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“A LIVING, WORKING FAITH”: REMEMBERING OUR COLLEAGUE DERRICK A. BELL, JR. AS TEACHER

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Derrick Bell’s innovations as a civil rights lawyer, scholar, and educator resist compartmentalization. His work in each of these areas cannot be confined or considered in isolation from the others because each of these roles has had multiple dimensions. His civil rights lawyering was an occasion to teach; his scholarship offered soul-searching reflection about a lawyer’s work;¹ his teaching, as this essay will argue, was an invitation to act. And thus it is hardly surprising that the reflections occasioned by this conference have resonated to such an extent across the panels, including Kendall Thomas’s identification of voice as an animating idea in Derrick’s life and work, and Sonia Katyal’s observations about risk-taking, a challenge Derrick always confronted.

Their reflections seem especially relevant to Derrick’s role as teacher, when we consider how Derrick’s teaching foregrounded students, amplified their voices, and, in the process, embraced the not insignificant risk of challenging law teaching orthodoxy: his reconceptualizing the role of teacher from that of central authority figure to facilitator and guide disrupted expectations and comfort levels—of law school colleagues and of students who were not accustomed to taking the degree of responsibility that Derrick’s approach required. And it is for this reason that I suggest that Derrick’s work as a teacher has had such an enduring impact. It operated directly on the successive cohorts of law students—lawyers in formation—whose ideas about the critical intersections of lawyering, legal doctrine, social policy, and moral values he was able to influence.²

Drawing on the themes of voice and risk-taking that were so resonant at the conference, I’ve chosen to reflect on a passage from Derrick Bell’s classic essay on the challenges of teaching constitutional doctrine, and the impediments to engaged learning generally, posed by the “passive classroom”³ that some students still experience to be the law school norm in courses other than clinics and lawyering classes. In *Constitutional Conflicts: The Perils and Rewards of Pioneering in the Law School Classroom*,⁴ Derrick described an innovative text and “participatory” approach to course design that placed students in the role of advocates, judges, op-ed writers, and, ultimately, teachers of the material.⁵

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¹ See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (arguing that civil rights lawyers’ advocacy in favor of school desegregation remedies did not always respond to the paramount concern of many of the clients these lawyers represented—to improve educational outcomes—and thus this advocacy raised ethical issues of conflict between lawyer ideals and client interests).

² And, as we have heard from my co-panelists Robin Lenhardt and Bennett Capers, his influence as a teacher persisted even among those who were not his students, in part because of the power of his example and the distinctiveness of his student-centered approach.

³ Derrick A. Bell, Jr., *Constitutional Conflicts: The Perils and Rewards of Pioneering in the Law School Classroom*, 21 SEATTLE U. L. REV. 1039, 1043 (1998) [hereinafter *Constitutional Conflicts Essay*].

⁴ *Id.*

⁵ *Id.* at 1045–48.

By foregrounding the role of the students and decentering the teacher in the classroom phase of the course, Derrick created a structure that reflected a deeply rooted understanding of what motivates students to stay engaged:

The process I utilize in the classroom is a model rather than a rigid formula. It can be altered to fit class size and student and teacher inclination. The key is to replace a basically passive procedure, consisting of assigned reading and lecture listening, with one requiring active involvement, similar to the multiple aspects of practice, teaching, and judicial functions. For all the pressures of the legal curriculum, students give every indication of welcoming responsibility, opportunity and challenge. For myself, I find that I learn from my students' fresh encounters with the Constitution, as we look at new questions and question old answers. Potentially, such a procedure allows us to approach the Paulo Freire ideal: that students become teachers and teachers become learners.⁶

Using this passage as a lens, I will reflect on the implications of Derrick Bell's radically imaginative, and, for law school, transformative, ideas that have influenced so many of us who are fortunate enough in our professional lives to work with law students. I argue that his participatory approach to the classroom, exam design, and grading informs a pedagogy grounded in an abiding faith—to invoke another conference theme—in students' capacities as agents, as active participants in their own learning. Moreover, Derrick's ideas were not only radical but also prescient, as my co-panelist Vanessa Merton has pointed out. He anticipated in his teaching practice by many years the recommendations of the Carnegie Foundation and others that law schools adopt a more integrated approach to pedagogy and eschew exclusive reliance on Socratic dialogue as the method for developing students' cognitive capacity, lawyering skill, and ethical sense.⁷

As Derrick recounted in the essay, the challenge of teaching constitutional law inheres in great part in its abstract, largely indeterminate character. With precedents often seeming ad hoc and difficult to reconcile, how could students engage with the doctrine in a way that would give them the confidence, and perhaps the forbearance, to live with the lack of a cohesive body of rules? How could the students be encouraged to understand the Constitution as a "living document" where meaning is forged in the crucible of ongoing economic and political struggle? And how, in the context of a large-enrollment class conventionally taught as a lecture largely relegating students to a passive-learner role, could students be enlisted to participate in the endeavor as active learners, as collaborators, and even as co-teachers?

The answer, for Derrick, was a course text, *Constitutional Conflicts*,⁸ built around thirty-one hypothetical situations. Each student, in the role either of judge or advocate, and working in teams with other students, would present the issue of one hypothetical to the class, and develop the issue into an exam question, to be graded later. All students would write brief "op-ed" pieces on at least half of the hypotheticals. In these op-ed pieces, they would advance a reasoned point of view and address counterarguments, and they would also have the freedom to incorporate a personal reflection. Students would be considered for grade enhancements if they completed additional op-ed pieces, wrote a paper augmenting one of their reflections on a law or policy issue, or developed a new hypothetical for the class.

Presiding over this dynamic structure with its many moving parts for a class in which upwards of one hundred students might be enrolled, Derrick also committed at the end of the semester to significant written feedback on each student's portfolio of work. This commentary, in the form of a memo to each

⁶ *Id.* at 1049–50.

⁷ See, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 57, 191–92, 195 (2007) (hereinafter CARNEGIE REPORT).

⁸ DERRICK A. BELL, JR., CONSTITUTIONAL CONFLICTS (1997).

student, was far more extensive than students would receive on a traditional law school final exam.⁹ This final course evaluation was considerable because it addressed the students' entire work product for the course, including presentations for class, ongoing class participation, op-ed pieces, and exam questions.¹⁰ Derrick's extensive feedback and complex course design were reciprocated by students' active participation that required them to work through and internalize concepts at the heart of the course, and take responsibility for their learning.

Although he intentionally decentered his role as the leader of the discussion in the classroom, he remained extraordinarily present in the teaching endeavor by giving this kind of feedback. And, as my co-panelist Joy Radice pointed out, Derrick's facilitating presence, promotion of students' active role in the course, and creation of opportunities for more informal interaction among the students also fostered a sense of community that was unusual, and memorable, in a law school class. This community-mindedness helped to break down the guardedness, and, worse, mistrust, that often otherwise accompanies discussions on issues that create constitutional conflicts.

Several years ago, I organized a panel for the Association of American Law Schools' annual meeting on Writing Across the Curriculum,¹¹ which brought together educators in law, medicine, and teacher education to address how reflective, narrative, and other imaginative modes of writing ("non-transactional" writing in the lexicon of Writing Across the Curriculum¹²) can support the development of students as writers and practitioners in these professional education contexts. Derrick, always extra-committed, and always extra-generous with his time, graciously agreed to speak on the panel. He used the occasion to elaborate on how the exam question-writing component of his Constitutional Conflicts course offered students the kind of engaging, non-traditional writing opportunity that would, following the insights of Writing Across the Curriculum, support students' learning of doctrinal concepts that were crucial to their professional formation. So, too, Derrick might have added, were his students' op-ed reflections, a writing genre that disaggregated legal content from legal form, and allowed students greater latitude and voice in exploring a constitutional law topic. The vehicle of an op-ed that would, if actually published, necessarily seek to engage a broader, not exclusively legally-trained audience, freed students from the constraints of lawyerly discourse and structure. At the same time, it challenged them to articulate and work out in writing their insight about a legal issue.

The opportunity that Derrick offered his students to explore legal ideas in the voice of an op-ed writer, an instructor writing an exam, a judge, or an advocate, was one of the ways in which he tried to create a participatory pedagogy, and overcome the abstract nature of constitutional doctrine. I once interviewed Derrick for an anthology I co-edited on police brutality in New York City, and we had a wide-ranging conversation about race, crime, legal activism, and a pedagogy that could prepare law

⁹ See Bell, Constitutional Conflicts Essay, *supra* note 3, at 1049.

¹⁰ *Id.*

¹¹ Writing Across the Curriculum: Professional Communication and the Writing that Supports It, Section on Legal Writing, Reasoning, and Research, Ass'n of Am. Law Schs Ann. Meeting, New York, N.Y. (Jan. 4, 2008).

¹² The identification of writing functions as transactional (generally truth-based expository writing), poetic (non-instrumental writing that invites an appreciation of form), and expressive (writing that expresses the "ebb and flow" of a writer's ideas and emotions) is traceable to a report prepared by James Britton and Associates for Britain's Schools Council project. David R. Russell, *American Origins of the Writing-Across-the-Curriculum Movement*, in LANDMARK ESSAYS ON WRITING ACROSS THE CURRICULUM 14–15 (Charles Bazerman & David R. Russell eds., 1994). I use the term non-transactional to include reflective, narrative, and other imaginative and literary writing. Andrea McArdle, *Writing Across the Curriculum: Professional Communication and the Writing that Supports It*, 15 LEGAL WRITING 241, 245–50 (2009).

students for the challenges they would face in bringing about change in the law. Derrick observed that part of the problem was “how lawyers are trained to think about these strategies.”¹³ He continued:

I think that one of the things that we who teach in law school miss is the opportunity to portray more vividly those kinds of challenges. There are a lot of folks who come to law school and get sidetracked. They come with the idea of doing good through the law, and learn that it's tough to do good.¹⁴

I then suggested to him that his engaged approach to teaching constitutional law, by moving beyond the abstraction of the rules to considering the practical impact and import of law, would be a way to enlist students in, and better prepare them for, using law to do good. With characteristic candor, he pointed to the challenges that exist when teachers use non-conventional approaches: “It’s hard,” he said. “It’s not for every student. Some feel they don’t learn the rules that way, but that’s part of the matrix.”¹⁵ Law students, he added, also must confront the contradictions inherent in their position, that they are part of the system that they might wish to change.¹⁶

The capacity to confront contradiction is part of the approach to critical pedagogy that Derrick recognized when he invoked Paulo Freire. His essay begins with this quotation from Freire: “Education must begin with the solution of the teacher-student contradiction, by reconciling the poles of the contradiction so that both are simultaneously teachers and students.”¹⁷ As his students have been simultaneously learners and teachers of their peers, I believe that Derrick would say that as teacher and creator of the course he, too, continually learned from it, as he shared with me that some students perhaps struggled with or resisted the approach while many others thrived on it. This facility for self-reflection, this engagement and embrace of challenge, contradiction, and complexity made Derrick the inspiring teacher and role model that he was for so many of us who have aspired to his insight, creativity, care, and generosity. Derrick’s student-centered, participatory approach in the law school classroom has pointed the way to a pedagogical practice that ultimately offers more to, as it asks more of, law students. It is an approach that stretches and challenges us as teachers as well because it obliges us to confront our own authority in the classroom and surrender some control over student discourse. At the same time, it requires us to engage with a more extensive student work product. One way to remember and honor Derrick would be to consider taking up, or recommitting ourselves to, that challenge and his sense of purpose—preparing the next generations of lawyers, in the words of the Carnegie Report,¹⁸ for the profession; that is, we would do well to clear a path for them to participate, front and center, in their own professional formation.

¹³ Andrea McArdle, *An Interview with Derrick Bell: Reflections on Race, Crime, and Legal Activism*, in ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 249 (Andrea McArdle & Tanya Erzen eds., 2001).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 250.

¹⁷ Bell, Constitutional Conflicts Essay, *supra* note 3, at 1039 n.1 (quoting PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 59 (1989)).

¹⁸ See CARNEGIE REPORT, *supra* note 7.