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# White Privilege and the Case-Dialogue Method

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# The William Mitchell Law Raza Journal

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# The William Mitchell Law Raza Journal

-ARTICLE-

## *WHITE PRIVILEGE AND THE CASE-DIALOGUE METHOD*

*Rob Trousdale\**

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\* Second-year law student at William Mitchell College of Law. I wrote the initial draft of this paper for a seminar course entitled Race and the Law. I wish to thank Valerie Jensen for teaching that course and encouraging me to write on the topic of race and legal education.

I also wish to thank Duchess Harris, Colette Routel, Peter Thompson, Natalia Darancou, Craig Green, Greta Hanson, Andrew Poole and Siobhan Tolar for reading and commenting on previous drafts. Each of whom may, or may not, agree with the arguments in this article.

As a second-year law student it would have been impossible for me to write this piece without standing on the shoulders of previous scholars who have written about whiteness and the law. I am grateful for their contributions. I do not mean to invade their space. All mistakes are my own.

**I. INTRODUCTION**

*“Resist!”<sup>1</sup>*

- Duncan Kennedy

I am disappointed in the legal education I have received.<sup>2</sup> I entered law school with training in Catholic social teaching, liberation theology, creative nonviolence and the Catholic Worker Movement.<sup>3</sup> In many ways the training was unsettling. My service learning experiences exposed me to the human suffering that accompanies systemic forms of subordination and discrimination. Reconciling such harsh realities with my own lived experience, as the white son of a Mayo Clinic surgeon, is an ongoing struggle. I have not, however, struggled alone. My collegiate experiences exposed me to dynamic communities of scholars, activists and friends, all committed to fighting for social justice. Similarly to Eamon Joyce’s expectations of law school, I hoped to “utilize these tools and theories in the law school context, challenging the Master’s voice in many of the languages of the Master.”<sup>4</sup> After nearly two years of legal inculcation, many of my hopes have been dashed.

My hopes have been replaced by a legal academe that pushes discussion of race, class and economic inequality to the periphery.<sup>5</sup> In my own view, it is the immensity of silence that is disconcerting. The fact that I did not formally study critical race theory until well into the second year of my legal education is a testament to the institutional hostility to outsider scholarship.<sup>6</sup>

The experience has been demobilizing. I rarely feel intellectually engaged in the classroom. I often sit in class bored and leave tired, disillusioned. I think much of my fatigue emanates from what Duncan Kennedy has described as the experience of double surrender.<sup>7</sup> As explained by Kennedy:

The actual intellectual content of the law seems to consist of learning the rules, what they are and why they have to be the way they are, while rooting for the occasional judge who seems willing to make them marginally more humane. The basic experience is of double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system.<sup>8</sup>

I did not resist. I had qualms about the way issues were discussed but I adapted, I acquiesced to the system. I read the cases. I learned the nuances of case analysis. I learned the rules and how to apply them. I learned the basics of legal reasoning. I got by.

If my Property I grade was any indication, I was certainly not the “extraordinary first year student who could, on his or her own, develop a theoretically critical attitude toward this system.”<sup>9</sup> Yet I wanted to. I felt stymied by the decontextualized analyses of cases that led to contrived classroom discussions devoid of any political, theoretical or historical meaning. These experiences encouraged me to question the system of legal rules and reasoning that everyone was simply taught to accept.<sup>10</sup>

Duncan Kennedy has described the implicit messages embodied within the formal legal curriculum as “nonsense.”<sup>11</sup> This paper is an attempt to draw meaning from this body of nonsense. It is a personal attempt to embrace Duncan Kennedy’s call for resistance.<sup>12</sup> It is a product of my frustrations with a disappointing law school experience.

This paper argues that the dominant legal pedagogy, the case-dialogue method, perpetuates white privilege through active subordination of minority law students. The paper is divided into five sections. Part I explores the history of the case-dialogue method. This section begins with a discussion of the case-dialogue’s historical origins and development. Part I concludes with a description of the case-dialogue method and a discussion of the pedagogy’s early criticisms. Part II exposes the fundamental presumption of the case-dialogue method – the objectivity of legal analysis – as false. Part III analyzes the dynamics of white privilege. Whites’

unconsciousness of whiteness, the reality of white privilege and the need to confront racial subordination with race consciousness are all discussed. Part IV analyzes how the case-dialogue method's incorrect presumption of objectivity operates as a white perspective. Part IV concludes by analyzing how this analytical method subordinates minority law students in the classroom. Part V puts forth a number of suggestions for pedagogical change that would confront the existence of white privilege in legal education.

## II. A HISTORY OF THE CASE-DIALOGUE METHOD

*“Many law professors are conscientious and devoted teachers, and quite a few are inspired ones, but their efforts are constrained and hobbled by an educational model that treats the entire twentieth century as little more than a passing annoyance.”*<sup>13</sup>

- Edward Rubin

The nineteenth century was a period of uncertainty in American legal education.<sup>14</sup> There was not a uniform approach for teaching the law.<sup>15</sup> Many students focused on the scholarly aspects of the law and studied philosophy and Roman law in conjunction with their studies of substantive American law.<sup>16</sup> Other law students forwent a formal classroom education and learned the law by apprenticeships.<sup>17</sup> The popularity of legal apprenticeships threatened the very existence of law schools.<sup>18</sup> Universities saw little scholarly value in the study of law because it was seen as a craft, not an academic subject.<sup>19</sup> The strongest critics believed that law schools should be abolished in favor of a straight apprenticeship program.<sup>20</sup>

Christopher Langdell's appointment to the deanship at Harvard in 1870 ended any possibility of law school's demise as an institution.<sup>21</sup> Langdell regarded the law as a science in its own right.<sup>22</sup> As a science, Langdell perceived the law as a coherent body of rules.<sup>23</sup> To find the rules, students must consult authoritative sources, such as the Constitution or judicial

opinions.<sup>24</sup> Langdell believed that “scientific” legal principles could be found by studying these authoritative sources.<sup>25</sup> Edward Rubin provides a succinct explanation of Langdell’s perspective on the law:

To study the law, according to the curricular innovations that Langdell introduced, meant to discern the principles that determined good decisions and gave those decisions coherence. To improve the law meant to alter or overrule judicial decisions that conflicted with those principles so that the totality of decisions formed a conceptually coherent unit. This framework permitted the analogy between the study of law and the study of natural science.<sup>26</sup>

A scientific inquiry, in Langdell’s view, started and stopped with the analysis of authoritative sources such as appellate court decisions.<sup>27</sup> The focus on court cases in law school curriculum became known as the case-dialogue method.<sup>28</sup>

The formal introduction of Langdell’s case-dialogue method occurred the same year Langdell assumed the deanship, 1870.<sup>29</sup> Viewing law through the prism of “science” provided additional scholarly legitimacy to the subject.<sup>30</sup> Concerns over the scholarliness of the law dissipated and law schools across the country adopted the case-dialogue method.<sup>31</sup>

Langdell’s broad decision to limit the study of law to case reports had a fair share of practical problems.<sup>32</sup> Certainly, students could not read all the case reports on a subject.<sup>33</sup> Langdell solved this problem by creating casebooks that included only a select number of legal decisions.<sup>34</sup> Kara Abramson described Langdell’s casebooks as such: “Not all legal decisions were fair game in his pedagogic vision, however. Instead, he selected only a few designed to reveal a body of doctrine or illustrate mistaken deviations from the rules.”<sup>35</sup>

Langdell was also confronted with a decision regarding the appropriate role of the law professor.<sup>36</sup> Langdell believed that an examination of original sources would not be scientific if it simply involved rote memorization of facts and rules.<sup>37</sup> Langdell decided to abandon traditional lecturing and adopt the “Socratic method.”<sup>38</sup> Instead of lecturing, professors would ask the

students to provide a case's facts, procedural history, legal issue, and reasoning.<sup>39</sup> Students discovered the necessary rules and principles of a subject through their Socratic dialogue with the professor.<sup>40</sup>

By the early twentieth century, Langdell's case-dialogue method became the norm in American law schools.<sup>41</sup> Remarkably, despite over a century of history, Langdell's case-dialogue method continues to be the dominant pedagogical tool in the modern law school classroom.<sup>42</sup>

John Sexton discusses the resiliency of Langdell's pedagogical approach:

What is surprising is that, in the face of seismic changes in the world of law practice, it has taken so long for the conversation [about reforming U.S. legal education] to begin – and that our pedagogy has remained unchanged for over 100 years. True, the last three decades have seen the development of clinical legal education and interdisciplinary work; but these pedagogies have matured within the traditional framework, with the actual change being at the margins.<sup>43</sup>

As alluded to by John Sexton, there have been challenges to Langdell's pedagogy.<sup>44</sup> In the 1920's, legal realists challenged Langdell's view of the law as a distinct science.<sup>45</sup> Legal realists related the law to the social environment in which it originated.<sup>46</sup> Realists believed that fundamental legal rules and principles meant little if they were not analyzed within a broader social context.<sup>47</sup> Langdell's "scientific" inquiry, however, did not move beyond the facts and reasoning contained in a court's opinion.<sup>48</sup> Realists believed such reasoning was narrow and constrained.<sup>49</sup> Despite legal realists' challenge to Langdell's approach, law schools continued to employ Langell's methods in their classrooms.<sup>50</sup>

Developments over the last fifty years have also challenged the predominance of Langdell's pedagogy in the law school classroom.<sup>51</sup> Schools have adopted more electives and courses involving clinical work.<sup>52</sup> New pedagogies have been introduced such as the problem method and the inclusion of broad introductory legal courses.<sup>53</sup> However, as described by Kara



Abramson, these changes have represented “more of an ornament atop the dominant Langdellian cast of legal education rather than a replacement of it.”<sup>54</sup>

Every law student who has been asked to recite the material substantive facts of *Palsgraf*, or to explain the court’s reasoning in *Erie Railroad*, has been touched by Langdell’s legacy. Langdell’s case-dialogue method pedagogy continues to stand as the overarching framework for teaching law students how to “think like a lawyer.”

### III. THE FALSE PRESUMPTION OF THE CASE-DIALOGUE METHOD

*“There is a real danger that inculcation into a legal culture - learning the rules of the game - can divert the initiates into a love of legal reasoning for its own sake. Seduced by the search for elegance and coherence and obsessed with technique, they lose sight of the ends and purposes which the law is intended to serve.”<sup>55</sup>*

- Michael Cooper

Law students are often told that they are being trained to think like lawyers. Thinking like a lawyer is commonly understood as a form of critical thinking used to solve legal problems.<sup>56</sup> The distinction between thinking like a lawyer and other forms of critical thinking lies in the lawyer’s ability to spot and define a legal problem and then utilize the relevant facts and legal rules necessary to resolve that problem in their client’s favor.<sup>57</sup>

The case-dialogue method is adeptly used in the training of law students to think like lawyers.<sup>58</sup> As discussed previously, it was Langdell’s hope that students would extrapolate “scientific” legal principles from the relevant facts provided in a case report.<sup>59</sup> In order to deduce such “scientific” legal principles, students must make distinctions between relevant and irrelevant facts, while spotting substantive legal issues.<sup>60</sup> Langdell’s case-dialogue method

approach encourages students to adopt the type of critical thinking typically associated with thinking like a lawyer.

The Carnegie Foundation for the Advancement of Teaching explained the impact the case-dialogue method had on students in a 2006 report on the status of American legal education.<sup>61</sup> The report argued that the extrapolation of legal principles from the narrow sets of facts provided in casebook opinions discouraged moral inquiry into the law.<sup>62</sup> As described in the report, the case-dialogue method's categorization of complex human interactions and conflicts into neat factual boxes discourages the “thinking through [of] the social consequences or ethical aspects of the conclusions.”<sup>63</sup> The Carnegie Report concluded that this model of legal education warns students “not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analysis.”<sup>64</sup>

If Langdell's fundamental presumption was correct, mainly that law is a type of natural science, then the case-dialogue method's failure to initiate moral inquiry is of little concern. Surely, if the law consists of unequivocally valid principles that produce good law, one need only discover those principles and apply them to new situations. If this were the case, moral inquiry, indeed, would serve only to cloud the analysis of scientific legal principles.

Langdell's fundamental presumption, however, is not correct. In his discussion of Langdell's pedagogy, Edward Rubin asserts: “the idea that law is a type of natural science is obsolete in its entirety.”<sup>65</sup> Rubin recognizes the current belief that the social sciences “provide the most useful analogies for the academic study of law in the sense, that they, like law, are “human sciences.”<sup>66</sup> Rubin explains how most scholars' conception of the law is sociological.<sup>67</sup> The law, in this regard, is seen as a construction of society's cultural values.<sup>68</sup> Rubin laments the failure of legal curriculum to recognize such a change:

[S]tudents of politics learned a great many lessons in the forty years after 1870, among them the idea that the real world, and not a library, is the true laboratory of the human sciences. Legal academics needed another seventy years or so to learn this, and they have not yet applied those lessons to the law school curriculum.<sup>69</sup>

Modern scholarship has displaced Langdell's premise of the law's scientific objectivity. Yet, the case-dialogue method is still the primary pedagogical tool in the modern law school curriculum.<sup>70</sup> As we shall see, the repercussions of stubbornly adhering to a faulty analytical framework go beyond the discouragement of moral inquiry within legal analysis. However, before we discuss the pedagogy's influence on issues of race and the law, we must first acknowledge the existence of whiteness as a racial category. This is done next.

#### IV. THE POWER AND PRIVILEGES OF WHITENESS

*"Whites spend a lot of time trying to persuade ourselves and each other that racism has nothing to do with us. A big step would be for whites to admit that we do benefit from racism and then to consider what to do about it."*<sup>71</sup>

- Stephanie Wildman

When I first heard the term critical race theory, an image of a black man came into my head. In contrast, when someone provides a description of an individual, and that individual's race is not specified, I readily assume that the person described is white.<sup>72</sup> Moreover, as a white person, I can curse, spit and eat with my mouth open without having others attribute my behavior with the poor morality or civility of my race.<sup>73</sup> Simply put, whiteness operates as the racial norm.<sup>74</sup> As the normative standard for race, whiteness often goes unperceived.<sup>75</sup> Barbara Flagg describes whites' unconsciousness of whiteness as the transparency phenomenon.<sup>76</sup> In her description of the transparency phenomenon, Flagg notes:

White people externalize race. For most whites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times, to

reflect on oneself (or other whites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive. Whites' "consciousness" of whiteness is predominantly *unconsciousness* of whiteness.<sup>77</sup>

Having the option to ignore race is a privilege of whiteness. The dynamics of white privilege, however, extend beyond not having to think about race. In her article, *White Privilege: Unpacking the Invisible Knapsack*, Peggy McIntosh provides a conceptual framework for understanding white privilege. McIntosh describes white privilege as an invisible knapsack of unearned assets.<sup>78</sup> These assets, such as passports, clothes, guides, and blank checks are especially difficult for whites to notice.<sup>79</sup>

Whites can rely on cashing in the assets of their whiteness throughout many of their lived experiences.<sup>80</sup> The assets are extensive and can be used in a variety of situations. McIntosh provides a number of examples: whites need not worry that their children will be provided a curriculum that testifies to the existence of their race;<sup>81</sup> whites can be relatively confident that if they need to talk to "the person in charge" that person will be white;<sup>82</sup> whites are never asked to be the "spokeswoman" for their racial group.<sup>83</sup>

The conceptualization of white privilege as an invisible knapsack is valuable because it helps to deconstruct the transparency of whiteness and white privilege. As McIntosh describes:

Describing white privilege makes one newly accountable. As we in Women's Studies work to reveal male privilege and ask men to give up some of their power, so one who writes about having white privilege must ask, "Having described it, what will I do to lessen or end it?"<sup>84</sup>

The benefits of white privilege go beyond the private, everyday effects discussed by McIntosh. Cheryl Harris testifies to the systemic nature of white privilege in her article, *Whiteness as Property*. As the title suggests, Harris argues that whiteness operates as a form of property.<sup>85</sup> Harris uses the histories of African slavery and Native American

land conquest to trace the “evolution of whiteness from color to race to status to property.”<sup>86</sup> Harris’ historical analysis leads her to conclude: “The law’s construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what *legal* entitlements arise from that status).”<sup>87</sup> Harris concludes that the legal entitlements of whiteness continue to be protected today.<sup>88</sup>

The work of McIntosh and Harris make visible the ways an unconsciousness of whiteness perpetuates hidden systems of oppression. Whites interested in racial justice must acknowledge their own whiteness and its corresponding privileges.<sup>89</sup> Whites, however, have a tendency to equate race consciousness with prejudice.<sup>90</sup> Many whites, fearful of appearing prejudiced, claim to be “colorblind” when it comes to race.<sup>91</sup> A colorblind approach implies that racism is nonexistent or has been defeated.<sup>92</sup> McIntosh and Harris debunk the notion that we live in a post-racial environment. Their message reveals the importance of exploring racial privilege through active race consciousness.<sup>93</sup>

As a white man that grew up in a white family, I know that race consciousness is difficult for most whites. Race consciousness forces whites to confront their own relationship with systems of oppression. Uncovering one’s connection to racial subordination is uncomfortable. Indeed, the label of “racist” is vilifying. This is so because whites are taught to associate racism with individualistic discriminatory treatment.<sup>94</sup> Yet the singular association of racism with discrimination obscures its corollary: privilege.<sup>95</sup> With racial privilege unacknowledged, terms like racism become pigeonholed in their meaning. The racist is associated with the Ku Klux Klan member and the skinhead. The white not engaged in overt racial bigotry is classified as neutral or

nonracist, despite enjoying the daily benefits of white privilege. It is difficult for whites, comfortably entrenched in their neutrality, to confront the ways in which their identity contributes to racial subordination.

The remainder of this paper is an attempt to escape that comfort zone. The next section juxtaposes the case-dialogue method's false presumption of legal objectivity with the call for racial consciousness.

## V. THE CASE-DIALOGUE METHOD'S PERPETUATION OF WHITE PRIVILEGE

*"To assume the air of perspectivelessness that is expected in the classroom, minority students must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts."*<sup>96</sup>

- Kimberle Crenshaw

An understanding of white privilege sheds a particularly unfavorable light on Langdell's case-dialogue method. The false presumption of the case-dialogue method, objectivity, stems from Langdell's incorrect understanding of the law as a natural science.<sup>97</sup> Langdell made this assumption at a time when nearly all lawmakers, legal educators, and law students were white. Thus, far from interrogating whiteness, the case-dialogue method affirms the transparency phenomenon by assigning whiteness as *the* objective value. Langdell's legacy lives on, as most contemporary legal educators disregard the discussion of race in the classroom.<sup>98</sup> Law students, in turn, are taught to adopt a colorblind approach to the law.<sup>99</sup>

This academic environment places minority law students in compromising positions. Kimberle Williams Crenshaw, a law professor and critical race theorist, examined the minority law student experience in her article, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*.<sup>100</sup> Crenshaw began with the assumption that minority law students often have

different values, beliefs, and experiences than their classmates and professors.<sup>101</sup> Crenshaw found that these differences are rarely discussed in a law school classroom because of the dominant assumption that legal analysis should be objective.<sup>102</sup> As described by Crenshaw, the objectivity of legal analysis is presumed to posit “an analytical stance that has no specific cultural, political, or class characteristics.”<sup>103</sup> Crenshaw coins this mode of analysis “perspectivelessness.”<sup>104</sup>

Crenshaw explains how the analysis of legal issues through the mode of perspectivelessness effects minority law students.<sup>105</sup> Crenshaw begins with a discussion of perspectivelessness itself:

While it seems relatively straightforward that objects, issues, and other phenomena are interpreted from the vantage point of the observer, many law classes are conducted as though it is possible to create, weigh, and evaluate rules and arguments in ways that neither reflect nor privilege any particular perspective or world view. Thus, law school discourse proceeds with the expectation that students will learn to perform the standard mode of legal reasoning and embrace its presumption of perspectivelessness.<sup>106</sup>

Crenshaw argues that this dichotomy places minority students in a compromising position.<sup>107</sup> Operating within the case-dialogue method leaves minority law students with one of two options.<sup>108</sup> They may choose to deny their identity and analyze issues “objectively” within the Langdellian framework.<sup>109</sup> Or they may accept and assert their identity and risk being ostracized for failing to think like a lawyer.<sup>110</sup> Thus, if a minority student wants to participate in the “objective” discussion of a court’s reasoning she must leave her racial identity at the door and put on the hat of a supposedly colorless legal analyst. Crenshaw describes the consequences of such an analysis:

The consequence of adopting this colorless mode is that when the discussion involves racial minorities, minority students are expected to stand apart from their

history, their identity, and sometimes their own immediate circumstances and discuss issues without making reference to the reality that the “they” or “them” being discussed is from their perspective “we” or “us.”<sup>111</sup>

The result is a classroom environment that actively encourages the silencing of minority students.<sup>112</sup> Forced to stand apart from their own self, minorities are generally more reluctant than their white counterparts to speak in the classroom.<sup>113</sup>

The silencing of minority law students supports both the private, everyday forms of white privilege discussed by Peggy McIntosh and the public, more systemic forms of white privilege discussed by Cheryl Harris. In reference to the everyday privilege discussed by McIntosh, the white law student can complete the assigned reading and answer a professor’s questions in class, assured that the legal reasoning asked of them will affirm their racial identity and history. This privilege is as much an asset as the property hornbook sitting inside the white student’s backpack.<sup>114</sup> The white student, while sitting in class, unhindered by thoughts of identity, remains oblivious to the systemic forms of racial subordination embedded within the law.

In reference to the systemic forms of white privilege discussed by Harris, discussions of whiteness as property never occur, as the voices that have the power to reveal the law’s endorsement of racial subordination are silenced. In the cruelest of ironies, the minority law student works within a legal educational system that produces “students who are dedicated to the maintenance of the status quo, even though that status quo is oppressive to them.”<sup>115</sup>

The premise of objectivity, the bedrock of the case-dialogue pedagogy, creates a classroom environment steeped in an unconsciousness of whiteness. The pedagogy subordinates minority law students and preserves white privilege. Possibilities for change are discussed next.



**VI. A DIFFERENT WAY TO LEARN THE LAW**

*“Education either functions as an instrument which is used to facilitate the integration of the younger generation into the logic of the present system and bring about conformity to it, or it becomes “the practice of freedom,” the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world.”*<sup>116</sup>

- Richard Shaull

Derrick Bell, a prominent critical race theorist, has suggested that white self-interest is the primary motivation of racial progress.<sup>117</sup> As a white law student, I take Bell’s suggestion as a challenge. I believe Bell is challenging all of those with racial privilege to work towards developing racial equality in ways that are not motivated by self-interest.

The prevalence of Langdell’s case-dialogue method pedagogy represents the failure of law schools, as predominately white institutions, to accept Bell’s challenge. If law schools took white privilege seriously, they would not adopt a pedagogical approach that supports the faulty notion of perspectiveless legal analysis. If law schools took white privilege seriously, they would not create a classroom environment that places students in compromising positions due to their minority status. If law schools took white privilege seriously, they would not disguise the systemic forms of subordination embedded within the law.

I am not the first to argue that traditional legal pedagogy fails to interrogate the relationship between race, whiteness and the law.<sup>118</sup> In a recent work, Margalynne Armstrong and Stephanie Wildman argue for the adoption of “color insight” within the law school curriculum.<sup>119</sup> Armstrong and Wildman stress the importance of talking about race, particularly whiteness, in the law school classroom.<sup>120</sup> Armstrong and Wildman argue that the need to discuss race, and whiteness, arises from the fact that traditional legal pedagogy “tends to

‘whitewash’ law, ignoring the roles of whiteness and privilege in the construction of legal rules, institutions and the application of law.”<sup>121</sup> After describing the need to talk about race, their conclusion provides a number of suggestions for the improvement of racial dialogue, both institutionally and in the classroom.<sup>122</sup> Institutionally, an expansion of forums that discuss issues of racial justice is suggested.<sup>123</sup> Possible forums include social justice centers, film series, and reading groups facilitated by faculty.<sup>124</sup> In the classroom, assigned reading and discussion of different theoretical perspectives, ranging from critical race theory to law and economics, is suggested.<sup>125</sup>

Armstrong and Wildman’s suggestions are unquestionably valuable. Their approach is pragmatic. Assigning a broader reading list can immediately be added to a professor’s syllabus. All law schools could open their auditorium or largest classroom a couple times a month for a film series focused on issues of race. These practical suggestions would help both students and faculty understand the role of race, particularly whiteness, in the law and the law school setting.

An understanding of Langdell’s faulty analytical framework bolsters Armstrong and Wildman’s argument for color insight in the law school classroom. In my view, however, legal educators should go beyond Armstrong and Wildman’s suggestions for “setting a context for talking about race and whiteness”<sup>126</sup> and adopt a pedagogy that fully interrogates the case-dialogue method’s false assumption of objectivity.

I am not suggesting that every first-year Property case should be deconstructed by neo-Marxist thought.<sup>127</sup> However, similarly to Armstrong and Wildman, I do feel that the formal incorporation of theory within the legal curriculum would help students deconstruct legal reasoning’s supposed objectivity.<sup>128</sup> Many legal scholars, especially those enamored with the traditional American liberal legal system, are critical of the incorporation of theory within legal

studies, arguing that the incorporation of theory abandons the objectivity and importance of law.<sup>129</sup> Yet the pedagogy I propose would not seek to abandon the law.<sup>130</sup> As described by Duncan Kennedy, I envision a pedagogy that allows students “to think about the law in a way that will allow one to enter into it, to criticize without utterly rejecting it, and to manipulate it without self-abandonment to their system of thinking and doing.”<sup>131</sup> It is there, working within a *knowingly* flawed legal system, where students could constructively and productively challenge the legitimacy of the legal rules and reasoning they are taught to adopt.

A model approach would be similar to John Calmore’s understanding of legal education “as the practice of freedom.”<sup>132</sup> Calmore argues that “traditional approaches to teaching that simply reinforce domination” must be abandoned.<sup>133</sup> Calmore’s pedagogy directly challenges the decontextualized reading of cases endorsed by the case-dialogue method. The core tenets of his pedagogy are succinctly outlined in the Preface of the text he uses in his Antidiscrimination Law course:

Our primary goal is to enable students to read law critically with a special sensitivity to the ways in which legal techniques, rhetorical strategies, and legal practices reproduce patterns of power and privilege that work to subordinate people based on categories of identity. The materials are designed to reveal these strategies through close readings of the language and underlying assumptions in judicial opinions. Students are encouraged to examine legal opinions for their similarities and differences in approaches to power and privilege across identity categories and to compare them with insights garnered from the wide range of multi-disciplinary scholarly excerpts surrounding the case texts.<sup>134</sup>

A pedagogy based on Calmore’s approach would adopt Armstrong and Wildman’s notion of color insight, while also interrogating Langdell’s incorrect assumption of legal objectivity. It would be a critical study of the law. It would challenge white privilege. It would be a more

honest, challenging and intellectual approach than the current model. It would be a better legal education.

## CITATIONS

<sup>1</sup> Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, in *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 16 (New York University Press 2004). Kennedy's critique of legal education should be mandatory reading for everyone involved — students and (perhaps especially) professors.

<sup>2</sup> The reflections of Eamon Joyce and Duncan Kennedy assisted greatly as I struggled to articulate my frustrations with law school. See Eamon P. Joyce, *Whiteness (and other ness(es)) as Property Revisited: A Response to Derrick Bell and a Vision for Multi-Cultural Coalitions and Legalisms*, 6 *U. PA. J.L. & SOC. CHANGE* 1 (2002); See also Kennedy, *supra* note 1.

<sup>3</sup> I am indebted to Professors Mark Chmiel, Sr. Louise Lears and Fr. Richard Quirk for teaching me the interconnectedness of non-violence, spirituality and social justice. I am also grateful to the LeaderworX community of Princeton, New Jersey for struggling with me as we tried to put our faith into action.

<sup>4</sup> Joyce, *supra* note 2, at 2.

<sup>5</sup> See Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 *U. PA. L. REV.* 1349, 1349–1352 (1992) (arguing outsider scholarship that discusses “key issues of race law” continues to be marginalized by mainstream legal scholars); Larry Cata Backer, *Measuring the Penetration of Outsider Scholarship into the Courts: Indifference, Hostility, Engagement*, 33 *U.C. DAVIS L. REV.* 1173 (2000).

<sup>6</sup> See generally Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making do While Making Waves* 12 *BERKELEY LA RAZA J.* 137, 149 (2001) (discussing the “institutional hostility to critical theory” in legal education).

<sup>7</sup> Kennedy, *supra* note 1, at 21–22.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 38.

<sup>10</sup> I wish to thank Professor Valerie Jensen for exposing me to the world of critical scholarship. The words and wisdom of scholars like Derrick Bell, Kimberle Crenshaw, Richard Delgado, bell hooks, Mari Matsuda, Duncan Kennedy, Stephanie Wildman and many others, have helped me fight through a debilitating law school experience. Indeed, much of what follows is not my voice, but the voices and thoughts of critical scholars much braver and wiser than I.

<sup>11</sup> Kennedy, *supra* note 1, at 36.

<sup>12</sup> Kennedy, *supra* note 1, at 16 (urging law students to not simply accept what they are told about law, legal reasoning and the legal profession).

<sup>13</sup> Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 *VAND. L. REV.* 609, 610 (2007).

<sup>14</sup> See Kara Abramson, “*Art for a Better Life: A New Image of American Legal Education*,” 2006 *BYU EDUC. & L.J.* 227, 229 (2006).

<sup>15</sup> See *id.* at 229–230.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* at 230.

<sup>18</sup> See Russell Weaver, *Langdell's Legacy: Living with the Case Method*, 36 *VILL. L. REV.* 517, 529 (1991).

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at 521–532.

<sup>21</sup> See *id.*

<sup>22</sup> *Id.* at 527.

<sup>23</sup> Rubin, *supra* note 13, at 640.

<sup>24</sup> See *id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Weaver, *supra* note 18, at 527–528 (“In his view, scientific method involved an examination of “original sources” – the printed reports of cases.”).

<sup>28</sup> See *id.* at 543. Langdell's pedagogical method is often referred to as the “case method.” *Id.* I use the term “case-dialogue method” because it incorporates the Socratic nature of the pedagogy. See *id.* at 532; Toni Fine, *Reflections on U.S. Law Curricular Reform*, 10 *GERMAN L.J.* 717 (2009) (referring to the case-dialogue method of teaching).

<sup>29</sup> *Id.* at 520.

<sup>30</sup> See *id.* at 529.

<sup>31</sup> See *id.* at 543.

<sup>32</sup> *Id.* at 531.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Abramson, *supra* note 14, at 230.

<sup>36</sup> See Weaver, *supra* note 18, at 532.

<sup>37</sup> See Abramson, *supra* note 14, at 230.

<sup>38</sup> Weaver, *supra* note 18, at 532.

<sup>39</sup> See *id.* at 532–533.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 518.

<sup>42</sup> See Fine, *supra* note 28, at 728–729.

<sup>43</sup> *Id.* at 728–729 (quoting John E. Sexton, “Out of the Box” Thinking About the Training of Lawyers in the Next Millennium, 33 U. TOL. L. REV. 189, 194 (2001)).

<sup>44</sup> Abramson, *supra* note 14, at 232–240.

<sup>45</sup> *Id.* at 232–233.

<sup>46</sup> See *id.*

<sup>47</sup> See Abramson, *supra* note 14, at 232–234.

<sup>48</sup> See *id.* at 230–231.

<sup>49</sup> See *id.* at 232–234.

<sup>50</sup> See Fine, *supra* note 28, at 728–729.

<sup>51</sup> See Abramson, *supra* note 14 at 235–236.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> Michael Coper, *Legal Knowledge, the Responsibility of Lawyers, and the Task of Law Schools*, 39 U. TOL. L. REV. 251, 254 (2008).

<sup>56</sup> See Sanja Ivkovic, *Exploring Lay Participation in Legal Decision Making*, 40 CORNELL INT’L L.J. 429, 437–438 (2007).

<sup>57</sup> See *id.*

<sup>58</sup> See Weaver, *supra* note 18, at 549.

<sup>59</sup> See *infra* Part I.

<sup>60</sup> See Weaver, *supra* note 18, at 527–529.

<sup>61</sup> Fine, *supra* note 28, at 717.

<sup>62</sup> *Id.* at 722.

<sup>63</sup> *Id.* (citing WILLIAM M. SULLIVAN ET AL., SUMMARY - M EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6 (2007)).

<sup>64</sup> *Id.*

<sup>65</sup> Rubin, *supra* note 13, at 635.

<sup>66</sup> *Id.* at 636.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* (Rather than being seen as a reflection of trans-cultural or philosophic norms, as in the natural law tradition, most scholars now regard the law as a product of culture, constructed by a particular society and drawing its value from the role it plays in that society. It is seen as the study of human beings, with all the complexity, normativity, and subjectivity that this study necessarily implies.”).

<sup>69</sup> *Id.* at 639. Rubin explains, with lucidity, the problems of Langdell’s narrow framework:

[I]t is important not only to know the case law regarding torts, but also to know how lawyers interpret that law, how the law and the lawyers’ interpretations affect businesses and private actors, and what effects are best for society as a whole. It is important not only to know the language of a regulatory statute, but also to know how that language is interpreted by implementing agencies, private attorneys, and the regulated parties, as well as the effect it produces on those parties, and whether those effects are best for society according to some policy objective. All these issues are central to the study of law once we adopt the modern view that this study is a mode of social science, a methodology that

did not exist, but was about to be discovered, when Langdell . . . developed the Harvard curriculum. *Id.* 640-641.

<sup>70</sup> See *Infra* Part I.

<sup>71</sup> RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 1229 (Juan F. Perea, Richard Delgado, Angela P. Harris, Jean Stefancic, Stephanie M. Wildman eds., Thomson West 2d ed. 2007) (citing Stephanie M. Wildman, *Looking Squarely at "White Bashing,"* S.F. CHRON., Feb. 26, 1998 at A21, col.2).

<sup>72</sup> See Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 973 (1993) (posing reflective questions that challenge white readers to recognize their own whiteness).

<sup>73</sup> See Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, in WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM 109, 110-111 (Paula S. Rothenberg ed., 2d ed. 2005) (providing twenty-six "daily effects of white privilege" that McIntosh discovered in her own life).

<sup>74</sup> Flagg, *supra* note 72, at 971 ("Whiteness is the racial norm."); see also Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1666 (1995) ("Because the dominant norms of whiteness are not visible to whites . . .").

<sup>75</sup> Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, in CRITICAL RACE THEORY: THE CUTTING EDGE 564, 569 (Richard Delgado ed., 1995) ("Being the norm allows whites to ignore race, except when they perceive race (usually someone else's) as intruding upon their lives").

<sup>76</sup> Flagg, *supra* note 72, at 957.

<sup>77</sup> *Id.* at 970.

<sup>78</sup> McIntosh, *supra* note 73, at 109; see also Mahoney, *supra* note 74, at 1665-1666 (explaining that "[o]pening a bank account appears routine, as does air travel without police stops, or shopping without facing questions about one's identification — unless the absence of suspicion is a privilege of whiteness.").

<sup>79</sup> *Id.* at 110 (relating the unconsciousness of male privilege to the invisibility of skin privilege).

<sup>80</sup> *Id.* at 109.

<sup>81</sup> *Id.* at 110.

<sup>82</sup> *Id.* at 111.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 109.

<sup>85</sup> Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1724 (1993) ("[T]he law has established and protected an actual property interest in whiteness itself, which shares the critical characteristics of property and accords with the many and varied theoretical descriptions of property.").

<sup>86</sup> *Id.* at 1714.

<sup>87</sup> *Id.* at 1725.

<sup>88</sup> See *id.* at 1761-1776 (arguing that a property interest in whiteness continues within the legal rules and reasoning concerning the legal definitions of group identity and affirmative action).

<sup>89</sup> See Michael Poulshock, *The Struggle within the Struggle: White Supremacy in the Movement for Racial Justice* 14 Temp. Pol. & Civ. Rts. L. Rev. 259, 261 (2004) (suggesting that "[W]hites who are concerned about or involved in the struggle for racial equality need, at some point, to confront their privileged status within those struggles.").

<sup>90</sup> Mahoney, *supra* note 74, at 1667 (explaining that many whites view the recognition and discussion of race as racially prejudicial).

<sup>91</sup> See *id.* ("Whites are color evasive about people of color, often declining to identify the race of someone who is "other" than white in an effort to avoid appearing prejudiced. . . . For whites, noticing race is not nice for whites because the meaning of "race" itself is "Other," inferior, and stigmatized.").

<sup>92</sup> See Flagg, *supra* note 72, at 953 ("[T]he more certain we are that race is never relevant to any assessment of an individual's abilities or achievements, the more certain we are that we have overcome racism as we conceive of it.").

<sup>93</sup> See generally Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008). I am deeply indebted to the thoughts and insights of Armstrong and Wildman. I view this paper as a continuation of their persuasive argument for the need of color insight in the law school environment. *Id.* at 635.

<sup>94</sup> See Stephanie M. Wildman with Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, in CRITICAL RACE THEORY: THE CUTTING Edge, *supra* note 75, at 573 (“Increasingly, people use –isms language as a way to describe discriminatory treatment.”).

<sup>95</sup> *Id.* at 574 (arguing that the language used in discussions of racism and discrimination hide systems of power and privilege).

<sup>96</sup> Kimberle Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN’S STUD. 33, 35-36 (1994).

<sup>97</sup> See *infra* Part II.

<sup>98</sup> See Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 68 (1994) (finding that “[t]he message of color blindness also is implicit in many of the common practices of legal education.”).

<sup>99</sup> See *id.* at 67–76.

<sup>100</sup> Crenshaw, *supra* note 96, at 33–52.

<sup>101</sup> *Id.* at 34–35.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 35.

<sup>104</sup> *Id.*

<sup>105</sup> See *id.* at 35–49.

<sup>106</sup> *Id.* at 35.

<sup>107</sup> See *id.* at 36–39.

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See *id.* The risks associated with stepping “outside the doctrinal constraints” go beyond the possibility of being ostracized for failing to think like a lawyer. As explained by Crenshaw: “[N]ot only have they failed in their efforts to “think like a lawyer,” they have committed an even more stigmatizing faux pas: they have taken the discussion far afield by revealing their emotional preoccupation with their racial identity.” *Id.* at 39.

<sup>111</sup> *Id.* at 36.

<sup>112</sup> Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847, 883-884 (2000) (explaining that “[t]he pedagogical techniques that are utilized in the law school classroom, which is designed architectonically and epistemologically to be hierarchical, have been repeatedly shown to alienate and silence students, especially students of color and women from different backgrounds.”).

<sup>113</sup> See *id.*

<sup>114</sup> See Greenberg, *supra* note 98, at 51 (citing the disparities in academic performance between white and black students).

<sup>115</sup> Montoya, *supra* note 112, at 883.

<sup>116</sup> John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903 (1997).

<sup>117</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“Translated from judicial activity in racial cases both before and after *Brown*, this principle of “interest convergence” provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”); Perea, *supra* 71, at 1228 (citing Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980)) (asking students if it “[i]s realistic to expect Whites to have a stake in combating racism?”)

<sup>118</sup> See generally Armstrong & Wildman, *supra* note 93; Calmore, *supra* note 116; Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education – A Curricular Study with LatCritical Commentary*, 13 Berkeley L. Raza L.J. 119 (2002).

<sup>119</sup> Armstrong & Wildman, *supra* note 93 at 635.

<sup>120</sup> *Id.* at 652.

<sup>121</sup> *Id.*

<sup>122</sup> See *id.* at 662–671.

<sup>123</sup> *Id.* at 662–664.

<sup>124</sup> *Id.*



<sup>125</sup> *Id.* at 666–672. Armstrong and Wildman provide different suggestions depending on class size (large Socratic classrooms v. smaller seminars). *Id.* The fundamental point, however, is the same: create a common ground for discussion of race and whiteness. *See id.*

<sup>126</sup> *Id.* at 666.

<sup>127</sup> *See id.* at 40 (explaining that “[i]t would be a full time job just to give instrumental Marxist accounts of the cases on consideration doctrine in first year contracts.”).

<sup>128</sup> I am generally referring to critical legal studies, critical race theory, law and economics, feminist theory and queer studies.

<sup>129</sup> *See generally* Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 789 (1999) (criticizing critical race theory as “an unprincipled, divisive and ultimately unhelpful attack on the liberal tradition in America.”); Richard Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40 (labeling critical race theorists “the lunatic core” of “radical legal egalitarianism.”).

<sup>130</sup> Nor did Professor Calmore’s. Calmore, *supra* note 116, at 909 (“The pedagogy I seek to validate does not dismiss the significance of law.”).

<sup>131</sup> Kennedy, *supra* note 1, at 42.

<sup>132</sup> Calmore is borrowing the phrase from the Brazilian critical pedagogist, Paulo Freire. Calmore, *supra* note 116, at 908.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 908 n.26. Calmore used this book in a seminar course on Antidiscrimination law. A similar pedagogical approach could, however, be implemented in larger “core” courses. *See generally* Armstrong & Wildman, *supra* note 93 at 666–670 (discussing the value in being “more conscientious about noticing when issues of race and whiteness arise in my constitutional law course and less self-conscious about using these issues to present a more complex understanding of substantive legal issues.”).