first black dean of the University of Oregon Law School,182 then the Master might be forced to make changes to save face. Hastie’s protest undoubtedly contributed to President Truman’s Executive Order 9981 abolishing segregation in the armed forces.183 Likewise, Bell’s protest undoubtedly contributed to the much higher number of minority and women faculty at Harvard Law and Oregon Law today.184

Second, unlike a classical liberal or armchair academic, the protester shares the same suffering that the people for whom she is protesting

---

179 See, e.g., Christopher W. Schmidt, Conceptions of Law in the Civil Rights Movement, 1 U.C. IRVINE L. REV. 641, 663 (2011) (quoting King as saying that “[b]lacks must not get involved in legalism [and] needless fights in lower courts”).
180 See BELL, supra note 105, at 19.
183 See BELL, supra note 105, at 19.
184 In 2017, Harvard Law School claimed to have 21% tenured women faculty and 60% tenure-track women faculty; 15% tenured minority faculty and 40% tenure-track minority faculty. See Ladder Faculty Demographics: 2008 to 2017, HARV., https://faculty.harvard.edu/fdd-annual-reports (select “Ladder Faculty Demographics: 2008 to 2017” hyperlink) (last visited Feb. 17, 2018). The University of Oregon School of Law currently has 53% women faculty and 16% minority faculty. University of Oregon School of Law, STARTCLASS, http://law-schools.startclass.com/l 124/University-of-Oregon#Faculty&s=4A8tcz (last visited Feb. 8, 2018).
experience. The protester’s injury is not hypothetical or abstract. The protester’s injury is real life. By resigning in protest, both Hastie and Bell gave up excellent jobs for the unknown. They risked their families’ welfare. When Bell took an unpaid leave of absence from Harvard Law School until it hired its first woman-of-color tenure-track professor, his wife, Jewel, was battling cancer. She died three months later.

Even before his disillusionment, Bell felt uncomfortable when he was lauded as a brave, crusading civil rights lawyer because his sacrifice paled in comparison to “what [his] black clients had to deal with every day.” Thurgood Marshall, who earlier had told Bell to save his protesting for the courtroom and not the real world, also understood that as a traditional lawyer he did not share his client’s suffering. When his biographer Carl Rowan praised Marshall for his courage, Marshall retorted: “You forget just one little fucking thing. I go into these places and I come out, on the fastest vehicle moving. The brave blacks are the ones who have to live there after I leave.”

As Bell’s second wife Janet reflected, Bell “understood the parallels between his work as a civil rights attorney and his support for student demands for diversity. He did not protest for the sake of protesting. Nor did he shy away from taking principled, sometimes public and controversial, stands.” With the benefit of hindsight, Bell later reflected: “Had I understood before accepting Harvard’s offer how ingrained the hiring and tenure practices are, I likely would not have taken the job.”

When first hired in 1968, Bell understood that Harvard would be hiring additional tenure-track black faculty after him. After six years of watching highly qualified black candidates never receive an offer for a tenure-track position at Harvard, Bell wrote an open letter in 1974 to Harvard Law School Dean Albert Sacks, copying all the Harvard faculty, where Bell

185 See Bell, supra note 105, at 119.
186 Id.
187 Derrick Bell Reader, supra note 73, at 13.
188 Id.
189 Bell, supra note 105, at 22.
189 See also Bell, supra note 119; see also Bell, supra note 169 and accompanying text.
189 See also Bell, supra note 169 and accompanying text.
191 Id. note 92, at iv.
192 See Bell, supra note 105, at 42.
193 Id.
declared that he would resign at the end of the year unless Harvard hired another black faculty member.  

A few months later, Harvard hired its second black male faculty member.  Dean Sacks made sure to inform Bell that his letter had nothing to do with the hiring.  A few years later, Harvard hired its third black male faculty member.  

With Wechsler, Dean Albert Sacks is considered one of LPS’s founding fathers.  Bell ironically offered Sacks as an example of how the credentials required by the academic Master “strongly correlate to upper-class standing.”  Sacks, along with Henry Hart, Jr.—Wechsler’s Federal Courts co-author and another LPS founding father—never published their Legal Process casebook.  Although the Legal Process School takes its name from Hart and Sacks’ book, the book was only published posthumously.  Bell believed that Sacks, perhaps like Wechsler, benefited from white privilege:

I don’t think [any of the Harvard Law faculty] cared that [Sacks] never published a book. There was a consensus: Al Sacks could do it if he wanted to. That was enough. The same acceptance was extended to several other [white] faculty members whose scholarly promise far exceeded their performance.

Needless to say, Bell did not believe that non-white faculty like himself would be given the same benefit of the doubt by his white colleagues.

Five years later, in 1979, Bell decided to try his hand at the Master’s game.  He applied to be Dean of the University of Oregon Law School.  In 1980, he was offered the job.  Recognizing potential obstacles, Bell urged the faculty to consider the significance of “hiring a black man committed to

194 Id. at 43.
195 Id.
196 Id. at 44.
197 Id.
199 BELL, supra note 105, at 41.
200 See Eskridge & Frickey, supra note 198.
201 BELL, supra note 105, at 41.
202 Id.
203 Id. at 44.
204 Id.
civil rights to head a mainly white law school in a state with no more than one or two percent black citizens. ‘We are ready,’ they assured me.” Bell accepted the job and served as Oregon Law’s dean from 1980 to 1986. He resigned in 1986 to protest the faculty’s unwillingness to hire an Asian-American woman. She had been ranked third behind two white males. When the two white males rejected Oregon’s offers, a few professors convinced a majority of the faculty that “we could do better.” As a result, the faculty refused to give an offer to the Asian-American woman, electing instead to reopen the search. Bell admitted that he resigned out of “frustration, rather than any good judgment or political sense.”

Bell then visited at Stanford Law School to teach Constitutional Law, a required first-year course. As he had done at several other law schools, Bell used an unconventional pedagogical method, critiquing American constitutional law through a racial and socioeconomic lens. He later learned from the local Black Law Students Association (BLSA) that about 24 of his students had started attending other Constitutional Law sections with the instructors’ approval. Instead of telling the students to give Bell a chance, these two faculty members had secretly accepted the students’ criticisms of Bell’s teaching ability without giving Bell an opportunity to respond. To make matters worse, a faculty member had invited Bell to speak at a public lecture series secretly designed to compensate for Bell’s perceived teaching incompetence.

The BLSA students told Bell that they were going to protest the

---

205 Id.
206 DERRICK BELL OFFICIAL SITE, supra note 1.
207 See BELL, supra note 105, at 45.
208 Id.
209 Id.
210 Id.
211 Id. at 46.
212 DERRICK BELL READER, supra note 73, at 11.
213 Derrick Bell, The Price and Pain of Racial Perspective, in THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT 1122, 1123 (2d ed. 1997). Bell probably used his Race, Racism, and American Law casebook in class; see also supra notes 174–91 and accompanying text.
214 DERRICK BELL READER, supra note 73 at 11.
215 Id.
216 Id.
lecture series as racist. He encouraged their protest. The student protest led to the cancellation of the series and the return of the students who had previously left Bell’s Constitutional Law section. Bell later wrote: “Even some weeks after the event, I am unable to rationally express the range of my feelings from abject humiliation to absolute outrage. . . . It was by a considerable margin, the worst moment of my professional life.”

After the BLSA protest publically shamed the Stanford faculty, everyone involved apologized to Bell. Bell’s friend and, ironically, noted LPS scholar Dean John Hart Ely apologized to Bell and urged him to forget the incident. After some deliberation, Bell decided to forego leaving quietly and instead protested the incident. He authored a description of the incident in the Stanford Law School Journal entitled The Price and Pain of Racial Perspective. He also mailed letters to other law school deans across the country explaining what had happened to him and urging them to discuss the incident at faculty meetings. Although initially defensive, Stanford Law School eventually responded positively to Bell’s protest, holding a series of town hall meetings to discuss the law school’s receptiveness to innovative pedagogy, racial minorities, and diverse viewpoints.

Bell then returned to Harvard Law School in 1987, where there were now three other black male faculty but still no women of color on the faculty. Harvard women-of-color law students then asked for Bell’s help.

---

217 Id.
218 Id.
219 Id.
220 Bell, supra note 213, at 1122.
221 DERRICK BELL READER, supra note 73, at 12.
222 Ely himself had earlier criticized Wechsler’s “Neutral Principles” because neutral principles did “not by [themselves] tell us anything useful about the appropriate content of those principles or how the Court should derive the values they embody.” JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 55 (1980). The title of Ely’s masterpiece, Democracy and Distrust, was inspired by Justice Stone’s Carolene Products footnote four. See id. at 86. For an examination of how Wechsler and Ely both impacted LPS, see Anders Walker, “Neutral” Principles: Rethinking the Legal History of Civil Rights, 1934–1964, 40 LOY. U. CHI. L.J. 385, 388 nn.16–17 (2009).
223 DERRICK BELL READER, supra note 73, at 12.
224 Id.
225 Id.
226 Id.
227 Id.
228 Id.
to lobby Harvard Law to hire its first woman-of-color professor. Bell became convinced that only a female law professor of color could provide the needed unique intersecting perspective the students sought. A man of color or a white woman simply couldn’t provide the same perspective.

Although a “few of his liberal colleagues” at Harvard “had told him, in private, that they were with him . . . when it came time to vote, most invariably melted away, switching sides or abstaining.” When the Harvard faculty failed to extend an offer to a visiting professor, a talented black woman who had taught during the 1989–1990 school year in a “look-see” visit, Bell decided that he had to protest again. His biographers’ description of Bell’s decision-making process highlights Bell’s preference for outsider protest over insider incremental reform:

“Is it possible,” he muttered to himself, “that some of my friends are right, and with almost fifteen years of service here, I can do more working from within?” He smiled, recalling that he had rejected similar advice more than thirty years earlier when he had chosen to leave the Justice Department over its ultimatum that he resign from the NAACP and that he had asserted for years that civil rights lawyers and activists need to stand ready to supplement petitions, lawsuits, and other forms of polite supplication with street protests and other forms of militancy. He turned to his computer and began writing his speech to what he expected would be a large and supportive gathering of students.

In that 1990 speech, Bell announced that he would take an unpaid leave of absence until Harvard hired its first woman-of-color law professor. His wife Jewel, seriously ill with breast cancer, did not oppose his protest but “wondered why he was always the one who took risks to protest what he considered racial injustices.” When Jewel died three months later,
Bell “remained determined to see his battle through.”237 Because Harvard limited faculty leaves of absence to two consecutive years, Bell ended up giving up tenure at Harvard.238 In 1992, Harvard dismissed Bell from his position as Weld Professor of Law.239 Harvard eventually hired a woman-of-color law professor in 1998.240

In the end, Bell perhaps found the perfect job where he could remain the perpetual outsider. His former law student, John Sexton, was now Dean of the New York University School of Law (NYU Law).241 Although Sexton offered to have the NYU Law faculty vote to grant him tenure, Bell declined.242 Instead, Bell signed a one-year contract as a visiting professor of law.243 He would sign 18 more. For 19 years, from 1992 until his death in 2011, Bell remained a permanent visiting professor at NYU Law.244 As a permanent visitor, Bell did not attend faculty meetings or participate in faculty governance.245 This arrangement, admitted Bell, helped keep him out of trouble.246 While Bell ended his life as a perpetual outsider, Wechsler lived his entire life as the consummate insider.

III. Herbert Wechsler’s Transformative Reconstruction of Legal Doctrine

Herbert Wechsler was one of the American legal profession’s elder statesmen at the time upstart Crits like Bell started questioning the utility of the rule of law and legal doctrine for marginalized people. Famed journalist Anthony Lewis wrote of Wechsler: “There was a gravity about him, a sense of sureness about the law.”247 Judge Richard Posner, himself one of Wechsler’s critics, gave Wechsler quite a complement, writing that “there is

237 Id.
238 Id.
239 Id.
241 DERRICK BELL READER, supra note 73, at 13.
242 Id.
243 Id.
244 Id. at 14.
245 Id.
246 Id.
no longer anyone in the legal profession who has the kind of stature that a Wechsler achieved.” 248 Orin Kerr claimed that a biography about Wechsler would be an interesting and important scholarly contribution. 249 Wechsler’s famous Neutral Principles article 250 remains the fifth most cited law review article of all time. 251 Bell himself called Wechsler “an outstanding lawyer, a frequent advocate for civil rights causes, and a scholar of prestige and influence.” 252

Wechsler may have been, as Posner claimed, one of the last traditional guild masters who instructed lawyers and judges in the craft of legal reasoning. Wechsler was “in the university but of the legal profession . . . training the next generation of lawyers and through scholarship—through law review articles, treatises, model laws, and restatements of the law—guiding judges and practicing lawyers in the path of sound legal reasoning.” 253

Throughout his legal career, Wechsler remained the consummate incrementalist insider legal reformer. 254 In particular, his co-authorship of the most famous federal courts treatise, his service as Executive Director of the ALI, which continues to create black-letter Restatements of the Law, and his principal drafting of the Model Penal Code all demonstrate that he also was a master of crafting, assessing, and revising legal doctrine.

A. Incrementalist Insider Reformer

Wechsler graduated from Columbia Law School in 1931 at the age of 22. 255 He had received his B.A. from the City College of New York at 19. 256 He was Editor-in-Chief of the Columbia Law Review. 257 Noted legal realist

---

250 Wechsler, supra note 11.
252 Bell, supra note 11, at 519.
253 Posner, supra note 248, at 82.
254 See id.
256 Id.
257 Id.
Karl Llewellyn taught Wechsler at Columbia.\textsuperscript{258} After graduating law school, Wechsler clerked for U.S. Supreme Court Justice Harlan Fiske Stone from 1932 to 1933.\textsuperscript{259}

During that clerkship, in the Columbia Law School faculty’s own words, “questions of the scope of the Supreme Court’s power of constitutional review were posed with a heated intensity never yet exceeded in our history.”\textsuperscript{260} Among his many rule-of-law accomplishments, Justice Stone later authored the famous Carolene Products Footnote Four, where in dictum he articulated an elegant, specific application of Critical Legal Process’s more general rule-of-law concern: “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”\textsuperscript{261} Amidst the racial strife of 1965, Wechsler commented on Footnote Four: “Narrower scope, more exacting judicial scrutiny indeed! What a change in the legal cosmos those few words portended in the quarter century ahead!”\textsuperscript{262}

Stone would also later author *Hirabayashi v. United States*, the U.S. Supreme Court decision upholding the curfew of Japanese nationals.\textsuperscript{263} As a government lawyer, Wechsler later would rely extensively upon *Hirabayashi* when defending the Japanese internment in *Korematsu*.\textsuperscript{264}

After completing his clerkship, Wechsler joined the Columbia Law School faculty.\textsuperscript{265} He stayed at Columbia—taking extended leaves of absence for public service—until his final retirement in 1992.\textsuperscript{266}

Instead of rehashing his entire biography, this section will highlight

\textsuperscript{258} At the end of his career, Llewellyn might have given up on legal realism. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960) (discussing the “craft” of appellate judging); accord POSNER, supra note 248, at 60.

\textsuperscript{259} Lewin, *supra* note 255.

\textsuperscript{260} Columbia Law School Faculty, *Resolution of the Faculty*, 78 COLUM. L. REV. 947, 947 (1978). As this Resolution was passed in honor of Wechsler’s emeritus status, it is likely that all of the characterizations of his career therein enjoyed Wechsler’s implicit if not explicit approval. *Id.*


\textsuperscript{262} HERBERT WECHSLER, THE COURTS AND THE CONSTITUTION 3 (1965).

\textsuperscript{263} Hirabayashi v. United States, 320 U.S. 81, 104 (1943).

\textsuperscript{264} Korematsu v. United States, 323 U.S. 214 (1944).

\textsuperscript{265} Lewin, *supra* note 255.

\textsuperscript{266} Louis Henkin, *Herbert Wechsler*, 146 PROC. AM. PHIL. SOC’Y 312, 312 (2002).
Wechsler’s long interaction with subordinated minority groups. This interaction consistently demonstrated his belief in incremental, insider legal reform. During a time when support for civil rights causes was not widespread, Wechsler showed great courage by authoring a Yale Law Review article in 1934 advocating for federal anti-lynching legislation and federal intervention in the South to assist blacks.267 He was unafraid of the ire of white supremacists and anti-Communists alike when he represented black Communist Angelo Herndon in *Herndon v. Georgia*, a case that ultimately ended up in front of the U.S. Supreme Court.268

With the outbreak of World War II, Wechsler took a leave of absence from Columbia to serve in the DOJ.269 His leave of absence for the federal government totaled six years.270 In 1941, as an Assistant Attorney General, he authored the United States’ Supreme Court brief in *United States v. Classic*, a criminal prosecution of white election commissioners who tampered with Democratic primary votes to favor white congressional candidates.271

In light of the *Classic* opinion, the NAACP petitioned for the Court to hear *Smith v. Allwright*.272 Thurgood Marshall thought that DOJ’s amicus curiae support of the NAACP’s petition might persuade the Court to grant their petition, so Marshall personally visited then-Attorney General Francis Biddle and Biddle’s Assistant Attorney General Herbert Wechsler.273 Wechsler advised Biddle not to assist the NAACP because, among other reasons, to do so would make the DOJ appear less neutral. As Wechsler explained:

Well, I thought it over, . . . and my advice to Biddle was not
to go in with Marshall. . . . I felt that if we came in with Marshall and asked the Court to extend *Classic*, our role could actually be hurtful. . . . We were a governmental department, . . . and we had to get along with the Senate Judiciary Committee, which was dominated by the Southerners—and this seemed an unnecessary fight.274

Wechsler added that Marshall understood the DOJ’s political view and did not protest their decision:

> When I told Thurgood that the answer would be no, he took it very well. He said, “I’m sorry, we’d like to have you with us, but we’ll just have to go it alone. I see your position.” That was one of his great virtues—seeing things from the other fellow’s side. He was a good, tough advocate who functioned without having to feel that his opponents were either knaves or fools.275

Despite the DOJ’s unwillingness to support the LDF, the Supreme Court nevertheless ended up granting certiorari in *Allwright*.276 Wechsler would later name *Allwright* as another Supreme Court opinion, like *Brown*, where he “with all sincerity” could not find “neutral principles that satisfy the mind” to justify the results of which he otherwise approved.277

Wechsler and Marshall would spar again, on November 10, 1951, when Wechsler helped moot the LDF’s *Brown* team on their Supreme Court appellate strategy.278 Despite his withering criticism of *Brown*, Wechsler made clear that he thought *Brown’s* desegregation outcome had “the best chance of making an enduring contribution to the quality of our society.”279 His belief in the justness of *Brown*’s outcome was the reason Wechsler decided to use *Brown* as “the hardest test of [his] belief in principled adjudication.”280

The Columbia Law School faculty were actively involved in the *Brown* litigation. In particular, both Charles Black, who joined the Columbia Law faculty in 1947, and Jack Weinstein, who joined the Columbia Law

---

274 *Id.*
275 *Id.* at 234–35.
278 KLUGER, *supra* note 273, at 531.
279 Wechsler, *supra* note 11, at 27.
280 *Id.* at 26.
faculty in 1952, were key members of the Brown team.\textsuperscript{281} Perhaps Black coordinated the LDF moot court. Black later authored what may be the most effective and most biting critique of “Neutral Principles”.\textsuperscript{282} Black’s valid points notwithstanding, for the rest of his legal career, Wechsler remained unpersuaded by all criticism, believing that he had effectively rebutted all attacks.\textsuperscript{283} Weinstein would later be Of Counsel at the LDF,\textsuperscript{284} a federal judge,\textsuperscript{285} and a renowned evidence scholar.\textsuperscript{286} One can only imagine what debate their presence on the same law school faculty might have generated.

During that vigorous moot court, Wechsler’s criticism of the NAACP’s legal strategy foreshadowed his later criticism of the Supreme Court’s Brown opinion.\textsuperscript{287} He posited that “Plessy [v. Ferguson] had a certain nagging ‘intellectual strength.’”\textsuperscript{288} Segregating blacks and whites, argued Wechsler, is not a denial of equal protection because both races face similar limitations on their liberty.\textsuperscript{289} Blacks cannot associate with whites but neither can whites associate with blacks. How is that a denial of equal protection?

NAACP lawyer and future federal judge Robert Carter\textsuperscript{290} responded “that segregated black and white children were not wronged equally.”\textsuperscript{291} Marshall continued that the Court would need to take judicial notice that white communities had greater political and lawmaking powers than black

\begin{footnotes}
\footnotetext{282}{See generally Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 YALE L.J. 421 (1960).}
\footnotetext{283}{Silber & Miller, supra note 51, at 927.}
\footnotetext{285}{See U.S. DISTRICT CT.: EASTERN DISTRICT OF N.Y., supra note 281.}
\footnotetext{286}{See generally David L. Faigman & Claire Lesikar, Organized Common Sense: Some Lessons from Judge Jack Weinstein’s Uncommonly Sensible Approach to Expert Evidence, 64 DePAUL L. REV. 421 (2015) (referring to the Symposium in Honor of Judge Jack Weinstein this piece was written for).}
\footnotetext{287}{See supra notes 61–65, 334–87 and accompanying text.}
\footnotetext{288}{See KLUGER, supra note 273, at 531.}
\footnotetext{289}{Id.}
\footnotetext{290}{Id. at 530.}
\footnotetext{291}{Id.}
\end{footnotes}
communities, and that whites in fact imposed segregation on blacks.\textsuperscript{292} 

Apparently now willing to look beyond lofty principles to factual reality, Wechsler asked—in an argument that echoed Bell’s later criticism of Brown’s focus on integrating the races to the detriment of equal educational opportunity\textsuperscript{293}—whether a black child attending a segregated school was worse off than a black child attending an integrated school where she might feel the full brunt of white prejudice.\textsuperscript{294} What about the limited economic and social opportunity of the wider de facto segregated world that awaited a black student enrolled in an integrated school?

Psychologist Kenneth Clark responded: “Which is better—to be sick or to be dead? Segregated school is a sort of fatality.”\textsuperscript{295} But, persisted Wechsler, was a black child any more harmed in a segregated school than in an overtly hostile white school?\textsuperscript{296} Clark then conceded Wechsler’s point.\textsuperscript{297} In its briefs and oral argument, the NAACP did not address Wechsler’s lofty arguments.\textsuperscript{298} As a result, neither did the Supreme Court in its subsequent Brown opinion.\textsuperscript{299}

At the time of the moot, Wechsler had just stepped down as Assistant Attorney General in charge of the DOJ’s War Division, where he supervised the Japanese internment and martial law in Hawaii and argued Korematsu for the United States in front of the U.S. Supreme Court.\textsuperscript{300} He later quipped that “[t]hese were nice cases for testing the role of the government lawyer.”\textsuperscript{301} As part of his duties, Wechsler also interacted with then-internment proponent (and later U.S. Supreme Court Chief Justice) California Attorney General Earl Warren.\textsuperscript{302} 

\begin{footnotesize}
\textsuperscript{292} Id.
\textsuperscript{293} See, e.g., Bell, supra note 169, at 124 (advocating for the opportunity of equal education through effective schools rather than racial balance).
\textsuperscript{294} KLUGER, supra note 273, at 530.
\textsuperscript{295} Id.
\textsuperscript{296} Id.
\textsuperscript{297} Id.
\textsuperscript{298} Id.
\textsuperscript{300} THE CANON OF AMERICAN LEGAL THOUGHT 318 (David Kennedy & William W. Fisher III, eds., 2006).
\textsuperscript{301} Silber & Miller, supra note 51, at 883.
\end{footnotesize}
Although the DOJ misled the Court in *Korematsu*,\(^{303}\) Wechsler adamantly maintained that he never personally made any material misrepresentations.\(^{304}\) But as the Assistant Attorney General in charge of the War Department’s legal strategy, surely the buck and the blame should stop with him. Given Wechsler’s civil rights bona fides, it was not surprising that Wechsler admitted that he had been “deeply disturbed” by the imprisonment of innocent Japanese-Americans into internment camps but at the time had “put aside his personal feelings and performed his duty as a lawyer.”\(^{305}\)

\(^{303}\) All three federal branches of government have repudiated the Japanese internment. In 1980, through a federal statute, Commission on Wartime Relocation and Internment of Civilians Act, Congress appointed the Commission on Wartime Relocation and Internment of Civilians to investigate the national security evidence utilized to justify the Internment. Pub. L. No. 96–317, § 2, 94 Stat. 964 (1980). In its final Report, the Commission concluded that “[t]he broad historical causes which shaped” the exclusion and detention of Japanese-Americans “were race prejudice, war hysteria and a failure of political leadership.” PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 18 (1982). As a result, “a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.” *Id.* Five years later, the U.S. Congress passed the Civil Liberties Act of 1988 formally apologizing for the Japanese internment and providing $20,000 in reparations for each surviving victim. 50 U.S.C.A. §§ 1989b-1-b-4(a) (West 1988). Following Congress’ lead, the U.S. District Court for the Northern District of California, the trial court where the original *Korematsu* case had been filed, granted Fred Korematsu’s petition for a writ of *coram nobis* to vacate his conviction for well-documented government misconduct in his original case. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Although not confessing any error, the United States joined the petitioner in asking that his conviction be dismissed. *Id.* at 1413. Finally, in granting the petition and vacating the conviction, the district court recognized that *Korematsu* unfortunately remained a valid—albeit limited—precedent. *Id.* at 1420.


\(^{304}\) For an in-depth discussion of Wechsler’s handling of the disagreement between DOJ and War Department lawyers preparing the *Korematsu* Supreme Court brief, see Ghachem & Gordon, *supra* note 269, at 340–52.

his *Neutral Principles* article, Wechsler said that he thought the Japanese internment was “an abomination when it happened, though in the line of duty as a lawyer [he] participated in the effort to sustain it in the Court.”

Speaking in front of the Jewish Theological Seminary of America, Wechsler, a Jew, would later characterize the internment’s “relocation centers” as “what in any fair estimate could be called concentration camps.”

“No one,” he later said, “could have felt more distressed about [the internment’s] existence, other than those personally affected by it, than I.”

Perhaps indicating that he remained at peace with his “I was just following orders” excuse, during a 1980 interview, Wechsler himself volunteered the obvious questions: If he disagreed with the internment, why did not he resign, and why did he cooperate with such manifest injustice?

In Wechsler’s own words:

> Now, the interesting question about all this that you should ask yourself is really the resigning question. When is the right thing to do to get out? Or to put it another way, when should you feel compromised by participating at all in a proceeding that may result in sustaining something that you would feel regret about having sustained?

> Should I have declined[?]... I might have done that. In fact, however, I did not. I did superintend the preparation of that brief. It presented the strongest arguments that I felt could be made in support of the validity of the action taken by the President.

Wechsler’s answer to his own question echoed the core fiction of the rule of law, the idea that compartmentalizing lawmaking by role, without taking the overall motives or circumstances into account, would create a sense of neutrality or objectivity. He managed to apply this legal fiction even to his own personal decision-making:

> You may ask why I did it. *Of course, I could have resigned.* .

---

306 Wechsler, *supra* note 11, at 27.
308 Silber & Miller, *supra* note 51, at 889.
309 Silber & Miller, *supra* note 51, at 888–90.
310 *Id.* (emphasis added).
311 *See supra* notes 55, 282–83 and accompanying text.
. . . I did it because it seemed to me that the separation of function in society justified and, indeed, required the course that I pursued; . . . one of the ways in which a rich society avoids what might otherwise prove to be insoluble dilemmas of choice is to recognize a separation of functions, a distribution of responsibilities, with respect to problems of that kind, and this is particularly recurrent in the legal profession.\footnote{Silber & Miller, supra note 51, at 890 (emphasis added).}

The questions and answers to end this portion of the interview are particularly instructive. Wechsler did not try to water down his own extreme commitment, waffle on the decisiveness of his “insoluble dilemma[] of choice,” or apologize for his actions.\footnote{Id.} He understood that his choice was dichotomous—either resign or be a loyal soldier:

\begin{quote}
Are you saying that the issue was either to resign or to carry out the task?
Yes.
And there was no other middle ground?
What middle ground could there have been?
Was it ever a serious option for you? I mean, did you consider the resignation option seriously?
No, I never considered it seriously. That was not my view.\footnote{Id. at 890 (emphasis added).}
\end{quote}

Compare Wechsler’s loyal devotion to duty over personal principle with the way Bell and his hero William Hastie reacted to conflicts of conscience.\footnote{See infra notes 343, 346 and accompanying text.} Despite his personal aversion to protest, Wechsler nevertheless recognized that if “our system gives to disidence no other institutional avenue of expression,” then the only remaining active choice was “civil disobedience subject to the charge of lawlessness and thus to ultimate repression.”\footnote{Wechsler, supra note 26, at 10.} Wechsler also considered reason to be at the heart of protest, observing that “a protest, [has] only such weight as [its] reasoning affords.”\footnote{Id. at 9.} As he demonstrated first at the DOJ and time and time again as an academic, Bell undoubtedly would have resigned from his position, if not engaged in an
active protest. In addition to being the first black federal judge, Hastie was also the Dean of Howard University School of Law, Special Adviser to the Secretary of War, and Governor of the Virgin Islands. During World War II, Hastie was the highest black civilian official in the War Department. As Louis Pollak observed (the same Pollak who had opposed Wechsler’s criticism of Brown), when faced with Wechsler’s dichotomy in 1943, Hastie chose to resign on personal principle rather than collaborate with those who refused to change an immoral discriminatory policy:

I would say a word about Hastie’s instinctive devotion to principle. One of the earliest and most celebrated evidences of Hastie’s stubborn integrity was his resignation, in the middle of the war, from the highest civilian post to which a black had been appointed—Special Adviser to Secretary Stimson. Hastie’s quarrel was with the Air Force, which resolutely continued to follow the flight patterns of Jim Crow. And the best way Hastie knew to call attention to this festering wrong was to remove himself from collaboration with those who had authority to take corrective action.

---

318 Bell enthusiastically supported the reopening of the Yasui internment case. Peggy A. Nagae, Tribute to Derrick Bell, 36 Seattle U.L. Rev. xxxix, xl–xli (2013). When Bell, as Dean of the University of Oregon School of Law, offered an assistant deanship to Yasui’s lead attorney, the attorney stated that she would have to decline his offer unless she could continue to work on his case. Id. at xli. Bell responded: “If my community asked me to be involved in such an important issue, I would do so without hesitation, so come to Eugene and bring your case.” Id. With Yasui’s coram nobis petition, the DOJ moved to vacate the conviction and dismiss the petition. Yasui v. United States, 772 F.2d 1496, 1498 (9th Cir. 1985). The U.S. District Court for the District of Oregon granted the DOJ’s motion. Id. Yasui’s Supreme Court appeal was pending when he died. It was dismissed as moot. See History of Minoru Yasui, MINORU YASUI AM. INN CT., http://minoruyasui.com/About.html (last visited Feb. 6, 2018).

319 See Pollak, supra note 181, at 1.

320 See id. at 2.

321 See id.

322 See id. (emphasis added). Pollak also recounted a story that might be considered a humorous rebuke of Wechsler’s freedom of association interpretation of segregation. See infra notes 379–385 and accompanying text. Pollak told of being a young white Army private first class in 1945 stationed near Howard University School of Law. See Pollak, supra note 181, at 4. He met with Howard Law Dean Hastie, who reassured Pollak: “It’s alright, Mr. Pollak, we accept whites.” Id. Pollak added: “One of the mysteries of our national experience is that blacks still do accept whites.” Id.
The black press lauded Hastie’s resignation. In particular, W.E.B. DuBois not only commended Hastie’s protest but also implicitly criticized Wechsler’s insider choice:

There are two sorts of public relations officials in Washington working on the situation of the Negro: one sort is a kind of upper clerk who transmits to the public with such apologetic airs as he can assume, the refusal of the department to follow his advice or the advice of anyone else calculated to cease the racial situation. The other kind of race relations official seeks to give advice and to get the facts and if he receives a reasonable amount of cooperation he works on hopeful. If he does not, he withdraws. It is, of course, this second type of official alone who is useful and valuable. The other is nothing. Hastie belongs to the valuable sort and will not be easily replaced.

Five years after Hastie’s resignation, in 1948, segregation was abolished in the U.S. military. At the end of the war, Wechsler served as Chief Technical Adviser to the U.S. judges at the Nuremberg War Crimes Tribunal.

World War II ended. The Korean War came and went. The Cold War began. Bell would later argue that the real reason for Brown was to mask U.S. hypocrisy during the Cold War. It was hypocritical for the United States to claim to champion freedom against communism overseas while at the same time to maintain segregation at home. By providing

323 Bell, supra note 105, at 18.
324 See Id. at 19 (quoting W.E.B. DuBois, Editorial, N.Y. AMSTERDAM STAR-NEWS, Feb. 6, 1943) (emphasis added).
325 See Id.
326 AMERICAN LEGAL THOUGHT, supra note 300, at 318.
330 Bell, supra note 11, at 524.
331 Id.
Brown as a paper tiger with no enforcement, the United States could now claim to have remedied its former hypocrisy while in actuality maintaining blacks’ subordination.332

In 1959, five years after Brown I333 and a year after Cooper v. Aaron (the only U.S. Supreme Court opinion signed by all nine Justices where the Court reiterated the federal government’s supremacy over Arkansas’ executive and legislative resistance to Brown, and the Court’s power of judicial review),334 Wechsler delivered the Holmes Lecture at Harvard Law School, which became his Neutral Principles article published that same year.335

Wechsler’s Neutral Principles article has been extensively analyzed and critiqued elsewhere.336 This analysis only highlights the article’s relevance to the rule of law. In the article, Wechsler wrote that the “main qualities of law” were “its generality and its neutrality.”337 “A principled decision . . . rests on reasons with respect to all the issues . . . reasons that in their generality and their neutrality transcend any immediate result that is involved.”338 Perhaps he best explained his “neutral principles” concept 20 years later: “I found myself developing the neutral principles ideas as a pedagogical instrument for pushing students into subjecting their own immediate reactions of approval or disapproval of the results of a particular

332 Id.
334 Cooper v. Aaron, 358 U.S. 1, 5 (1958).
335 Wechsler, supra note 11.
337 Wechsler, supra note 11, at 16.
338 Id.
decision to a more searching type of criterion of evaluation.”

As Posner observed, Wechsler thus elevated a law school pedagogical technique to a “methodological requirement of constitutional adjudication.” A principle is neutral “only if it treats consistently not only the case at hand but any hypothetical or actual case within the principle’s semantic scope.” Such principles thus are an “appeal to reason—reason stated in a principle fairly susceptible of general and neutral application.”

The “real test” of such principles is “in the force of the analysis.” Wechsler later clarified that his idea was not meant to provide a decision-making formula but rather a test to confirm the decision-maker’s objectivity:

> It is not, of course, thought of as a formula to guide or produce the decision of hard cases, but rather as a negative test, a test to be applied by a judge, with the essence of the question whether he is being adequately consistent in the process of adjudication, in reaching a particular type of result in a particular type of case. That is to say, essentially that he ask himself, “Would I reach the same result if the substantive interests were otherwise?”

In other words, neutral principles do not “dispense[] with the agony of judgment in arriving at decisions.”

Neutral principles, as Wechsler conceived them, were a fairly narrow concept aimed at judges reviewing legislation. Wechsler conceded that his article has been misunderstood to “seem[] to claim[] more for the neutral principles concept than I ever undertook to claim for it.” Wechsler continued: “I never quite had the missionary sense about that article that so many people have kind of assumed I had. I didn’t have a sense that the ideas that I was expressing had the novelty that some people think I thought they had.” Wechsler added, “there was nothing novel in my insistence that the

---

339 Silber & Miller, supra note 51, at 925.
340 POSNER, supra note 248, at 72.
341 Id.
342 WECHSLER, supra note 262, at 15.
343 Wechsler, supra note 11, at 25.
344 Silber & Miller, supra note 51, at 925.
345 WECHSLER, supra note 262, at 17.
346 Silber & Miller, supra note 51, at 925.
347 Id.
348 Id. at 931.
legitimacy of the decision is to be gauged in terms of the reasons given for it.”

He admitted that his “neutral principles” concept left “room for a much broader exegesis” but explained that he simply had not had time to write one. Wechsler never further elaborated on his “neutral principles” idea. Nevertheless, his “neutral principles” meme has taken on a life of its own. As Kent Greenawalt recognized, the concept of neutral principles in lawmaking continues to have “enduring significance.”

Greenawalt also recognized that Wechsler did not “mean to equate principled decision with correct decision. . . . An opinion can be principled but unsound in its interpretation of the Constitution.” Wechsler recognized that much legal doctrine, particularly legal doctrine impacting previously subordinated groups, involved value choices. As he wrote in Neutral Principles, “some ordering of social values is essential . . . all cannot be given equal weight.”

Even if a judge must choose among constitutionally protected values, she still should “give it an even-handed development” and rely upon neutral principles when choosing. Wechsler believed that cynical outcome-determinative lawmaking, where “you either like the results of decisions or you don’t, appraising them in terms of your own values,” doomed law to be no different than politics.

One of the reasons Wechsler chose to criticize Brown was because he wanted “to exhibit the tension between results and bases, in terms of situations where [he] liked the result, but felt a moral obligation to question the grounds.” His former student and colleague Justice Ruth Bader Ginsburg explained that Wechsler’s point was “that the way we decide things is . . . as important as what we decide.”

Perhaps Wechsler’s most glaring error remains his disregard of his

---

349 Id. at 925.
350 Id. at 927–28. Wechsler also conceded that, while the word “neutral” was imperfect, it was the best with which he could come up. HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS xiii (1961). He rejected alternative adjectives “impartial,” “disinterested,” “impersonal,” “general,” and “objective.” Id.
351 Greenawalt, supra note 336, at 982.
352 Id. at 991.
353 Wechsler, supra note 11, at 25.
354 Silber & Miller, supra note 51, at 927.
355 WECHSLER, supra note 262, at 12.
356 Silber & Miller, supra note 51, at 926.
own white privilege—a legitimate criticism of not only Wechsler but also many normative reconstructionists, the rule of law concept, and legal doctrine writ large. Similar to how white men often are blissfully unaware that whiteness remains the silent default in American society, the Master can remain ignorant of the fact that, by positivist and formalist default, the rule of law reinforces preexisting legal doctrine.

In his explanation of how he thought a personal anecdote illustrated his freedom-of-association neutral principle for Brown, Wechsler inadvertently revealed startling ignorance of his own white privilege. He had befriended Howard University School of Law Dean Charles Hamilton Houston. Houston was Hastie’s second cousin and had first brought Hastie to Howard. Houston’s “lawyer as social engineer” statement represents the pinnacle of the rule-of-law normative reconstructionist vision. Houston’s famous words remain Howard Law’s school motto:

A lawyer’s either a social engineer or ... a parasite on society ... A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities and in bettering conditions of the underprivileged citizens.

---

358 See infra notes 391–404 and accompanying text. See also Black, Jr., supra note 282, at 424.
359 See supra note 28 and accompanying text.
360 See Bell, supra note 28, at 906 (“Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privileges, American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.”).
361 Bell related a paradoxical example of what might be ignorance of white privilege during President Barack Obama’s first Presidential election.

Canvassers knocked on a door in a rural white area and asked how the householders intended to vote. The woman who responded at one modest house called the question back to her husband. “Who we votin’ for?” The answer came back: “We votin’ for the nigger.” His answer said it all.

Derrick A. Bell, On Celebrating an Election as Racial Progress, 36-FALL HUM. RTS. 2, 3 (2009).
362 Rhee, supra note 8, at 293–94.
363 KLUGER, supra note 273, at 126.
364 Id. at 129.
Wechsler recalled Houston as “a charming, delightful man” who “seemed moderate in his manner but his determination was evident.” In his Neutral Principles article, Wechsler decided to use a spontaneous lunch with Houston to illustrate his point: “In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court [in 1935] . . . he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess.”

Twenty years later, Wechsler explained that as he was hurrying out from the U.S. Supreme Court building (then housed in the old Senate Office Building), he bumped into Houston, who was there to file a petition for rehearing. Wechsler explained: “I proposed that we have lunch in the Capitol . . . and he said no, we couldn’t do that, but we might go over to Union Station for a bite. I hadn’t realized.”

Bell recognized that Wechsler remained painfully oblivious to the obvious, that the Jim Crow system did not treat whites and blacks equally but rather was designed to subjugate blacks in favor of whites. “To doubt,” Bell wrote, “that racial segregation is harmful to blacks, and to suggest what blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then.”

Only in a fantasy world of hypothetical assumptions and mind games did Wechsler’s argument make sense. As Geoffrey Hazard observed, if blacks have a right to associate with whites, then under neutral principles, whites should have a right to associate with whites too. But then how could both blacks and whites equally share a right of free association? The right to associate freely with whom you choose also includes the right to exclude those with whom you don’t wish to associate.

While Wechsler’s argument was logical and might have made for a good law school exam question, as Bell correctly recognized, the argument had no basis in reality. The whole point of Jim Crow and slavery’s vestiges

---

366 KLUGER, supra note 273, at 129.
367 Wechsler, supra note 11, at 34 (emphasis added).
368 KLUGER, supra note 273, at 129.
369 Id.
370 Bell, supra note 11, at 522.
372 Id.
was to keep blacks subordinate and inferior to whites. Wechsler inexplicably rejected this argument, going so far as to agree with *Plessy* that if blacks felt inferior, “it is solely because [blacks] choose ‘to put that construction upon it.’”

Whites wanted to associate with whites because legal doctrine treated whites as the Masters. Associating with whites meant receiving superior goods and services. Associating with blacks meant receiving inferior goods and services. Most blacks probably could have cared less about associating with whites’ sake. Blacks wanted to be treated the same as whites, which meant having equal access to the same restaurants only open to whites. The association with whites was only incidental to the better treatment.

Houston, as a black man, understood that he could not eat lunch at the most convenient restaurant because blacks were legally forbidden from eating there. Wechsler, however, had not realized that the best and most convenient restaurants were limited only to whites. Blacks were relegated to the train station. Like the rule of law, Wechsler may have had good intentions in trying to break bread in public with a black man, but ended up spotlighting his own foolishness. Under Wechsler’s own neutral principles logic, his good intentions are not entitled to any weight or deference. Bell might have observed that, like Wechsler, the rule of law has good intentions but remains caught up in its own legal fictions and is thus ignorant about the real world.

As Bell recognized, the “equal” in “separate but equal” was a glaring lie. Surely Wechsler was surrounded by ample evidence of this lie in Washington, D.C., and New York City. How could Wechsler not notice it? Wechsler was blind not only to segregation’s ugly realities but also to the clear ludicrousness of his example. Someone with perhaps more self-awareness than Wechsler would have been ashamed to mention the anecdote to anyone else. Anyone more reflective of their own privilege probably would

---

373 Wechsler appeared to grasp this argument in *Neutral Principles* yet nevertheless rejected it. He understood that *Brown* “must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved.” Wechsler, *supra* note 11, at 33. Wechsler thus appeared to be echoing Marshall’s argument from the 1951 moot court. See *supra* note 317 and accompanying text.

374 Wechsler, *supra* note 11, at 33 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).

375 See *Id.* at 31–32.

376 Bell, *supra* note 11, at 524–25.
not have drawn more attention to this embarrassing anecdote by mentioning it at a high profile Holmes Lecture at Harvard and in a published attack on the beloved Brown opinion.\(^{377}\)

Ironically, Wechsler appeared to believe that the anecdote was self-evident not for the obvious proposition—that segregation mistreated blacks more than whites—but for the ludicrous suggestion that Wechsler and Houston were both equally inconvenienced at lunch. But Wechsler clearly was not equally inconvenienced. As a white man, he could have eaten anywhere. Notice also that Wechsler was not likewise excluded from the Union Station restaurant. Even though a white man, he apparently could eat at a blacks-only restaurant if he so desired.\(^{378}\)

Houston however did not share Wechsler’s luxury. As a black man, Houston was far more inconvenienced because the closest restaurant where he could eat was much further for him than for Wechsler. Similar to how he assumed equal inconvenience when none such existed, Wechsler assumed the equality of segregated school facilities when he volunteered freedom of association as a possible neutral principle to justify Brown’s result.\(^{379}\) But, as Judge Carter had replied during their earlier moot court and Bell later observed, there were no equal, segregated school facilities.\(^{380}\) Black school facilities were always inferior to white ones. Wechsler was abstractly assuming a ludicrous fantasy world.

A much better example of neutral principles in action was Wechsler’s counsel to the U.S. judges at the Nuremburg War Crimes Tribunal. Wechsler convinced the U.S. judges to use neutral principles to adjudicate accused enemy war criminals. He encouraged U.S. judges to “judge the enemy only by standards that we would apply to ourselves, be willing to apply to ourselves, and feel obliged to apply to ourselves.”\(^{381}\) This “judge not lest thee be judged”\(^{382}\) example makes much more sense than the example of lunch with Houston.

\(^{377}\) Wechsler, supra note 11, at 34.

\(^{378}\) Louis Pollak might have recognized his own white privilege when he joked about being told by Dean Hastie that even though Pollak was a white person, Pollak could still attend Howard Law. See Pollak, supra note 336.

\(^{379}\) See Wechsler, supra note 11, at 34.

\(^{380}\) See Bell, supra note 11, at 524–25; supra notes 315–16 and accompanying text.

\(^{381}\) Silber & Miller, supra note 51, at 930.

\(^{382}\) Matthew 7:1 (King James).
Twenty years later, Wechsler remained unrepentant. After rejecting all criticisms of his article as illegitimate, Wechsler reiterated his same freedom of association neutral principle:

It really seems to me that the point on segregation is essentially that it’s a denial of liberty, and it’s a denial equally of the liberty of whites to associate with blacks, if those are the groups, and vice versa. . . . There isn’t anything in the paper that I regret or would do differently now. Wechsler thus demonstrated that for all of his vaunted liberal sympathies, he remained ignorant of—if not complicit with (recall Wechsler’s response to Marshall in Allwright and his statement that he had to cooperate with ardent racists)—the white subjugation of blacks.

Perhaps the best response to Wechsler’s ridiculous false equivalence was his faculty colleague Charles Black’s suggestion that we exercise one of the “sovereign prerogatives of philosophers—that of laughter.” Black correctly observed that “[w]hen the directive of equality cannot be followed without displeasing the white, then something that can be called a ‘freedom’ of the white must be impaired.” As Kendall Thomas rightly recognized, Wechsler’s associational argument ignored the distinction between some whites who happen to be forced to interact with blacks in public having to put up with “some disagreeableness” and the freedom of those same whites not to interact with blacks “in the privacy of that white American’s home.”

Despite Wechsler’s demonstrated lack of self-awareness, his core argument that the rule of law must rely upon neutral principles that transcend the immediate result remains legal doctrine’s unavoidable end goal in a democracy. Transcendental reconstructionists continually ask, how can we perfect or improve the neutral principles (or lack thereof) we have in our

383 Silber & Miller, supra note 51, at 927.
384 Id. at 865–926.
385 See supra note 298 and accompanying text.
386 Black, Jr., supra note 282, at 424.
387 Id. at 429.
389 Id. at 11.
390 See, e.g., Greenawalt, supra note 336, at 999 (“For any well functioning governance, it is as important that decisions seem appropriate as well as that they are appropriate.”).
existing legal doctrine? Particular legal doctrine—like Jim Crow laws—is bad law because it fails to exhibit neutral principles.


While Wechsler was finishing up *Sullivan*, he was asked to be the Executive Director of the ALI. Wechsler’s legal career thus shifted from legal practice attempting to improve legal doctrine incrementally to drafting model legal doctrine to encourage legal reform.

B. *Master Doctrinalist*

Throughout his legal career, Wechsler proved a master of legal doctrine and a distinguished insider legal reformer. One of Wechsler’s “most important” articles of faith was a surprisingly positivist and formalist view of legal doctrine: “legal understanding is imperfectly attained, so long as law is treated as an independent discipline consisting solely of an ordering of rules and doctrines drawn from statutes and decisions.” He wrote treatises summarizing legal doctrine, a myriad of model rules to improve legal doctrine, and federal procedural rules to referee the federal doctrinal process. Chief Justice Warren Burger explained that Wechsler “has contributed broad perspective and constructive criticism, and his imprint is large on the fabric of our system of law.”

First, Wechsler authored two comprehensive treatises on legal

---

391 See Bell, *supra* note 28.
393 *Id.* at 258–60.
394 *Id.* at 272–74.
396 Silber & Miller, *supra* note 51, at 920.
397 *Id.* at 864.
doctrine, *Criminal Law and Its Administration* (with Jerome Michael),\(^{399}\) and *The Federal Courts and the Federal System* (with fellow LPS founding father Henry M. Hart, Jr.).\(^{400}\) *Criminal Law* has been called “the template for all contemporary criminal law casebooks and perhaps the modern casebook more generally.”\(^{401}\) When Wechsler joined the Columbia Law faculty in 1933, no course in criminal law was offered in the curriculum.\(^{402}\) *Criminal Law* described “a process from police investigation to executive clemency” by applying the “functional approach” to criminal law.\(^{403}\) Under that approach, Michael and Wechsler asked “what our purposes are and whether our means are well adapted to achieving those purposes.”\(^{404}\)

Akhil Amar called *The Federal Courts* “beautiful and brilliant—probably the most important and influential casebook ever written.”\(^{405}\) The casebook has remained acclaimed over three editions and more than four decades.\(^{406}\) Chief Justice Warren Burger called *The Federal Courts* “an essential tool for the practicing bar.”\(^{407}\)

Second, Wechsler also was the chief reporter of the ALI’s Model Penal Code and ALI’s Executive Director for 21 years, from 1962 to 1984.\(^{408}\) Chief Justice Burger characterized the ALI under Wechsler’s leadership as being “at the forefront of improvement in American law.”\(^{409}\) As Wechsler himself recognized, the ALI “has been engaged . . . in the restatement of the common law and in preparing model legislation” and in so doing “has had

---

\(^{399}\) Michael & Wechsler, *supra* note 54.

\(^{400}\) The Legal Process School takes its name from the famous casebook, *The Legal Process*, a collection of class materials Hart and Albert Sacks used at Harvard Law School to teach generations of distinguished lawyers and U.S. Supreme Court Justices. See American Legal Thought *supra* note 300, at 318.


\(^{404}\) Id.


\(^{408}\) American Legal Thought *supra* note 300, at 318.

\(^{409}\) Burger, *supra* note 32, at 951.
enormous influence on the development of our law.” The ALI was founded in 1923 as a permanent organization “to promote the clarification and simplification of the law and its better adaption to social needs, to secure the better administration of justice, and to carry on scholarly and scientific legal work.” To accomplish this ambitious law reform mission, the ALI publishes Restatements of the Law summarizing the common law, model statutes, and commissioned law reform studies.

Under Wechsler’s directorship, the ALI shifted from a more passive reporting role to a more active law reform role. ALI’s First Restatement of Law was just that, a descriptive restatement of American common law “stated in the absence of a cleavage of authority and without assessment of the influence that such decisions would or should exert on a contemporary court.” The impetus of the change was the ALI’s approval of Section 402A of Torts Restatement (Second), which adopted a strict liability rule for “any product that is in a defective condition unreasonably dangerous to the user or consumer or his property.” In response, the Defense Research Institute (DRI) predictably criticized the ALI for adopting such a “minority” rule. The DRI remains, in the words of its mission statement, “the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation.”

In 1969, Wechsler decided to use the DRI’s criticism as a jumping off point to explore the fundamental law reform question of “how far a judgment as to what the law should be legitimately plays a part in reaching a decision as to what it is.” He believed that the DRI’s criticism exhibited “too simple an antithesis between an affirmation of what the law is and one as to what it ought to be.” Instead, Wechsler challenged a purely positivist conception

411 Id.
413 Wechsler, supra note 410, at 147.
414 Id. at 150.
415 Id. at 148.
416 Id. at 149.
418 Wechsler, supra note 410, at 149; accord Geoffrey C. Hazard, Jr., Tribute in Memory of Herbert Wechsler, 100 COLUM. L. REV. 1362, 1365-66 (2000).
419 Wechsler, supra note 410, at 149.
of legal doctrine:

I asked, therefore, if the statement of a rule does not involve something more than the conclusion that it is supported by the past decisions, for this is an implicit judgment that our courts today would not perceive a change of situation calling for the adaptation of the rule or even for a new departure. And if we ask ourselves what courts will do in fact within an area, can we divorce our answers wholly from our view of what they ought to do, given the factors that appropriately influence their judgments, under the prevailing view of the judicial function?420

Under Wechsler’s direction, the ALI ultimately decided to “declare the rule that an enlightened court faced with the question would announce”421 in its subsequent Restatements of Law. To aid the ALI in its model rulemaking, Wechsler proposed “a working formula” that the ALI unanimously approved: “we should feel obligated in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.”422

Wechsler recognized that this drafting change would permit “the Restatements to attempt to be what they have been and are in fact—a modest but essential aid in the improved analysis, clarification, unification, growth, and adaptation of the common law.”423 Reflecting his scrupulous unwillingness to inquire into motives or intentions,424 Wechsler was proud that the ALI never lobbied to have its recommendations actually adopted by lawmakers. Once their recommendations are published, the ALI’s role in law reform is finished. They let “interested individuals or organizations who care about the matter to do something about it.”425

At ALI, Wechsler’s proudest achievement426 was the completion of the Model Penal Code (MPC).427 Sanford Kadish called Wechsler “a

420 Id.
421 Id. at 147.
422 Id. at 150.
423 Id.
424 See supra notes 56, 363–66, and accompanying text; see, e.g., MICHAEL & WECHSLER, supra note 54, at 5.
425 Silber & Miller, supra note 51, at 922.
426 Monaghan, supra note 2, at 1370.
427 MODEL PENAL CODE (1962); see David Wolitz, Herbert Wechsler, Legal Process, and
towering figure who, more than anyone else, made the study of criminal law a respectable intellectual enterprise again” and “the latest in a tradition of Anglo-American criminal law codifiers going back to Jeremy Bentham.”

As the Code’s Reporter, Wechsler worked on the MPC from 1952 until the MPC was adopted in 1962. The MPC, by his own admission, “absorbed every bit of time and energy that [he] had.”

Finally, Wechsler helped draft the Federal Rules of Criminal Procedure and helped revise the Rules of Practice of the Supreme Court. He also was appointed to the President’s Commission on Law Enforcement and the Administration of Justice.

Although undoubtedly aware of Derrick Bell’s 1980 critique of his Neutral Principles article published in the same Harvard Law Review, Wechsler remained defiantly unrepentant for the rest of his life. Nevertheless, could anything or anyone make unconvinced white men like Wechsler change? Yes—their daughters.

IV. TOWARD CRITICAL LEGAL PROCESS: ERIKA WECHSLER AND WHITE CITIZENS FOR BLACK SURVIVAL

Although there appears to be a great divide between Bell’s critical deconstruction and Wechsler’s transformative reconstruction of legal doctrine, Bell’s fictitious story involving Wechsler’s imaginary daughter suggests common ground. The enlightened, white lawyer–revolutionary Erika Wechsler, in Bell’s *Faces at the Bottom of the Well*, symbolizes Critical Legal Process’s goals. She represents the perhaps tongue-in-cheek hope for a remorseful Master, the dream that the powerful white majority might not only understand the permanence of racism but also do something about it. Like Critical Legal Process, Erika recognizes the danger of the rule of law and the need to go beyond theoretical discussions to concrete action, be it through legal process or revolution.

A. *The Story of the Remorseful Master.*

In the story, Bell visits an Oregon national park with a light lunch and his laptop computer to get some writing done amidst the beautiful trees. While Bell sits on a log typing away at his laptop, a bullet ricochets nearby. The shooter, who apologizes for the near miss, is “a sturdy white woman, probably in her mid-thirties . . . dressed in camouflage battle fatigues and . . . a long-billed baseball cap over disheveled blonde hair” carrying a semiautomatic rifle. She introduces herself as Erika Wechsler and politely asks if she can join Bell.

Erika immediately identifies Bell as “one of those civil-rights-lawyer

of Title IX’s co-sponsors, white male Senator Birch Bayh, recounted what his white father told him: “He said, I’m going to testify before Congress. I’m going to tell them they need to spend as much money on little girls for physical education as they do for little boys. Little girls need strong bodies to carry their minds just like little boys do.” Aman Ali, *The Father of Title IX*, WNBA, http://www.wnba.com/archive/wnba/features/the_father__title_ix_2012_05_22.html (last visited Feb. 24, 2018).

---

436 See *supra* note 29 and accompanying text.
437 See *supra* note 30 and accompanying text.
438 Because this story is hypothetical, whether Wechsler actually had a daughter named Erika who agreed with Bell’s character was probably beside the point. For further discussion, see *supra* notes 85–86 and accompanying text.
439 Bell, *supra* note 34, at 89–108.
440 Id. at 89–90.
441 Id. at 90.
442 Id. at 90–91.
types who believe it’s enough to rely on law to secure rights for [oppressed] people.”

My father was a law professor. You talk like he did. And it’s obvious you’re as compulsive as he was, coming all the way out here to work when any sensible person would be simply enjoying the scenery. Plus, your folders read ‘Constitutional Law class notes and Civil Rights seminar.’ I mean, how many clues do I need?

It turns out that Erika completed law school “for [her] father’s sake” even though she “hated every minute” of law school and law practice as well. However, she remains “fascinated by law.”

Surprised, Bell admits that he used to be a liberal law professor like Wechsler: “Yes, that’s what I was—once. For years I believed law was the answer, and I still teach law, including civil rights law.” He goes on to explain his transition to Critical Race Theory: “Now, though, I’m convinced that racism is a permanent part of the American landscape.” Bell then emphasizes the rule of law’s continuing mythological power among lawmakers and the public, pointing out that “as soon as [he] express[es] the view that racism cannot be vanquished by the enactment and enforcement of strong civil rights laws, most people conclude that [he has] given up, or surrendered, or, worse, sold out.”

Presciently, Erika identifies one of the key areas of disagreement between Crits and liberal law reformers: tangible concrete action. Erika responds: “But, Professor, you’re always dealing with theories and abstractions. Many of the civil rights veterans you upset are committed to the tangible, to what they see as real—including, paradoxically enough, traditional symbols like racial justice, equal opportunity, even integration.”

---

443 Id. at 92.
445 Bell, supra note 34, at 91–92.
446 Id. at 92.
447 Id.
448 Id.
449 Id.
450 Id. at 92–93.
After further conversation, it is clear that Erika wholeheartedly agrees with all of Bell’s scholarship and theory.\textsuperscript{451} Erika then tells Bell that her “work could prove of great help” to him.\textsuperscript{452} She helped found “White Citizens for Black Survival” (WCBS).\textsuperscript{453} WCBS’s program has two prongs. First, a “racial realism” policy that largely parallels Bell’s pessimistic view of racism’s permanence.\textsuperscript{454} Second, an “activist phase, in which we aim to build a nationwide network of secret shelters to house and feed black people in the event of a black holocaust or some other all-out attack on America’s historic scapegoats.”\textsuperscript{455} Erika’s WCBS essentially embodies the remorseful Master:

\begin{quote}
[WCBS is] a collective of whites dedicated to doing what we can to shield blacks from the worst dangers of racism. . . . To last in WBCS, one must try to be as sensitive to racial subordination as a member of the oppressor class can be: aware of what went on in the past beyond history’s received truths, and cognizant of the fact that slavery, for example, tried to dehumanize blacks, and failed, and didn’t try to dehumanize whites, but succeeded.

. . .

We . . . are determined to avoid in ourselves the oppressor’s penalty. We try to understand contemporary racism and the role it plays in American law, because law has always been a powerful expression of ruling interests. We believe that America’s race problem is a white problem. We have determined to take personal responsibility.\textsuperscript{456}
\end{quote}

Erika recognizes that both classic liberals and Crits deny reality.\textsuperscript{457} “Advocates of liberal civil rights theory,” like her father, Herbert Wechsler, “tend to deny [the] reality” of discrimination around them for fictions in legal doctrine.\textsuperscript{458} Because she is a lawyer and Herbert Wechsler’s daughter, Erika understands the rule of law and legal doctrine. She recognizes that her law degree “gives [her] protection against” legal fictions like the rule of law’s

\begin{footnotes}
\textsuperscript{451} Id. at 93.
\textsuperscript{452} Id.
\textsuperscript{453} Id.
\textsuperscript{454} Id.
\textsuperscript{455} Id.
\textsuperscript{456} Id. at 94–95.
\textsuperscript{457} Id. at 93.
\textsuperscript{458} Id.
\end{footnotes}
objectivity. Many critical theorists like Bell, however, remain academic and refuse to take their theories’ logic to their natural, practical conclusions. As Erika explains to Bell

New ideas always stir resistance. Look at your reaction to WCBS’s mission to help black refugees in case of a general racial attack. You think I’m crazy. I see it in your eyes, and yet your view, that oppression on the basis of race is permanent, renders such an attack not only possible, but probable.

To which Bell replies: “Which is why so many people reject it.”

The supernaturally wise Geneva Crenshaw later admonishes Bell: “I hope you took Erika’s message seriously. For all the reasons you have been describing, black people may need places of refuge and whites to provide escape from future betrayals.” To which Bell responds: “Even if I knew for a certainty that whites planned another massive betrayal of blacks, most whites—and some blacks—would not believe me.”

B. Critical of the Rule of Law.

Like Critical Legal Process, Erika remains highly skeptical of the rule of law while understanding how legal doctrine is created and reformed. Her insider knowledge of law, as both a lawyer and a liberal law professor’s daughter, helps her understand how the Master’s favorite tool was used to build his house. By her own admission, such understanding helps her cut through legal fictions and get lawmakers to “straighten right up and talk sense.”

Immediately before his Erika Wechsler account, Bell placed another story about a black man; a story, the immortal Geneva Crenshaw told

459 Id.
461 Bell, supra note 34, at 99.
462 Id.
463 Id. at 108.
464 Id.
465 Id.
Bell, in which the character was purposefully related to Erika’s story.\textsuperscript{467} This story introduced the so-called Last Black Hero. Like Erika, the Last Black Hero was also a lawyer, “worked in civil rights law for a few years” but “became frustrated with the law’s proclivity for preserving the status quo even at the cost of continuing inequities for black people,” and abandoned hope in the rule of law.\textsuperscript{468} He “realize[d]—unlike most of [his] civil rights lawyer friends—that activism more than legal precedent is the key to racial reform.” The Last Black Hero concluded: “You can’t just talk about, meet about, and pray about racial discrimination. You have to confront it, challenge it, do battle” with it.\textsuperscript{469}

Although Bell’s Last Black Hero and Erika Weschler both understood the Master’s favorite tool and the Master’s house, unlike the Last Black Hero, as a member of WCBS, Erika is the Master. Erika and her WCBS agreed with the Last Black Hero’s admonition to confront, challenge, and do battle with inequality and injustice. Erika, WCBS, the Last Black Hero, and—by inference—Bell all appeared to turn Thurgood Marshall’s earlier admonition\textsuperscript{470} on its head, to save their protesting for the real world and not the courtroom.

C. \textit{Action through the Legal Process not Revolution.}

Critical Legal Process echoes Erika Wechsler and the Last Black Hero’s desire for concrete action. Concrete action, of course, is not necessary.\textsuperscript{471} The common complaint lodged against critical legal movements as nihilistic is unfounded.\textsuperscript{472} Before you can resolve a problem, you have to know that the problem exists. Identifying a problem without offering any concrete solutions remains a genuine scholarly contribution.

However, Bell appears to disagree. He prefaces his Erika Wechsler story with a quote from the Book of James in the Bible: “For as the body without the spirit is dead, so faith without works is dead also.”\textsuperscript{473} Mere faith in critical theory thus would appear to be insufficient to Bell. One must live

\footnotesize
\textsuperscript{467} Bell, supra note 34, at 108.
\textsuperscript{468} Bell, supra note 466, at 66.
\textsuperscript{469} \textit{Id.} at 67.
\textsuperscript{470} Bell, supra note 119, at 29–31; see supra note 136 and accompanying text.
\textsuperscript{471} See, e.g., Angela P. Harris, \textit{Teaching the Tensions}, 54 ST. LOUIS U. L.J. 739, 750, 750 n.50 (2010).
\textsuperscript{472} See \textit{id.}.
\textsuperscript{473} Bell, supra note 34, at 89 (quoting James 2:26 (King James)).
that faith through concrete action.

If, however, we take critical legal movements’ pessimistic assumptions about the Master’s oppression seriously, then ironically, the only viable alternative for concrete action is the rule of law. Critical Legal Process thus literally or figuratively focuses on using the Master’s favorite tool to dismantle his house.

Because they agree with Lorde that the Master’s favorite tool, the rule of law, can never be used to dismantle his house of legal doctrine, Erika and the Last Black Hero choose to act through potentially violent revolution. If the Master’s oppression is so entrenched and permanent as Bell argues, then nonviolent protest, which relies upon changing public opinion and the Master’s heart, would be futile.

As Erika and the Last Black Hero both concede, the problem with violent revolution is that the permanent structural power disparities that multiple critical legal movements take for granted, by their own admission, doom their violent revolution to failure as well. As the Last Black Hero explained: “Universal black militance would end black people. Whites could not stand it.” In fact, Bell’s Last Black Hero conceded that his black militancy was nearly suicidal:

Militant black leadership is like being on a bomb squad. It

---

475 See LORDE, supra note 4, at 112.
476 Although Bell’s Last Black Hero, unlike Erika Wechsler, never indicates a willingness to use violence, he recognizes that whites have and shall probably continue to respond to his militant protests with violence. Bell, supra note 466, at 67–68.
After surviving a bomb that killed most of his compatriots, the Last Black Hero remained:

fiercely independent and took enormous pride in the fact that he said and did what he wanted to do, despite the opposition of whites who viewed as a distinct threat his militant rhetoric and his growing support from blacks in all sectors. Those blacks applauded as whites winced.

Id. at 66.
478 All of Bell’s pronouncements of the permanence of American racism rest upon such permanent power disparity. See supra notes 71–74, 173–77 and accompanying text. Moreover, Audre Lorde concurs with Bell’s assessment. LORDE, supra note 4, at 112.
479 Bell, supra note 466, at 67.
requires confidence in your skills and a courage able to survive the continuing awareness that you’re messing with dynamite, but that someone has to do it. One mistake, and you’re gone! Sometimes you’re gone whether or not you make a mistake.\footnote{Id.}

At the end of the day, the more radical and pessimistic core assumptions at the heart of critical legal movements such as Bell’s Racial Realism\footnote{See Derrick Bell, Racial Realism, 24 CONN. L. REV. 363, 379 (1992).} are just that: unprovable assumptions.\footnote{Accord Justin Driver, Rethinking the Interest-Convergence Thesis, 105 NW. U. L. REV. 149 (2011).} They are unprovable because there are simply too many variables to test their veracity. For example, you either believe, along with Bell and Critical Race Theorists, that U.S. racism is structurally permanent and impervious to legal reform, or, along with Wechsler and civil rights advocates, that U.S. racism, while still present in modern American society, can be lessened through the rule of law. In the final analysis, core assumptions like the permanence or impermanence of racism are more about faith than reason or evidence.

As Bell recognized with his critical deconstruction of legal doctrine,\footnote{Bell, supra note 28.} for better or worse, many lawmakers and practicing attorneys in a democracy believe that legal doctrine is the only “real” form of law.\footnote{Rhee, supra note 8, at 293–94.} They unfairly reject critical theoretical legal scholarship as useless.\footnote{See Harris, supra note 471.} Even if they refuse to accept critically deconstructed hypothetical legal doctrine seriously as workable alternatives, they can nevertheless better understand critical legal theoretical concepts when “translated” into legal doctrine.

Just as identifying the problem is the necessary prerequisite to solving the problem, Bell’s critical deconstruction of legal doctrine is the necessary prerequisite to Wechsler’s transformative reconstruction of legal doctrine. Above all, Critical Legal Process’s willingness to use legal doctrine symbolically and practically allows people who run the ideological gamut, from well-intentioned but hesitant incremental law reformers to radical critical legal theorists disdainful of the rule of law, to work together to improve the lives of oppressed groups.
CONCLUSION

In another story, *The Ultimate Civil Rights Strategy*, Bell acknowledged that the Master’s tool, the rule of law, might be repurposed in a third way to dismantle the Master’s house. The Celestial Curia Sisters, immortals who resemble the Greek Muses, left open the hope that this third way might work:

“My Curia Sisters,” Geneva [Crenshaw] said, “I . . . confess[] confusion. You warn us that our legal programs are foredoomed to failure, and yet you urge us to continue those very programs because they will create an atmosphere of protest. I must reiterate my fear that this approach will simply perpetuate the pattern of benefit to whites of legal reforms achieved by civil rights litigation intended to help blacks.”

[The Curia responded,] “The benefit they bring to all is proof of how potent a weapon your civil rights programs can be in seeking a restructured society. Future campaigns, while seeking relief in traditional forms, should emphasize the chasm between the existing social order and the nation’s ideals. Thus, Sister Geneva, litigation as well as protests and political efforts would pursue reform directly as well as create a continuing tension between what you are and what you might become. Out of this tension may come the insight and imagination necessary to recast the nation’s guiding principles closer to the ideal—for all Americans.”

Tension understandably leaves us uncomfortable. We crave certainty. Yet with sharply divisive legal and policy issues like race, tension is what helps us escape our confirmation bias echo chamber and make better—dare we say—more objective decisions.

Critical Legal Process seeks to embrace the continuing tension the

---

486 Bell, supra note 156, at 255.
487 Id. at 196.
488 Id. at 255.
Curia identified—between our ideals and our reality—to find a third way to improve legal doctrine. In this sense, Critical Legal Process, like both Bell and Wechsler, cares more about the struggle, the journey, and the process than the eventual destination or outcome.

In their own way, both Bell and Wechsler admitted that their tasks ultimately were impossible. In light of the overwhelming power disparity and structural permanence of racism, real racial progress seemed impossible to Bell.\textsuperscript{490} Although Wechsler believed that legal doctrinal reform could limit racism, Wechsler also agreed that perfect legal doctrine was impossible.\textsuperscript{491} Wechsler probably would also concede that it is impossible to eradicate racism.

Both Bell and Wechsler found meaning and significance in—as American realist Justice Oliver Wendell Holmes, Jr. stated—wearing your heart out in pursuit of the unattainable.\textsuperscript{492} Wechsler’s famous Neutral Principles address, to which Bell responded, was dedicated to Justice

\textit{Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary “peaks of progress,” short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it, not as a sign of submission, but as an act of ultimate defiance.}


\textsuperscript{490} Bell admitted this during an interview about \textit{Faces at the Bottom of the Well}. The interviewer quoted this intentionally italicized passage from the book (which eventually became Bell’s Racial Realism Rule):

\textsuperscript{491} Silber & Miller, supra note 51, at 930.

\textsuperscript{492} Stephen B. Bright, Director, Southern Center for Human Rights, Commencement Address at Yale Law School: Keep the Dream of Equal Justice Alive: Yale Law School Commencement Address 10 (May 24, 1999), https://www.schr.org/files/resources/commence.pdf (last visited Feb. 24, 2018). Holmes of course was the American jurist considered one of the founders of legal realism, the evolutionary predecessor of Critical Race Theory and all other critical legal movements. \textit{AMERICAN LEGAL THOUGHT}, supra note 300, at 19–20.
Holmes.\textsuperscript{493} Wechsler called himself a “jobbist . . . [c]oncerned with competence and . . . intellectual integrity in thinking about law and working about law.”\textsuperscript{494} Holmes explained about his “imaginary society of jobbists” that “[t]heir job is their contribution to the general welfare and when a man is on that, he will do it better the less he thinks either of himself or his neighbors, and the more he puts all his energy into the problem he has to solve.”\textsuperscript{495}

For all their considerable ideological disagreement, Bell probably would agree with Wechsler that he too was a jobbist. When it comes to our continuing “American Dilemma”\textsuperscript{496} of race relations and remediation of past discrimination, we all need to be jobbists.

Although Bell and Wechsler disagreed over the content of \textit{Brown’s} neutral principle,\textsuperscript{497} both were undoubtedly courageous people. Perhaps Wechsler’s truly neutral principles of law and Bell’s definition of courage share an overlapping vision. Bell defined courage as “a decision you make to act in a way that works through your own fear for the greater good as opposed to pure self-interest. Courage means putting at risk your immediate self-interest for what you believe is right.”\textsuperscript{498} Despite his cynicism, Bell acknowledged that people still respected courage and principle:

\begin{quote}
I think that there is, even in our bottom-line society—you know, take care of number one . . . there is a real respect and a regard for individuals who are willing to act on principle, whether it turns out to be right or . . . wrong or misguided.\textsuperscript{499}
\end{quote}

To Wechsler, a truly neutral principle of law would satisfy Bell’s definition of courage. Eschewing outcome-determinative self-interest for the greater good of principled legal doctrine makes for the courageous rule of law.

\textsuperscript{493} The lecture where Wechsler first espoused his neutral principles theory was the Oliver Wendell Holmes Lecture at Harvard Law School. Wechsler, \textit{supra} note 11, at 36 n.d1.
\textsuperscript{495} \textit{Id.} at 22–23 n.77 (2004) (quoting Letter from Holmes to John C. H. Wu (June 16, 1923), in \textit{JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES \& UNCOLLECTED LETTERS \& PAPERS} 164, 178 (Harry C. Shriver, ed., 1936)).
\textsuperscript{496} See \textit{GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM \& MODERN DEMOCRACY} (1944).
\textsuperscript{497} See \textit{supra} notes 61–66 and accompanying text.
\textsuperscript{498} \textit{BELL, supra} note 119, at 43.
\textsuperscript{499} Bell, \textit{supra} note 142.
We need the courageous rule of law. Perhaps, like Audre Lorde claimed, the Master’s tool will never dismantle his house.500 Perhaps the rule of law will provide only temporary relief but never genuine change. Only time will tell. In the meantime, we can find solace in Derrick Bell’s wise words: “[W]e must not forget that it is our duty to keep looking for an answer, realizing that we may never find it. Our salvation is not in the discovery, but in the search.”501

500 LORDE, supra note 4, at 112.
501 Bell, supra note 167, at 82.