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ARTICLES

LAW'S VIOLENCE: DERRICK BELL'S NEXT ARTICLE

Richard Delgado*

INTRODUCTION

Derrick Bell enjoyed a long career as a teacher and writer and did not slow down toward the end.¹ It is interesting, then, to speculate what he would have written next had he lived. Books, certainly, perhaps on religion,² Obama,³ and the new colorblind jurisprudence,⁴ topics that were very much on his mind during his final years.

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¹ See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *Introduction*, in THE DERRICK BELL READER 1, 1-15 (Richard Delgado & Jean Stefancic eds., 2007) (discussing his life and thought) [hereinafter READER].

² See DERRICK BELL, *GOSPEL CHOIRS: SONGS OF SURVIVAL IN AN ALIEN LAND CALLED HOME* (1997) (discussing the role of faith in the struggle for social reform).

³ June Oliver Velez, *Remembering Derrick Bell and the Rev. Fred Shuttlesworth*, DAILY KOS, Oct. 9, 2011, <http://www.dailykos.com/story/2011/10/09/1024116/-Remembering-Derrick-Bell-and-the-Rev-Fred-Shuttlesworth#>; Derrick Bell, *On Celebrating an Election as Racial Progress*, 36 HUM. RTS. 2 (2009) (discussing the meaning of Obama's presidency for African Americans).

⁴ See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004) (discussing impediments to racial progress including colorblind jurisprudence and premature celebration).

What about law review articles? A recent review of his contributions revealed a range and coverage even broader than many give him credit for.⁵ He was a fast writer who could capture an interesting idea quickly, employing a variety of vehicles, including conventional case-and-policy analysis,⁶ narratives and storytelling,⁷ and legal history.⁸

What follows is my effort to predict what Bell might have written next and to write that article for him. Like a number of recent scholars, including Jacques Derrida,⁹ Robert Cover,¹⁰ Tayyab Mahmud,¹¹ and Benjamin Ginsberg,¹² Bell was interested in the connection among law, politics, and violence.¹³ Indeed, the last edition of his casebook for the first time mentioned Jacques Derrida's concept of originary violence, which appears in a section on the law of racial protests.¹⁴ Law

⁵ See READER, *supra* note 1, at ix–xii, 6, 14–15, 475–84 (containing a bibliography of his works).

⁶ See Derrick Bell, Brown v. Board of Education and the Interest Convergence Dilemma, 93 HARV. L. REV. 518 (1980) (analyzing the decision in light of precedent and international setting) [hereinafter Bell, *Dilemma*]; Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing an inherent conflict of interest in law-reform litigation).

⁷ Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) (employing narrative and dialogue to analyze recent Supreme Court decisions) [hereinafter Bell, *Civil Rights Chronicles*]; George Taylor, *The Object of Diversity*, 75 U. PITT. L. REV. 653 (2014) (noting how Bell employed these devices to defend diversity and racial justice).

⁸ DERRICK BELL, *Chronicle of the Constitutional Contradiction*, in AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 26 (1987) (discussing the role of political compromise during the colonial era).

⁹ See *infra* note 14 and accompanying text.

¹⁰ Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1991) (observing that violence inheres in the very act of judging).

¹¹ Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK J. INT'L L. 1 (2011) (explaining how poorly drawn borders and the legacies of colonialism left the region unstable and prone to conflict).

¹² BENJAMIN GINSBERG, *THE VALUE OF VIOLENCE* (2013) (discussing the role of violence in social organization).

¹³ See Bell, *Dilemma*, *supra* note 6 (drawing a connection between international power struggles and black civil rights).

¹⁴ DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 600 (6th ed. 2008) [hereinafter BELL, *RACE, RACISM*], citing JACQUES DERRIDA, *FORCE OF LAW, THE "MYSTICAL FOUNDATION OF AUTHORITY," IN DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 5 (Drucilla Cornell et al. eds., 1992). See also GINSBERG, *supra* note 12, at 1 ("Violence is the driving force of politics.").

does ordinary violence, Bell wrote, when it sentences someone to prison or orders him or her to do something the person was not otherwise inclined to do, such as pay damages or refrain from doing something.¹⁵ Law also perpetrates a kind of psychological violence by holding the threat of punishments, sanctions, and damages over the heads of ordinary citizens, even those who are law-abiding.¹⁶

But originary violence is both broader and more foundational than that. It is the violence that occurs when the law first announces itself and serves notice of its intentions.¹⁷ For Derrida as well as Bell this announcement is an act of imposition and a type of violence. It comes before and is logically prior to the types of coercion that follow, such as sentencing someone or ordering him to pay a fine. And the trappings of due process, equal protection, trials, and tiers of review—what we call “justice”—enter only later to legitimize the initial act of violence and persuade ordinary citizens to accede to it.¹⁸ Violence comes first, that is, with justice, order, and regularity entering subsequently, to make things more palatable, not the other way around.

Bell introduced this concept in the sixth edition and seemed to agree with it.¹⁹ Elsewhere, he cited Robert Cover's famous line about law's writing in a field of pain and death.²⁰ He thus saw a connection between law and the infliction of pain.

¹⁵ BELL, RACE, RACISM, *supra* note 14, at 600 n.7, citing DERRIDA, *supra* note 14, at 5.

¹⁶ BELL, RACE, RACISM, *supra* note 14, at 600–01.

¹⁷ Originary violence is connected on a conceptual level to the question of whether we have an obligation to obey the law. For if law achieves its authority by means of an act of unprincipled violence, we have little reason to accede to it, unless, of course, we agree with it independently or believe that society is better off with some set of rules, however violently established. Many prominent thinkers have struggled with this related question. *See, e.g.*, ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 13–14 (2012) (noting that citizens have no moral duty to obey the law; rather law is one among many sources we should consider when pondering what obligations we have to each other in a given situation); LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012) (same); H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) (noting that law and morality exhibit no necessary connection and that the obligation to obey the law arises only from analysis and agreed criteria); RONALD DWORKIN, *LAWS' EMPIRE* (1986) (noting that judicial method, correctly understood, is a search for integrity and coherence, not absolute truth).

¹⁸ BELL, RACE, RACISM, *supra* note 14, at 600–01, citing DERRIDA, *supra* note 14, at 5. *See also* GINSBERG, *supra* note 12, at 1–12, 45–76 (noting how governments attempt to legitimize official violence through laws, codes, procedures, and bureaucracies).

¹⁹ BELL, RACE, RACISM, *supra* note 14, at 1–12, 45–76 (“This originary violence replays itself over and over It is a fiction to which courts are committed.”).

²⁰ Cover, *supra* note 10, at 1601, cited in BELL, RACE, RACISM, *supra* note 14, at 600 (“Legal interpretation takes place in a field of pain and death.”). *See also* Derrick Bell, *Justice Accused*:

Moreover, he realized that much of law's violence is originary and arises before the trappings of legitimacy, procedure, social contract, and consent of the governed that induce us to obey meekly and without protest.

In this essay, I elaborate on that premise as he might have done had he lived. He was an imaginative and radical scholar who scandalized many of his readers²¹ but enlightened even more.²² Let us, then, look more closely at a connection that he may have been on the point of developing, beginning with that between violence and the state.²³ This will entail looking at how nations establish and announce themselves, including drawing the imaginary lines that they declare to be their borders: "Here is where the nation of X begins. If you want to proceed further, you must ask our permission, show your passport, pay a fee, etc."²⁴

Then, we shall consider the coercion that accompanies the state's declaring itself the sole source of law, even setting itself up as the official arbiter of disputes between private citizens.²⁵ This latter exercise, which we call jurisdiction, follows from and resembles the one that occurs when the state draws borders and passes laws. It, too, turns on geographical space and concerns the location of a person or dispute in such a way as to bring the person or dispute before the court.²⁶ We shall also examine standing, the quality that gives individuals permission to come before a court and ask it to exercise power on their behalf.²⁷ Each of these threshold requirements turns on an exercise of violence of the originary sort—not the kind

Antislavery and the Judicial Process, 76 COLUM. L. REV. 350 (1976) (reviewing a book by Robert Cover).

²¹ See, e.g., Bell, *Dilemma*, *supra* note 6 (positing that the famous decision arrived not from a belated act of conscience on the part of the Supreme Court but as a means of burnishing America's image in the struggle against international communism).

²² See Bell, *Civil Rights Chronicles*, *supra* note 7. The *Harvard Law Review's* annual Supreme Court issue is perhaps the most widely read legal publication in the English-speaking world.

²³ See *infra* Part I.A.

²⁴ "And if you don't, you'll be sorry." See *infra* Parts I.A, I.B, and I.F.

²⁵ That is, if you want to obtain a legally enforceable demand that Smith (who has injured you) make you whole, you may not avail yourself of vigilante justice or self-help. The state has asserted an exclusive right to this field. You must come before a court, have it hear your case and decide whether a remedy is in order.

²⁶ See *infra* Part I.C.

²⁷ *Id.*

having to do with orders and payments, both of which come into play only after a court concludes and renders judgment.²⁸

We shall also explore the relation between today's reigning methodology—formalism—and violence.²⁹ As we shall see, that mode of thought, which professes to turn legal analysis into a kind of algebra, carries and conceals a class of dangers, including the good-Nazi syndrome, my-hands-are-tied, and several other forms of behavior that social science would deem pathologies were they not so prevalent.³⁰ It also turns law practice into a dreary, pressure-filled routine of billable hours, regimentation, and boredom.³¹ It is thus a kind of specialized violence that lawyers dole out and suffer on a daily basis, sometimes without realizing it.

We shall also consider an implicit limit, itself coercive, to law's ability to coerce conduct that we might like it to do—namely redress broad injustices inherent in areas like corporate capitalism,³² immigration,³³ and civil rights³⁴ that are essential to national self-definition. In these arenas, law's refusal to intervene leaves the reformer with few options other than protest, rebellion, and self-help.³⁵ Those who are reluctant to undertake those risky strategies find themselves relegated to docile lives as salaried wage-earners, accepting what their superiors see fit to pay them,³⁶ while making peace with the status quo and their place in it.³⁷

²⁸ This usage is mine, having to do with the establishment of a system that will be in the business of dispensing violence much of the time.

²⁹ See *infra* Part I.D.

³⁰ *Id.* See also JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS* (2005) [hereinafter STEFANCIC & DELGADO, *LOSE THEIR WAY*] (discussing the current vogue of formalism in legal thought and practice). On obedience to authority and having the courage to disobey, see Pat K. Chew, *Challenging Authority*, 75 U. PITT. L. REV. 711 (2014).

³¹ STEFANCIC & DELGADO, *LOSE THEIR WAY*, *supra* note 30, at 47–71 (discussing the high incidence of dissatisfaction, alcoholism, depression, and other ills in the legal profession).

³² See *infra* Part I.E.

³³ See *infra* Part I.F.

³⁴ *Id.*

³⁵ Except on the rare occasions when the interests of the establishment and the activist converge. See, e.g., Bell, *Dilemma*, *supra* note 6.

³⁶ See KARL MARX, *CAPITAL* (1867); Ted Trainer, *Marxist Theory: A Brief Introduction*, Mar. 2010, available at <https://socialsciences.arts.unsw.edu.au/tsw/Marx.html> (last visited Mar. 6, 2014) (explaining that in a capitalist society, government caters to the wishes of owners of the means of production over those of the workers).

After this overview of violence's role in law, authority, jurisdiction, regulation, immigration, capitalism, and civil rights, I consider what we can do to reduce the violence of everyday life.³⁸ In showing that law turns on violence and then increases it, I am making a plea for more humane treatment of fellow human beings and a more peaceable social order. In an age of thermonuclear weapons and hair-trigger sensibilities associated with religion, ideology, national identity, race, and clan, the question of what policy planners and ordinary citizens can do to avoid a future of marauding, threat, revenge, alienation, coercion, mass imprisonment, enmity, grievance, discrimination, and bloodshed, much of it enabled and performed by means that are perfectly legal, indeed inherent in the law itself, would seem to be a first order of business.³⁹

Surprisingly, it turns out that in many respects we need less law, not more; more connection, less threat and coercion; fewer hard lines, but more opportunities to see each other not in categorical terms (offender, enemy, adversary, plaintiff, or defendant) but, as we really are, our close relatives and neighbors on the same planet.⁴⁰ It will also emerge that *originary* violence and the many forms that it takes, including immigration, civil rights, and capitalism, *increase the likelihood of the everyday kinds*—including revenge, crime, enmity, ill will, strained relations, imprisonment, execution, and military campaigns.⁴¹

³⁷ And if this person is a member of a minority group, that place may include separate schools, discrimination, racial profiling, stereotyping and hate speech. See, e.g., RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA (Juan Perea et al. eds., 2d ed. 2007) (describing the struggles of racial minorities and poor whites for equal treatment in many sectors of life) [hereinafter RACE AND RACES].

³⁸ See *infra* Part II.

³⁹ If we are to avoid a dystopian future, that is. See generally BLADE RUNNER (Warner Bros. 1982) (depicting a bleak future in a decaying Los Angeles). See also GINSBERG, *supra* note 12 (warning of a cycle of revenge in which the losers of a struggle bide their time).

⁴⁰ Earlier, writers in the critical legal studies movement made much the same argument in connection with rights, which they considered bourgeois, alienating, and unreliable. Rights never protect you when you need them. Most are easily evaded, since your adversary can generally assert a countervailing right—my right to speak, trumped by your right not to hear my noise; my right to wander freely versus your right to the exclusive enjoyment of your land; and so on. See Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); see generally PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1992) (discussing the critical legal studies critique of rights).

⁴¹ See *infra* Parts I.B, I.E, I.F. See also GINSBERG, *supra* note 12, at 13–19, 23, 160–63 (urging that citizens maintain a skeptical attitude toward government for this reason). For a discussion of the

In short, more law, more animosity and bloodshed; less law, more connection and peaceful coexistence. This is the track Derrick Bell could have been on in his last days. In any event, it is mine.

Now let us explore further the connection between law and violence.

I. VIOLENCE AND THE LAW

Most legal actors, including, I imagine, most readers of this article, have good opinions of themselves. Most of us are glad we went to law school and joined the legal profession. We believe that being a lawyer is an honorable calling. Most believe that our line of work—which consists, basically, of suing people—produces a peaceful, orderly world, with everyone doing what they are supposed to and not stepping on each other's toes.⁴² This flattering self-image⁴³ is paradoxical, once you think about it, since law is violent, and lawyers do violent work.⁴⁴ Societies with few lawyers and little reliance on legalism (for example, Japan) are among the most peaceful and least crime ridden on earth.⁴⁵ This is not by accident.

By contrast, those societies with the most law, like South Africa under apartheid, with its elaborate rules, passes, ethnic categories, and checklists,⁴⁶ or the

violence of prison, see Spearlt, *Economic Interest Convergence in Downsizing Imprisonment*, 75 U. PITT. L. REV. 475 (2014).

⁴² See generally THOMAS HOBBS, *LEVIATHAN* (1651) (explaining the basis of the social contract in the desire for mutual protection).

⁴³ Viz., that suing people for a living is an exalted thing to do and on par with emergency medicine, the clergy, and kindergarten teaching as a useful contribution to social wellbeing.

⁴⁴ Viz., suing people, putting some in jail, helping others escape liability for a tort or broken contract, etc.

⁴⁵ See Hiroyuki Kachi, *Japan Crime Rate Down, But Scams More Complex*, WALL ST. J., Feb. 2, 2014, <http://blogs.wsj.com/japanrealtime/2014/01/15/japan-crime-rate-down-but-scams-more-complex/> (noting the relatively low rate of crime in that densely populated country). The reader may respond that Japan, being an island nation surrounded by a very large ocean, had little need for border control. This is, however, exactly my point: The more ordinary violence and its apparatus of watch-towers, borders, etc., the more violence of the secondary kind, including surveillance, imprisonment, and repressive laws, see *infra* note 51.

⁴⁶ See, e.g., F.W. DE KLERK, *THE LAST TREK: A NEW BEGINNING* (St. Martin's Press 1998) (discussing the country's progression from apartheid to freedom); Hirsh Goodman, *Losing the Propaganda War*, N.Y. TIMES, Feb. 2, 2014, at 6 (Sun. Rev.) (noting how "Masses of black people were forcibly moved from tribal lands to arid Bantustans in the middle of nowhere. A 'pass system' stipulated where blacks could live and work, splitting families, and breaking down social structures, to provide cheap labor for the mines and white-owned businesses, and a plentiful pool of domestic servants for the white minority.

American South under the Black Codes, have been, and still are, among the worst, with high levels of crime, imprisonment, income inequality, and other measures of social distress.⁴⁷ My thesis is that legalism is both the cause and effect of this state of affairs. Indeed, legalism, as mentioned, *is* violence, in both the originary and the ordinary senses.⁴⁸ On some level, we all know this. We know that we, and others, too, respond violently to violent treatment and being ordered around, even by a court. We realize that this reaction, which can break into outrage at any time, prompts the state to respond with even more laws and more enforcement, and more displays of power, uniformed or not, and other symbols of state authority. The spiral, once it starts, continues and increases, with high levels of social unrest requiring more law, which, in turn, spurs greater social resentment, imprisonment, and rebellion, in an endless chain.⁴⁹

If the most legalistic societies have the worst records of incarceration, capital punishment, war, colonial aggression, and the highest military, police, and surveillance budgets, many will try to ascribe this to effect, not cause: A state like the U.S. or South Africa with complex histories, heterogeneous populations, historical grievances, enmity, envy, and class conflict, requires (they say) a large law-and-order establishment.⁵⁰ Although this may be true, it oversimplifies, and, in

Those found in violation were arrested, usually lashed, and sentenced to stints of hard labor for a few shillings per prisoner per day, payable to the prison service.”).

⁴⁷ Former slave states, for example, still practice capital punishment. This is probably not mere coincidence, see Richard Delgado & Juan Perea, *Racial Templates*, 112 MICH. L. REV. 1133 (2014) (noting how one act of cruelty often serves as a template for a later one); Stephanie Taylor, *Death Penalty Bills Clear Hurdles: But Some Defense Attorneys Say Legislation is Unnecessary*, TUSCALOOSA (AL) NEWS, Jan. 26, 2014, at A-1; GINSBERG, *supra* note 12, at 101–03 (noting that the U.S. is harsher and more carceral than many other nations). See also PAUL CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW (1999) (noting the large number of laws this country maintains on its books; we are one of most law-bound nations in the world).

⁴⁸ See *supra* notes 13–22 and accompanying text, explaining the two kinds of violence. Not every law is equally violent, of course. A law against driving 100 miles per hour through a crosswalk in front of an elementary school is a sensible measure, even if it contains overtones of violence in its enactment and enforcement. It reflects a judgment that, on balance, it is better to have those kinds of violence than to have run-over kids.

⁴⁹ See *infra* Part II; GINSBERG, *supra* note 12, at 31 (noting how states employ symbols and displays of police power to intimidate the populace and discourage dissent); Martin Luther King, Jr., Nobel Lecture, The Quest for Peace and Justice, Dec. 11, 1964, available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1964/king-lecture.html (noting that “Violence never brings permanent peace. It solves no social problem. It only creates new and more complicated violence.”).

⁵⁰ Viz., to keep all the disparate folks with strange ways and incomprehensible languages in line.

fact, has things largely reversed. Law is violence, hence the more of it the more violent the society. Ordinary violence, in particular, increases the other kinds—crime, murder, resentment, ethnic enmity, large armies, historical feuds—requiring (we think) more laws, more police, more watch-towers at the border, and so on.⁵¹

What could we do to stop this spiral? As discussed later, if we wanted to live more peacefully with each other, we would gradually but steadily⁵² reduce the amount of law, police, and armed forces that we maintain on alert. We would deformalize legal relations and our legal epistemology. We would reduce military budgets. We would open up our borders to citizens from other nations, promoting the kind of social contact and interracial friendships that, over time, reduce enmity, suspicion, and dread.⁵³ We would give everyone computers and untrammelled access to the Internet.⁵⁴ We would make access to courts turn on something other than geographical location.⁵⁵ We would reconsider ordinary acts that in hindsight now appear violent to groups on whom a border or national grouping was thrust against their will and desires.⁵⁶

⁵¹ See *supra* notes 40–41, 45 and accompanying text; *infra* notes 57–74, detailing how this happens.

⁵² And, of course, selectively. See *supra* note 48 (finding little violence in laws against speeding through crosswalks and the like).

⁵³ See GORDON ALLPORT, *THE NATURE OF PREJUDICE* 252–60 (1958) (discussing social contact as a means to reduce prejudice); Tom Bartlett, *The Science of Hatred*, CHRON. HIGHER ED., Nov. 27, 2013 (Chron. Rev.), available at <http://chronicle.com.proxy.seattleu.edu/article/The-Science-of-Hatred/143> (noting that over 500 studies have confirmed the social-contact hypothesis and that the greater the amount of contacts of the right sort, the more peaceable interactions are likely to be among the group concerned). On the way racial suspicion functions as a form of implicit character evidence, see Monte Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High-Profile Cases*, 75 U. PITT. L. REV. 679 (2014).

⁵⁴ So that they can communicate with each other and rise up against unfair laws and exercises of authority. See, e.g., David Batty, *Arab Spring Leads Events Captured in Cameraphones*, THE GUARDIAN, Dec. 29, 2011, available at <http://www.theguardian.com/world/2011/dec/29/arab-spring-captured-on-cameraphones>; GINSBERG, *supra* note 12, at 163–64, 172 (same). Internet searching can also lead one to realize that we are all biologically related, see, e.g., A.J. Jacobs, *Are You My Cousin?*, N.Y. TIMES, Jan. 31, 2014 (Sun Rev.), available at <http://www.nytimes.com/2014/02/01/opinion/sunday/are-you-my-cousin.html?hpw&ref=opinion>; Nicholas Wade, *Tracing Ancestry, Researchers Produce a Genetic Atlas of Human Mixing Events*, N.Y. TIMES, Feb. 13, 2014, available at <http://www.nytimes.com/2014/02/14/science/tracing-ancestry-team-produces-genetic-atlas-of-human-mixing-events.html>.

⁵⁵ Minimum contacts is a good start, since it provides a smaller role for geography and aims to resolve disputes in the areas where they arise. See *International Shoe v. Washington*, 326 U.S. 10 (1945).

⁵⁶ See Mahmud, *supra* note 11 (discussing the Durand Line and similar legacies of colonialism).

Let us now look at law and violence, particularly the low-visibility originary kind that often passes below our notice—but not that of Derrick Bell, Robert Cover, Jacques Derrida, Tayyab Mahmud, and other visionary figures, all of whom saw it clearly.

A. *Originary Violence and the State*

Countries start up when a group of people who believe themselves united in destiny draw up a border, a line on the ground or on a map.⁵⁷ They then build some watch-towers on this border and post armed detachments there with orders to fire on intruders. If other people do not get the message—“Cross here without our permission and we will shoot you”—they will pay with their lives. If a group already living on the land, e.g., the Indians or Mexicans, protest or make trouble, the newcomers quickly enact laws and doctrines (removal, the Trail of Tears, the Discovery Doctrine, terra nullius) that rectify the situation.⁵⁸ A recent book by Benjamin Ginsberg, *The Value of Violence*,⁵⁹ notes that almost all societies start this way, with an imposition of force. Any country foolish or idealistic enough to neglect to fortify its border fell quickly to its enemies, was overrun, and lost its identity.⁶⁰ Violence is a precondition of nationhood and an essential ingredient in the formation of a nation or country.

After becoming established, some nations (like Switzerland) have been relatively peaceful and did not seek to expand their borders or make war on their enemies, while others (Nazi Germany) were aggressive toward other nations⁶¹ or to their own citizens (South Africa).⁶² But each (including the subsequently peaceable ones) was violent in its originary, founding act.⁶³ To be sure, some originary acts

⁵⁷ See GINSBERG, *supra* note 12, at 20–21, 30–31, 84, 94–95. See generally JARED DIAMOND, GUNS, GERMS, AND STEEL (1999); Jared Diamond, *Vengeance is Ours*, NEW YORKER, Apr. 21, 2008, at 74 (discussing territorial struggles in a number of primitive societies, including New Guinea). Even within a single country like the United States, borders, such as those between cities and suburbs, may be the source of injustice and inequality. See Patience Crowder, *Interest Convergence as Transaction?*, 75 U. PITT. L. REV. 693 (2014).

⁵⁸ See, e.g., RACE AND RACES, *supra* note 37, at 180–85, 194–98, 220, 271–82.

⁵⁹ GINSBERG, *supra* note 12 (discussing the ubiquity of violence in human affairs).

⁶⁰ *Id.* at 19–21, 84, 94–97.

⁶¹ See, e.g., WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH (1960).

⁶² On South Africa under apartheid, see Goodman, *supra* note 46.

⁶³ *Viz.*, “We are soon-to-be peace-loving Switzerland. This is our border. These are our watch-towers. We may be peace-loving but the guards inside have guns.”

were more violent than others and blithely ignored traditional borders, living patterns, ethnic enclaves, mountains, and prior inhabitants and told everyone to get used to it. The reader can, no doubt, think of many examples including post-World War II Yugoslavia,⁶⁴ modern Afghanistan,⁶⁵ the Durand Line after colonialism,⁶⁶ and Israel.⁶⁷ In earlier times, one thinks of Mexico and the U.S. War with that country, which resulted in the forcible acquisition of about one-half of Mexico, corresponding to approximately one-third of the land mass of the current United States.⁶⁸ The war left Mexico impoverished and resentful and many former Mexicans adrift in a new country that exhibited little knowledge of, or respect for, their culture, history, or language.⁶⁹ Those nations whose original laws were most violent have often demonstrated subsequent histories of great brutality,⁷⁰ paranoia

⁶⁴ See Roger Cohen, Op-Ed., *Setting Aside Revealed Truth*, INT'L N.Y. TIMES, Feb. 7, 2014, at 7, available at <http://www.nytimes.com/2014/02/07/opinion/cohen-setting-aside-revealed-truth.html?hp&rref=opinion> (discussing the unsettled condition in which ancient grudges and modern treaties left this part of Europe).

⁶⁵ See GRACIELA DEL CASTILLO, REBUILDING WAR-TORN STATES: THE CHALLENGE OF POST-WAR ECONOMIC RECONSTRUCTION 166–91 (2008) (discussing recent efforts by the major powers to pacify and unify the country).

⁶⁶ See Mahmud, *supra* note 11. See also Carl Leubsdorf, Op-Ed., *Fallujah is a Reminder of Why U.S. Should Stay Out*, DALLAS NEWS (Jan. 6, 2014, 6:39 PM), <http://www.dallasnews.com/opinion/columnists/carl-p-leubsdorf/20140106-carl-leubsdorf-fallujah-is-a-strong-reminder-of-why-u.s.-should-stay-out.ece> (“The increasing connection between the two wars, along with the fighting across the Syria-Lebanon border, is hardly surprising, given the artificial nature of the region’s national boundaries. The lines were largely created by the British and other Western powers, rather than stemming from the development of homogeneous national groups.”).

⁶⁷ See, e.g., Tom Friedman, Op-Ed., *Just Knock It Off*, N.Y. TIMES, Oct. 20, 2010, at A29, available at http://www.nytimes.com/2010/10/20/opinion/20friedman.html?_r=2&partner=rssnyt&emc=rss& (discussing the strains on Israel of maintaining settlements on the Left Bank); Omar Barghouti, *Why Israel Fears the Boycott*, N.Y. TIMES, Feb. 4, 2014, at 6 (Sun. Rev.) (same). See also Thomas L. Friedman, Op-Ed., *Whose Garbage is This?*, N.Y. TIMES, Feb. 9, 2014, at 11 (Sun. Rev.) (noting that “the colonial boundaries of the Middle East do not correspond to the ethnic, sectarian and tribal boundaries—and it is one reason that some Arab states are breaking up”); GINSBERG, *supra* note 12, at 21 (noting that the creation of the Israeli state was highly controversial in the Arab world).

⁶⁸ See Delgado & Perea, *supra* note 47, at 1133. See also Julio Ortega, *Remapping the Territory: Felipe Fernandez-Armesto's Revisionist History of America Pays Tribute to its Hispanic Past, Present, and Future*, N.Y. TIMES, Jan. 19, 2014, at 8 (Book Rev.) (noting that the history of colonial settlement in the New World “is one of random violence . . . those borders were traced through rebellion, looting, and murder”); GINSBERG, *supra* note 12, at 21 (same).

⁶⁹ Delgado & Perea, *supra* note 47, at 1133, 1136–38, 1141, 1153.

⁷⁰ E.g., South Africa, see *supra* text and notes 46, 50.

and militarism,⁷¹ constant revolutions,⁷² discontent over borders and limits,⁷³ or civil rights offenses toward Indians, blacks, and other minorities.⁷⁴ Let us now examine this second level of originary violence having to do with the enactment of law and laws.

*B. Originary Violence and the Law—the Lawmaking Function:
Laying Down the Law*

Once nations establish themselves, one of their first tasks is to enact laws, which they think will make everything better.⁷⁵ With enactment arrives a second type of originary violence associated with the law-giving function. For, as Derrida and Bell point out, the law cannot justify itself. Justificatory tools such as due process, social contracts, consent of the governed—constitutional conventions, even—follow the announcement of the first laws rather than precede them.⁷⁶ This announcement arrives by fiat, an imposition or act of violence. Someone says,

Let us have a new government and some laws. We will meet at Philadelphia or someplace. And then, we will announce what we have done and expect all the others to accede to it all. If they do not, we will make plain to them that they will be sorry. We will try them as lawbreakers, even traitors.⁷⁷ But first, we will provide them with an attorney and a copy of the charges against them and the rules of evidence we will use for their trial. That way, we will gull them into thinking it was all legitimate. Others will get the message (do not break our

⁷¹ *E.g.*, Israel, *see supra* note 67.

⁷² *E.g.*, Mexico, *see text and notes supra* 67–71, many of whose internal coups and revolutions were likely the product of unequal social relations stemming from colonial conquest by Spain and, later, the United States.

⁷³ *E.g.*, India and Pakistan, *see Mahmud, supra* note 11.

⁷⁴ *E.g.*, the United States, whose history includes slavery, Jim Crow, Indian extermination, Japanese internment, and a war of aggression with Mexico. *See Delgado & Perea, supra* note 47; RACE AND RACES, *supra* note 37.

⁷⁵ A highly debatable proposition. *See supra* Part I.A and *infra* Part I.D-F and accompanying text. *See also supra* note 48 (noting that some laws are less violent than others).

⁷⁶ *See supra* notes 17–41 and accompanying text (outlining this thesis).

⁷⁷ *See The Loyalists*, U.S. HISTORY.ORG, <http://www.ushistory.org/us/13c.asp> (last visited Mar. 4, 2014) (discussing the treatment of British royalists during the American revolution); GINSBERG, *supra* note 12, at 176 (same).

laws), while we can pretend that it was all perfectly regular, even consensual. What reasonable state would not have laws of some kind?⁷⁸

C. *Violence and Jurisdiction, the Power to Proceed*

Much of civil procedure is concerned with place and its consequences. As such, the concept functions very much like the national borders that come into play in connection with nation-building.⁷⁹ The law of personal jurisdiction, in particular, harkening back to *Pennoyer v. Neff*,⁸⁰ links a court's ability to hear a case with geography. A plaintiff either finds the defendant, or the defendant's property, within the territorial confines of the state in which he hopes to bring suit, or does not. If he does find him or it there, he must bring him or it before the requisite court,⁸¹ or else the case may unravel later.

Jurisdiction is said to be an exercise of the court's *power*, which must be carried out carefully and respectfully, accompanied by filing pieces of paper here and there, observing just the right rules, procedures, and time limits.⁸² Territoriality is the touchstone—the law of jurisdiction is complete in itself, with everything but the watch-towers. If you, the plaintiff, do it the wrong way, we, the court, will turn you aside, refuse to throw our weight behind the power you hope to exercise in your lawsuit.⁸³

⁷⁸ See, e.g., GINSBERG, *supra* note 12, at 21 (discussing Walter Benjamin's treatment of law-making violence), 84–87, 96–97 (discussing how laws and trials legitimize ordinary violence). And, of course, we both need and fear other people. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 29 BUFF. L. REV. 205, 211–13 (1979). Because we fear the speeding driver in the crosswalk, see *supra* note 48, yet do not want excessive rules that interfere with our ability to form loving relationships with other people. Rules tell other people: "Stay away from me; I've got my rights." Intentionally or not, they separate us from each other. Certainly, some rules ("flush the toilet after using it") are necessary for civilized existence. Many of these do not need the force of law, however. They are self-evident and enforceable through ordinary social sanctions such as disapproval and pursed lips.

⁷⁹ See *supra* text and notes 57–60 and *infra* text and notes 101–04.

⁸⁰ *Pennoyer v. Neff*, 95 U.S. 714 (1878).

⁸¹ I.e., the requirement that one serve notice of process. See FED. R. CIV. P. 4 (setting out requirements for service of process in a federal court).

⁸² *Id.*

⁸³ See *Pennoyer*, 95 U.S. at 734 (holding that Mitchell, who brought the suit, lacked jurisdiction).

Standing operates in similar fashion. If you lack the standing to sue (having suffered no injury in fact),⁸⁴ it is *not your place* to bring that suit. Like an illegal alien attempting to cross a border in between two watch-towers in the middle of the night, you are out of line. You do not belong. You are out of place. Another might have the correct credentials, but not you. Ordinary violence of the plainest sort, this exercise of “legality,” is artificial, hard to justify, and infuriating to the plaintiff desiring, often legitimately, to fix a bad situation with the aid of a court.⁸⁵ Much like an undocumented alien, thinking to himself, “I could really do that job, lead a better life, if I could just get there.” The law, however, says no—you are out of line, out of place. Apply to the guard at the watch-tower.

D. *Violence and Formalism—Law’s Reigning Methodology*

The law is not only highly selective in whom it lets speak, it requires that a person’s speech conform to prescribed patterns, including the rules of evidence. A plaintiff who seeks redress for an injury may only describe that injury in highly stylized terms. Not everything she may have thought pertinent to her story turns out to be describable.⁸⁶ Moreover, he or she may speak only in a prescribed sequence, in response to the lawyer’s questions.⁸⁷ The story that emerges, then, is highly unlikely to correspond to the one she would tell in recounting it to a friend. But this fracturing of a story—narricide, a type of violent killing of a story or event—is only the tip of the iceberg.⁸⁸ What the lawyer does behind the scenes is even more violent.

⁸⁴ See *Warth v. Selden*, 422 U.S. 490, 502–14 (1975) (holding that a public interest organization and several aggrieved residents could not challenge a zoning regulation that burdened minority families and the poor). See also *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803) (declaring that it is courts’ *place*—and no one else’s—to determine the constitutionality of laws).

⁸⁵ See *Warth*, 422 U.S. at 502–17 (finding that plaintiffs could not sue to redress housing discrimination in a city’s zoning code).

⁸⁶ *E.g.*,

That no-good defendant not only ran over my kid’s bicycle while backing out of his garage in a hurry that day. Everyone around here detests him. He is always driving too fast. And when we ask him to slow down, he flips us off. Not only that, he never mows his lawn and lets his dog wander around loose. He doesn’t care about civilized behavior.

⁸⁷ And not, say, in an uninterrupted narrative or story.

⁸⁸ On narricide, see Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 *How. L.J.* 473, 474–75 (2005).

In former times, the law was a noble profession. Lawyers saw themselves as dispensing wise counsel. Often, they would urge a client not to sue, or to modify his course of conduct out of concern for the public interest. Lawyers had the time to reflect on the broader public good and, in many cases, the desire to bring their work in line with it.⁸⁹

The world of law practice today is much more pressured, with overwhelming numbers of billable hours to rack up, briefs becoming longer and longer, and cases taking on a near-baroque complexity.⁹⁰ Many lawyers spend the first years of practice entirely inside the library, at their computers, or in a back room somewhere going through document review, and never meeting a client.⁹¹ This is all largely a byproduct of formalism, a mode of legal analysis that eschews policy (which it reduces to just another “argument”), consideration of the public good, and broad ethical concerns in favor of wrangling over precedent, loopholes, and creative statutory construction with the aim of gaining advantage.⁹² Office organization has shifted to follow suit. As I pointed out on another occasion, if you learn to think like a machine, someone is likely to come along and make you work like one.⁹³ Regimentation, broad associate-to-partner pyramids, and 80-hour workweeks are the result, as well as high rates of depression, drug-taking, divorce, drop-out, alcoholism, and suicide among lawyers.⁹⁴ The public like us no better than we like ourselves; some polls show lawyers at the level of automobile salesmen and loan sharks for public trust and esteem.

Formalism lies at the heart of much of this misery and social disrepute. With it as law's dominant epistemology, the only thing that matters is amassing more citations than your adversary, more clever arguments. Many lawyers believe they could just as easily argue either side of a case. Our clients sense this and interpret it as coldness—which it is. The coldness is that of the hired gun, someone who could represent either side with equal equanimity—who enjoys doing violence for violence's sake.

⁸⁹ See STEFANCIC & DELGADO, *LOSE THEIR WAY*, *supra* note 30, at 35, 49.

⁹⁰ *Id.* at 39–40, 51, 53–55.

⁹¹ *Id.* at 53–56.

⁹² *Id.* at 33–46.

⁹³ *Id.* at 77–78.

⁹⁴ *Id.* at 66–71.

E. Violence, Capitalism, and the Law

A further source of violence of both the ordinary and the consequential (ordinary) kind is capitalism.⁹⁵ This mode of organizing a country's economic sector is more violent than many of the alternative forms of doing business, because it is competitive, even cutthroat, by design. That is, it has winners and losers, and everyone knows this going in. Not only that, the losers cannot complain, but must lump it. A country whose economic system exemplifies pure capitalism will have very little in the way of a social safety net. If your luck (or judgment) is bad, you must live with the consequences. Losers will not be able to call on others for help, except for family and close friends. And they must not be sore losers who begrudge other people's success. (That is class warfare.) If their fortunes are poor and their business fails, that is the breaks. They must gather themselves up, dust themselves off, and try again.

Once a country, like the United States, commits itself to a relatively pure variety of economic capitalism, this state of affairs will be relatively unamenable to reform through law.⁹⁶ Note, for example, how little reform the government has been able to enact in the wake of the financial crisis of 2007–2011, or how few reforms the banking, housing, and insurance industries have enacted to avoid another.⁹⁷ Corporate capitalism resists reform through law, because the two—law and capitalism—are the same thing, and a thing cannot reform itself. Regulators almost never impose wide-ranging reforms fundamentally altering the nature of the finance system, for example, because they (the regulators) and the regulated (Wall Street financiers) are the same people, with the same mindsets, values, and training.⁹⁸ New regulations are for that reason limited, incremental, and do not greatly modify the underlying structure of business. The regime of corporate capitalism resists reform through a host of homeostatic mechanisms, clichés,

⁹⁵ See, e.g., Richard Delgado, *Rodrigo's Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87 (2014).

⁹⁶ *Id.* at 92–98; GINSBERG, *supra* note 12, at 34–35 (noting how bureaucracies surround themselves with rules and procedures that make them, for all intents and purposes, impregnable to criticism and reform). See also Juan Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583 (2014) (noting how the country established the G.I. Bill following World War II and hardly anyone noticed how it greatly increased economic inequality).

⁹⁷ *Id.* at 98, 106.

⁹⁸ *Id.* at 96–97, 105. See also GINSBERG, *supra* note 12, at 35 (noting that all large bureaucracies resist reform for the same reason).

mindsets, and presumptions (e.g., too much regulation would inhibit healthy competition) that render serious reform almost unthinkable.⁹⁹ Only very serious crises call for proposals for it, and these rarely last long.

F. Violence and the Citizenry: Immigration and Civil Rights

Almost no area of the law is more redolent of violence than the law of immigration or is harder to reform from outside.¹⁰⁰ In fact, the area benefits from its own suit of armor. Termed the plenary power doctrine, it holds that substantive immigration law lies beyond the purview of courts and is for Congress alone.¹⁰¹ For the reader who has come this far, none of this will be surprising, for no area of law is more thoroughly concerned with national self-definition than the laws, codes, and quotas governing immigration. That body of law governs who gets to enter the United States, in what status, and how long they can remain here and doing what. It declares who may be a citizen and who may not. For a long time (162 years, to be exact) that body of law limited naturalization (that is, acquisition of U.S. citizenship) to free white people.¹⁰² For many years, it imposed an express preference for Northern Europeans in connection with those merely wishing to enter in any capacity—never mind become U.S. citizens.¹⁰³ Original violence is often hard to see, having to do with the process by which groups designate themselves nations and law-makers assert the right to hand down laws that all of us must obey. But immigration law is crude, often racist, and unapologetically selective—it tells certain groups of outsiders, we do not want you and your kind entering our society. Never mind why. We just do not. And we do not have to explain or justify it. It is our country, after all, and we get to determine who lives here.¹⁰⁴

⁹⁹ Delgado, *supra* note 95, at 96–97, 105. Indeed, if the mode of economic organization determines any society's ideology, see Trainer, *supra* note 36, any society's moral code is likely to pronounce any effort to reform its mode of doing business unethical.

¹⁰⁰ *Id.* at 98–102, 107–09.

¹⁰¹ *Id.* at 100.

¹⁰² See, e.g., IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1–7 (10th ed. 2006) (discussing the many “prerequisite” cases that came before the courts during this period).

¹⁰³ See National Origins Act of 1924, Immigration Act of 1924, ch. 190, 43 Stat. 153 (limiting immigration to a small proportion of the makeup of the existing population, which at that time was dominantly northern European).

¹⁰⁴ ROGERS SMITH & PETER SCHUCK, *CITIZENSHIP WITHOUT CONSENT* (1985). After all, God placed all the races on separate continents for a reason, did he not? So, today, if one of *them* wants to come here, they have a heavy burden of proof, since they are violating God's plan. See JOHANN BLUMENBACH, *DE*

II. REDUCING VIOLENCE

To reduce law's violence, of either the originary or consequential (ordinary) kind, one should consider some of the measures mentioned earlier, namely selective law-reduction and deformalization, reduction in military spending, wider access to the Internet, and more-open borders.¹⁰⁵ We should reduce emphasis on harsh penalties and long prison sentences as solutions to poverty, unemployment, and other social pathologies.¹⁰⁶ We should simplify and rationalize civil procedure and evidence law so that access to courts is less intimidating.¹⁰⁷

Many of these measures take the form of blurring hard lines—national boundaries in the field of immigration, narrow self-defense treaties in the realm of national security, and excessive formalism in the construction of statutes and case law. Criminal laws depriving judges and juries of discretion to tailor punishment to the offense likewise compound a bad situation. Anything that impairs connection and increases alienation should be avoided. Separate schools and neighborhoods by race or class are prime offenders. Social contact across every conceivable line is generally a good thing. Hobbes wrote that law and the social contract are what stood between us and savagery.¹⁰⁸ That is true, but only up to a point. Carried to excess, unnecessary law, line-drawing, and security measures reduce safety, interpersonal connection, and caring, and make us all less safe, especially on occasions when we need an instinctive helping hand from someone. At that point, we do not want the other person thinking, what is the law here? We want them thinking, what can I do to help?

GENERIS HUMANI VARIETATE NATIVA [ON THE NATURAL VARIETY OF MANKIND] (1775) (dividing mankind into five races, one per continent, and attributing this diversity to an innate force visible as early as Adam and Eve). If, ultimately, law achieves its sway over us by means of an act of unprincipled violence, we have little reason to accede to it, unless, of course, we agree with it independently or believe that society is better off with some set of rules, however violently established.

¹⁰⁵ See *supra* notes 52–56 and accompanying text.

¹⁰⁶ See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (discussing America's heavy reliance on crime and imprisonment as instruments of social control); GINSBERG, *supra* note 12, at 12, 40, 61–77 (same).

¹⁰⁷ See *supra* notes 79–85 and accompanying text.

¹⁰⁸ HOBBS, *supra* note 42. But see GINSBERG, *supra* note 12 (noting that Charles Tilly regarded states as protection rackets, offering citizens “security in exchange for their taxes, service, and obedience—whether they want protection or not”), 40–42 (noting that Hobbes preferred state tyranny over an unruly citizenry).

III. WAS DERRICK BELL ON THE VERGE OF RETHINKING INTEREST CONVERGENCE?

What, then, of Derrick Bell and his growing recognition of law's innate violence? If I am right that he was turning skeptical about law's potential to advance human wellbeing and freedom—because that institution is shot through with violence—he may have been on the verge of seeing the dark side of law itself. Toward the end of his life, this powerful thinker may have been starting to doubt the rationality and usefulness of law and, even, of some of his own premises. If so, where might he have gone next in his scholarship?

Consider how one of his major advances in the field of civil rights was interest convergence, the idea (related to his racial realism) that progress for blacks only came when it coincided with white self-interest.¹⁰⁹ This bracing, if pessimistic, hypothesis at least offered the hope of its own rationality: If one could figure out what white elites in decision-making roles wanted and needed at a given point in history, one would have a strong clue as to what might happen in the way of civil rights breakthroughs.¹¹⁰ This held true for law reform generally. If one wanted to change bad laws, one need only recognize the right opportunity and strike then. One might even, on occasion, arrange a breakthrough by educating white elites on what lay in their self-interest.¹¹¹ People and events were ultimately rational and would succumb to knowledge and insight. Law was essentially a form of algebra, with self-interest as the major variable, especially in Bell's main field, civil rights.

Recently, however, psychoanalytically oriented social scientists such as Joel Kovel¹¹² and John Dovidio¹¹³ have been pointing out how a great deal of racism is unconscious and irrational. Many whites associate black and brown skinned people with dark forces, fears, and unrecognized associations with dirt, filth, and

¹⁰⁹ Bell, *Dilemma*, *supra* note 6. See also Stacy Marlise Gahagan & Alfred L. Brophy, *Reading Professor Obama: Race and the American Constitutional Tradition*, 75 U. PITT. L. REV. 495 (2014) (discussing how interest convergence and other critical themes found their way into a course at the University of Chicago law school).

¹¹⁰ Bell, *Dilemma*, *supra* note 6. See also Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011) (taking issue with Bell's hypothesis).

¹¹¹ See, e.g., Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23 (2006) (noting how elite self-interest underlay a key decision regarding Latino civil rights).

¹¹² JOEL KOVEL, *WHITE RACISM: A PSYCHO-HISTORY* 54–55 (1984).

¹¹³ John Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829 (2001).

excrement.¹¹⁴ These analytically trained social scientists have created the powerful category of the aversive racist—those who cannot bear to touch black skin and for whom interracial sex is an abomination, for whom touching, even between children and the very young, is to be firmly discouraged, and for that reason finds racial separation and segregation in school, residential neighborhoods and elsewhere the natural order of things.¹¹⁵

Might Bell have begun to realize that much of racism is not rational at all, and that race law, at least, is inherently violent? If so, interest convergence is not a promising remedy, since many whites would vote, for example, against black rights even when this was not in the whites' self-interest. To take a current example: In many impoverished communities, the residents loath Latinos, even though their arrival and settlement would do much to boost the regions' farms and businesses.¹¹⁶ If loathing is irrational, even interest convergence will often fail to trump it. If the law, of immigration for example, or of black electoral chances, reflects a deep form of little-understood loathing, it is likely always and already to perpetrate violence. Interest convergence may explain an occasional breakthrough, but not all of racial ebb and flow. To understand the many occasions when racial progress does *not* come, we need to consider loathing, repulsion, and a host of deeply rooted unconscious forces and drives.

Immigration and settlement are originary questions that, as noted, have much to do with national self-definition—who votes, holds office, gets to enter without knocking or paying dues at the watch-tower.¹¹⁷ They govern who gets to live next to you, the languages and chatter you hear when you walk down a city street, the food smells you inhale along the way. These are the areas that are most likely to be irrational, violent, unprincipled, and resistant to alteration. Some people hate the food smells and like the current national self-definition, which is dominantly white but in danger of changing as we move into the future.

In observing that law in many respects has been violent, might Bell have been on his way to repudiating the search for rationality and order—including his own interest convergence formula—and conceding a broader, darker principle in human

¹¹⁴ See, e.g., RACE AND RACES, *supra* note 37, at 43 (citing Joel Kovel).

¹¹⁵ *Id.* See *supra* note 104 (explaining how racial separation has struck some as divinely arranged).

¹¹⁶ See John M. MacDonald & Robert Sample, *Don't Shut the Golden Door*, N.Y. TIMES, June 20, 2012, at A29.

¹¹⁷ See *supra* notes 57–74, 95–104 and accompanying text.

affairs? If so, racial realism, one of his signature themes, would have acquired a new frightful urgency and we would need to come to terms with its new meaning and import.¹¹⁸ This realization could easily generate an impetus of the type that gave rise to critical race theory itself at a workshop at a small convent outside Madison, Wisconsin years ago. This new, deeper form of critical theory would look unblinkingly at the content of the innermost recesses of the human mind. It would look at basic presumptions about the ways we define ourselves (originary violence) and how this often turns on drawing a sharp distinction between ourselves and the loathsome other.¹¹⁹

This would entail re-examining some of law's most basic premises. It would look at things like disgust, fear of the stranger, and the innate, deeply entrenched attitudes toward territory, belonging, and inclusion that legal structures—including borders, authority to make law, jurisdiction, entry, and citizenship—govern and enforce. Those who would honor Bell would do well to explore these matters, for I believe they are ones he might have investigated. Even if he would not have, for some reason, they bear investigation. I at least plan to do so.

¹¹⁸ That is, things will not change until whites determine that is in their self-interest to have this happen and they conquer their deep-seated disdain for nonwhite neighbors and associates. Bell was courageous in his personal life and was willing to take risky action and pursue unpopular premises. See Jean Stefancic, *Discerning Critical Moments: Lessons from the Life of Derrick Bell*, 75 U. PITT. L. REV. 457 (2014).

¹¹⁹ See KOVEL, *supra* note 112.

