RACIAL INEQUALITY IN CONTRACTING: TEACHING RACE AS A CORE VALUE

DEBORAH ZALESNE*

Today's students live in an era that dominant social voices declare to be a "post-racial society." Issues of "discrimination," it follows, are simply isolated incidents easily addressed by the panoply of existing civil rights laws. This belief creates expectations on the part of first-year law students who may dismiss or ignore the existence of structural racism, sexism, and classism. The law not only creates structures of subordination, it also makes them invisible. Revelation of the subordinating effects of legal rules is an important first step in legal education.

The apparent neutrality of contract law in particular masks the distributive effects of legal rules. Contract is an area of private ordering, but it is courts that invalidate or legitimize the use or allocation of power between or among parties to a contract. Unspoken assumptions about power—who has it, who may use it, and how it may be used—are embedded in contract law and theory. These assumptions may conceal bias, stereotypes, and cultural preferences in a court's final decision. An analysis that presumes neutrality on the part of the court and autonomy on the part of the parties overlooks the various advantages and handicaps that people bring with them to each transaction, some of which may be the result of the social identity of the parties. A "neutral" free market system tolerates certain pockets of discrimination in contracting which are, in turn, endorsed by the law in the name of freedom of contract.

This Article addresses the importance of incorporating such discussions about identity in the first year core curriculum. It offers specific materials and techniques for doing this in a contracts class, with emphasis on the necessity and the value of grounding theoretical analysis squarely in the instruction students receive in legal reasoning. The Article proposes that issues of identity should be incorporated into the classroom not only when the parties in the cases are people of color, and not simply as a politically correct exercise, but pervasively throughout the semester as a way of advancing students' legal reasoning skills and understanding of legal doctrine. This approach should improve the law school experience for most students and produce lawyers who are more capable of practicing law holistically.

* Professor of Law, City University of New York School of Law; B.A., Williams College; J.D., University of Denver College of Law; LL.M., Temple University School of Law. Some of the introductory remarks to this paper, as well as parts of the discussion of *Williams v. Walker Thomas,* were first printed in DAVID NADVORNEY AND DEBORAH ZALESNE, TEACHING TO EVERY STUDENT: EXPLICITY INTEGRATING SKILLS AND THEORY INTO THE CONTRACTS CLASS (2013). Parts of the discussion of *Acedo v. State of Arizona, Department of Public Welfare* were first printed in Deborah Post & Deborah Zalesne, *Vulnerability in Contracting: Teaching First Year Law Students About Inequality and its Consequences in* VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER 89 (2011). I would like to thank Professors Alan Chen, David Nadvorney, and Deborah Post for their detailed and thoughtful comments on an earlier draft. I would also like to thank my fabulous research assistants from the University of Denver, Michael Claggett and Jacob Holt, and from CUNY, Miranda Junge, Bright Limm, and Natalie Saidi, for their invaluable research assistance.

I. INTRODUCTION: RACE NEUTRALITY AND CONCEALED RACIAL DIMENSIONS IN CONTRACT LAW

Today's students live in an era that the most dominant social voices declare to be a "post-racial society."[1] Issues of "discrimination," it follows, are simply isolated incidents easily addressed by the panoply of existing civil rights laws. This belief creates expectations on the part of first-year law students who may dismiss or ignore the existence of structural racism, sexism, and classism. The law not only creates structures of subordination, it also makes them invisible. Revelation of the subordinating effects of legal rules is an important first step in legal education.

Traditionally, much of the first-year law school curriculum is teaching students to "think like lawyers." This includes learning, at least as a baseline principle, that the law is objective and is generally applied equally to all people. The underlying assumption is that the law includes all cultural perspectives, and therefore should be unaffected by the discourse on race and gender. While law students are commonly taught to analyze and dissect case law and legal doctrine, they are less frequently taught to question the fundamental and unstated assumptions on which legal doctrine depends. Without the requisite training or critical perspectives, students who assume neutrality and objectivity accept a flawed analytical structure.

Contract law provides a particularly rich and interesting backdrop for the analysis of racial assumptions, in part because of its racially-charged history and the ways in which the doctrine is inextricably linked to race.[2] Further, a complete understanding of contract disputes routinely requires an

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[1] *See* Sheryll Cashin, *Shall We Overcome? "Post-Racialism" and Inclusion in the 21st Century*, 1 ALA. C. R. & C.L. L. REV. 31, 34 (2011) (discussing America's nondiscriminatory national identity); Barack Obama, Ill. State Senator, Keynote Address at the Democratic National Convention (July 27, 2004) *available at* http://www.barackobama.com/news/entry/remembering-the-2004-convention/ (describing the United States in post-racial terms: "There's not a black America and white America and Latino America and Asian America; there's the United States of America . . . .").

[2] Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 6–7 (1995) (claiming that "[t]he history of American contract law and issues of race and culture are inextricably intertwined" beginning with African American slaves' early position as the subject of contracts); *see also* Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 293 (1994) (giving the objective theory in contract law as an example of "race function[ing] as a foundational element of legal doctrine").

analysis of the effects of inequality, including race dynamics, on parties' bargaining choices.[3] This Article starts from the premise that the best way to properly train students to question the fundamental assumptions of contract doctrine is to fully embed the critiques in the analytical structure and legal analysis of the doctrine we teach our students.

When contracts scholars talk about economics, they traditionally refer to neoclassical economics of the type espoused by Judge Posner. Neoclassical contract theory embraces the idea of formal legal color blindness in assessing the validity of a contract, assuming that an individual's race or ethnicity played no role in a contract's formation or content.[4] By focusing on "efficiency" rather than "fairness," the neoclassical perspective assumes a certain level of natural fairness and self-regulation in the system, even when there are great disparities in wealth.[5] The neoclassical perspective that dominates contract doctrine also assumes autonomous choice and self-sufficiency on the part of economic actors.[6] These assumptions require courts to treat all consenting adults the same way based on the notion that the rational economic actor has no race or gender. [7] However, Anglo-American law was written by and for white men and the rational economic actor has been conceptualized principally from a white male perspective. The law privileges this perspective, often ignoring the contested meanings and competing perspectives that exist in the wider society.[8]

The apparent neutrality of contract law masks the distributive effects of legal rules. Contract is an area of private ordering, but it is courts that invalidate or legitimize the allocation of power between or among parties to a contract. Unspoken assumptions about power—who has it, who may use it, and how it may be used—are embedded in contract law and theory. These assumptions may conceal bias, the

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[3] Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889 (1997).

[4] Chase, *supra* note 2, at 48 (noting the tendency for colorblindness in modern contract law, and citing Justice Scalia's concurrence in *City of Richmond v. Croson*, 488 U.S. 469, 520 (1989) as suggesting an approach which forbids consideration of race); s*ee also* Blake D. Morant, *supra* note 3, at 890 (discussing the seemingly impartial goals of modern contract law).

[5] Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 SAN DIEGO L. REV. 55, 58 (2004) ("Law and economics in its early form asked legislators and, most often, judges to make decisions on the basis of efficiency, while critical legal studies asked them to base their decisions on a concern for social justice.").

[6] When legal scholars talk about economics, they have traditionally referred to neoclassical economics of the type espoused by Judge Posner. A "pure" economic legal analysis carries with it several basic assumptions, including: "(1) people behave rationally, according to the definitions of rational behavior extant in neoclassical economics; (2) people act only with self interest; (3) income distribution is in accordance with relative productivity under conditions of perfect competition; (4) preferences are independent of the economic system; (5) race, sex, and nature can be ignored or encapsulated within the market; and (6) the best starting point for economic analysis is one that considers essentially, or nearly factually accurately, the conditions necessary for perfect competition, including no barriers to market entry, perfect knowledge, zero transactions costs, and others." Lynne L. Dallas, *Teaching Law and Socioeconomics*, 41 SAN DIEGO L. REV. 11, 17–18 (2004).

[7] Leon Trakman, *Pluralism in Contract Law,* 58 BUFF. L. REV. 1031, 1086–87 (2010) (pointing out that the judiciary "use[s] paternalistic principles of contract law to mask substantive inequalities between parties a treats the reasonable person as a reasonable white man").

[8] Socioeconomics differs from neoclassical economics primarily in that it "begins with the assumption that an adequate understanding of economic behavior cannot be achieved by the assumptions of autonomy, rationality, and efficiency that stand at the epistemological foundations of neoclassical economics." Robert Ashford, *Socioeconomics: What is its Place in Law Practice?*, 1997 WISC. L. REV. 611, 612 (1997). Whereas neoclassical economics views markets as "natural," guided by efficiency principles and invisible hands, from the socioeconomic perspective, markets are a social construction. Dallas, *supra* note 6, at 29. Consumption, production and distribution of income are not the result of an aggregation of autonomous choices, but occur within the context of social norms, disparate bargaining power, sexism, racism, and educational inequalities. The socioeconomic perspective, recognizing the capacity for empathy, questions the notion that behavior can only be explained through self-interest rather than through other forces such as socialization or psychology of the individual. Under this view, though people often act to maximize their own utility, other motivations may also be at play, including interest in the well being of others—competitive behavior is only a subset of human behavior within a societal and natural context that both enables and constrains competition and cooperation. *Id.*

impact of stereotypes, and cultural preferences in a court's final decision.[9] An analysis that presumes neutrality on the part of the court and autonomy on the part of the parties to the contract overlooks the various advantages and handicaps that people bring with them to each transaction, some of which may be the result of the social identities of the parties. The market, both as an institution and as an analytical concept, is flawed. The flaws are ignored or hidden in contract jurisprudence with particular (unintended) consequences for people of color and other disenfranchised groups. A "neutral" free market system tolerates certain pockets of discrimination or discriminatory impact in contracting. These practices are, in turn, endorsed by the law in the name of private ordering and freedom of contract.[10]

Courts and theorists have struggled to address the effect of identity in contract. The choices are represented as a set of trade-offs among moral, political, and practical goods, based on a general conflict between competing concerns about autonomy and social welfare. Legal protections cut both ways. Legal rules that protect vulnerable parties can address vast disparities in bargaining power. These rules redistribute power by lending the power of the state to some of its most disadvantaged citizens. At the same time, the legal doctrines that police contract bargains often employ harmful stereotypes, seemingly justifying intervention in terms of the ignorance, incapacity, intellectual deficiency, or lack of will power of the protected party. In this political struggle, oppositional forces may employ a rhetorical strategy that turns remedial action or constraints on overreaching or predation into "special protection" for people of color or white women. The law can cast the "victim" as "not only ignorant, incapable, or dishonest, but also advantaged—perhaps even unduly advantaged."[11] In the end, the redistribution of power to the powerless, cast in terms of the characteristics which make them marginal, works to maintain the hierarchical differentiation between blacks and whites and women and men.[12] The dilemma is thus how to redistribute power without resorting to the cultural tropes and scripts that exist in a stratified society.

Critical legal theory provides a useful lens through which to consider this dilemma. At the heart of critical theory and jurisprudence is a belief that the law is rife with bias and subjectivity.[13] Critical legal theorists do not agree about the best ways to address such bias. Some critical race theorists embrace contracting as a means of empowerment. For example, many feminist and LGBT legal scholars believe that individual liberty can be achieved by contracting around society's default rules or restrictions (for example, contract can facilitate gay and lesbian relationships and parenting arrangements outside of the positive law).[14] Other critical legal scholars focus on contracts between members of the subordinated community and members of the dominant society, expressing concern about the limited bargaining power of most people of color and other historically disadvantaged groups.

Most law school contracts classes feature the dominant economic paradigm of transactional law, disregarding critical legal theory. We cannot rely on specialty or seminar courses to raise the difficult issues of race, ethnicity, gender, sex, disability—characteristics that mark people or communities as "other"—and make up for their absence in traditional first-year course materials.[15] Indeed, doing so

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[9] Lorraine Bannai & Anne Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 23 (2003).

[10] *See, e.g.*, Kastely, *supra* note 2, at 293–94 (introducing the idea that objectivity in law centered on a privileged white male perspective).

[11] DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS 293–94 (2003).

[12] The same debate exists in the context of affirmative action programs. The perpetuation of negative stereotypes about people of color is precisely one of the justifications conservatives offer for strict scrutiny of affirmative action policies. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 394–95 (2003) (Kennedy, J., dissenting); *see generally* Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn its Flawed Decision in* Grutter, 15 TEX. REV. L. & POL. 437, 470 (2011).

[13] *See generally* James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 706 (1985).

[14] *See, e.g.*, Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, But Not Hell Either*, 73 DENV. U. L. REV. 1107, 1137–42, 1154 (1996); Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J.L. & FAM. STUD. 1, 3 (2003).

[15] Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN'S L. REV. 901, 905 (2003); *see also* Susan Bisom-Rapp, *Contextualizing the Debate: How Feminist and Critical Race Scholarship Can*

reinforces the message that such concerns are at best marginal and at worst irrelevant and a waste of time that should be spent on "black letter law."

In the early stages of law school, students do not know what to do with their own beliefs and information-filtering systems as they read cases. They certainly come to law school with values and beliefs about how the law can impact social and political issues, but they do not necessarily know how to use those beliefs effectively in their legal analysis. Often, the use of these pre-existing beliefs is minimized in class, in many casebooks, and certainly in study aids (including hornbooks and commercial outlines).

This Article addresses the importance of incorporating discussions about identity in the first-year core curriculum. It offers specific materials and techniques for doing this in a contracts class, with emphasis on the necessity and the value of grounding theoretical analysis squarely in the instruction students receive in legal reasoning. The Article proposes that issues of identity should be incorporated into the classroom not only when the parties in the cases are people of color, and not simply as a politically correct exercise, but pervasively throughout the semester; this incorporation will advance students' legal reasoning skills and understanding of legal rules and doctrine. This approach should improve the law school experience for most students and produce better lawyers who are more capable of practicing law holistically.

The Article uses race as a starting point to talk about identity in the broader sense; the strategies proposed in the Article, relating to teaching about the law's effects on people of color, can also be used with different groups. The Article highlights the competing values critical race theorists grapple with in challenging race neutrality and the ways to use this debate to broaden the classroom discussion to consider the relevance of identity in any legal regime. Specifically, the Article examines the effects of various race-neutral contract law doctrines on people of color and their ability (or inability) to empower themselves through the longstanding practices and legal institution of contracting.

Part Two provides a brief overview of critical race theory and discusses how and why aspects of critical race theory should be taught explicitly in the mainstream curriculum. Specifically, this Part highlights three distinct features of critical race theory that can be used as a starting point for law teachers to incorporate issues precipitated by race into the mainstream curriculum.

Part Three makes specific suggestions for teaching about racial inequality in contracting. Using the three features of critical race theory described in Part Two, Part Three suggests that race theory can and should be raised throughout the course when teaching the race-neutral doctrine, despite the courts' silence on these issues in most cases. Specifically, this Part identifies various contracting issues that tend to be impacted by the race of the parties, and suggests cases in these doctrinal areas that can provide a useful backdrop for discussing the effects that race can have on contracting. For each doctrinal area, the Article poses thought questions to push forward the class's thinking about these issues and to highlight the impacts of the doctrine on some people of color. The overarching question presented by each of these doctrinal areas is what role race should play in legal analysis.

In the broadest terms, the Article addresses the potential power of the relationship between skills and theory and the ways in which legal reasoning can elevate general race theory from social science to legal persuasion.[16] The Article focuses on developing students' ability to see what may appear to be a

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Inform the Teaching of Employment Discrimination Law, 44 J. LEGAL EDUC. 366, 368 (1994) (discussing the message sent to law students by the exclusion of differing perspectives, namely, that the interests of women and people of color are irrelevant to the law, or at least that these issues belong only in specific courses which are rarely taken by white male students).

[16] Considerations of social science deepen students' understanding of legal doctrine and thus give them the ability to make more complete, persuasive, and nuanced arguments. Legal theory should not be divorced from the social sciences, as at their best, courts rely on the latter discipline in making law, determining facts, and providing context for their decisions. *See* John Monahan & Laurens Walker*, Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571, 571 (1991).

narrow legal problem in a broader social and political context. It highlights ways for courts, parties, and students to strategically incorporate race theory in articulating arguments. The suggested questions in Part Three are meant to encourage students to identify underlying premises and implicit assumptions reflected in the law, and to develop awareness of their own and alternative theories and perspectives and their implications for law and lawyering. One goal is to get students to bring what they already know about social mores, cultural values, and historical perspectives to bear in the class discussion, making the cases more "real" and students more passionate, more analytic, and more confident.

II. CRITICAL RACE THEORY AS A BACKDROP

Inspired by the civil rights, anti-war, and student movements in the late 1960s, the Critical Legal Studies (CLS) movement developed as a response by concerned legal academics to the disparate treatment of groups historically marginalized by the law.[17] Fundamentally, critical legal scholars challenged the assumption of determinacy—a predictable legal outcome—in classic liberal jurisprudence. The "crits," as they are known, "set out to 'deconstruct,' and thus destroy, the myth that law and legal institutions are separate from ordinary political debate."[18] Before the advent of critical jurisprudence, the traditional legal view was that the law is an "objective arbiter of social conflict" free from the influence of politics or political choices.[19] This "formalist" and "objective" approach to lawmaking was criticized for failing to recognize the aspects of human choice, bias, and subjectivity that inherently inform choices about the law and its application to peoples' lives.[20]

Critical Race Theory (CRT) developed during that time out of a dialectical engagement with both liberal discourse on race and the emerging CLS discourse of the time.[21] The CRT school manifests at least three broad distinctive features that can be used to frame issues in the core curriculum: (1) a commitment to broadening the scope of discussion on what justice require; (2) a commitment to identifying and actively including marginalized voices in legal discourse; and (3) a recognition of the central and often explicit assumption that racism is still deeply rooted in our society and far more entrenched than what both the legal discourse and society at large acknowledge.[22] While many critical race theorists discuss various additional CRT features or frame CRT issues differently, the three focused upon here are chosen as particularly pertinent to teaching about racial inequality in contract law.

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[17] RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 13 (2004). For an overview of the history of critical legal studies, see generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

[18] Robert E. Scott, *Chaos Theory and the Justice Paradox,* 35 WM. & MARY L. REV. 338, 345 (1994).

[19] *Id.*

[20] Unger, *supra* note 17, at 570. Contrary to the belief that the law was a set of established principles, CLS theorists characterized the law as a series of principles and counter-principles. For instance, while the first principle in contract law is the freedom to contract, the counter-principle is that the freedom to contract is not absolute, especially when it conflicts with social policies or other values deemed essential to the well-being of the family, community, or society. *Id.* at 620. For that reason, critical legal theorists attacked the traditional "rights" approach of liberal legal theorists seeking equality under the law. For many CLS scholars, the emphasis on rights obscured the actual conflicts that underlie how rights are decided, applied, and enforced, and the focus on rights as a vehicle for justice and equality simply reified the existing judicial apparatus and its values. Tushnet, *supra* note 17, at 1526. The criticism of rights-based jurisprudence alienated many members of the CLS movement, including many scholars of color, feminist scholars, and academics fighting for rights in areas such as gender, racial, and sexual equality. For many, criticism of a rights discourse neglected to recognize that people of color and women had successfully used the language of legal rights to effect change in the civil rights and women's rights movements. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 348 (2006). Soon after clashes with CLS scholars at the Critical Legal Studies conferences in 1985 and 1987, members of the critical race theory group within CLS left the group. *Id.* Similar fragmentation happened with feminist legal scholars, scholars of other ethnic minorities, and lesbian and gay rights scholars.

[21] Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 U.C.L.A. L. REV. 1343, 1343 (2002).

[22] JURISPRUDENCE: CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM 616–19 (Richard Haman, Jr. et al. eds., 2d ed. 2002) [hereinafter JURISPRUDENCE].

In an attempt to broaden the dialogue on justice, critical race theorists "articulate concerns that may have been ignored or marginalized by the dominant discourse; call into question concepts that seem otherwise immune from scrutiny; and suggest resolutions that are frequently at odds with the prevailing demands of convention or fashion."[23] CRT scholarship also calls for modifying the form of jurisprudential dialogue to accommodate marginalized voices.[24] According to most critical race theorists, conventional legal discourse has been limited in ways that tend to mute voices on the margins—voices that often include racial minorities.[25] Accordingly, many critical race theorists have emphasized the need for interdisciplinary studies to challenge and expand the sense of what counts as specifically *legal* discourse, as well as the need to create and promote *new* modes of discourse.[26]

Finally, a simple but central working assumption of nearly all CRT scholars is the belief that racism is much more common than most people think.[27] According to this view, racism is "ordinary, not aberrational." In fact, for many CRT scholars it is evident that racism is "[s]o deeply embedded that it is practically invisible, like the air," and that, accordingly, the system of white ascendancy and dominance will only give way to "exceptionally diligent efforts" which will entail "real costs."[28] These "costs" include the loss of white privileges that the legal system has continued to support, if not *de jure* then at least *de facto*.

The following section sets forth specific ways to use these three principles to incorporate issues surrounding race and racial inequality into the first year contracts class.

III. THE EFFECT OF RACE ON VARIOUS COMMONPLACE CONTRACTING ISSUES

Because of the supposed race-neutrality of the law, when writing opinions, judges often omit identifying specific characteristics of the parties involved in a contractual dispute.[29] Details sure to have influenced the judge's legal reasoning and analysis—such as the relationship between the parties, or the age, race, gender, or class of one or both of the parties—are conspicuously missing, leaving readers to hypothesize or fill in the gaps.[30] When judges omit the race, the presumption is usually that all the parties are white.[31] The result is the "invisibility" of African American or black parties in mainstream

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[23] *Id.* at 616. Not surprisingly, the CRT movement has invoked significant controversy and is subject to ongoing criticism. *See* Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 513–29 (1997) (critiquing what he views as CRT's mischaracterization of liberalism, its narcissism in focusing on personal anecdotes that may have little legal basis, its emphasis on storytelling which brings it away from legal doctrine, its reliance on what Litowitz sees as the implausibility of the interest-convergence theory, and its notions of insiders and outsiders). Judge Posner has harshly criticized CRT, in part claiming that its reliance on narrative hurts the reputation of legal academics of color. Richard A. Posner, *The Skin Trade*, THE NEW REPUBLIC Oct. 13, 1997, at 40 (book review) (claiming that "[w]hat is most arresting about critical race theory is that . . . it turns its back on the Western tradition of rational inquiry, forswearing analysis for narrative. Rather than marshal logical arguments and empirical data, critical race theorists tell stories—fictional, science-fictional, quasi-fictional, autobiographical, anecdotal—designed to expose the pervasive and debilitating racism of America today. By repudiating reasoned argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites.").

[24] JURISPRUDENCE, *supra* note 22, at 616.

[25] *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); Tushnet, *supra* note 17; Unger, *supra* note 17.

[26] JURISPRUDENCE, *supra* note 22, at 617–18.

[27] *Id.* For an in-depth discussion of the on-going prevalence of institutional racism, see Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L. J. 1717 (2000).

[28] *Id.*

[29] Kastely, *supra* note 2, at 283 (noting Judge Posner's failure to explicitly mention race in Wassell v. Adams, 865 F.2d 849 (7th Cir. 1989) (Posner, J.), although Kastely translates his coded language).

[30] *Id.* at 286 (discussing the requirement of reading cases with certain racist and sexist presumptions in order to understand a judge's coded language).

[31] *Id.* at 291 (noting that in *Doe v. Dominion Bank*, 795 F. Supp. 456 (D.D.C. 1991), *rev'd*, 963 F.2d 1552 (D.C. Cir. 1992), "[b]y not coding the race of the neighborhood as black, Judge Hogan signaled it as white—or partly white . . ." and explaining that where parties are black, the judge will use coded language to signal this to the reader).

commercial contracts, which places "constraints on both the abilities of nonwhites and whites to see black people as businesspeople who engage in commercial transactions."[32]

Despite the court's silence about certain characteristics of the parties, race, gender, class, and sexuality do have the potential to play an unspoken role in contracting and in the court's reasoning in some cases. There are many opportunities to raise issues relating to identity, even when such characteristics about the parties are not readily apparent in the case. Indeed, with generally only a few cases in any given casebook involving African American parties, professors must create opportunities to bring issues of race into the classroom. In most cases, the parties' race is unknown and not at issue. But it is possible (and advisable) to periodically interject discussions surrounding race, even where not raised in the case. One way to do this is to simply ask whether it would make a difference to the outcome of the case, or to ask how the judge or students may perceive the parties in the case, if we knew the race of one or both of the parties.

This section will provide tools to use the three core principles of critical race theory articulated in section II to promote creative, reconstructive thinking on how contract law should evolve in order to advance racial equality and the just economic empowerment of racial minorities. Specifically, this section examines various contracting issues that arise in the first year contracts curriculum that tend to be impacted by the race or other personal characteristics of the parties. These areas include price disparities in commercial contracts (relating to the doctrines of consideration and unconscionability) (*see infra* Part A), issues of assent and the use of the objective test (relating to the doctrines of offer, acceptance, and contract interpretation, among other things) (*see infra* Part B), issues surrounding the enforcement of contracts involving alternative reproduction technologies (relating to the doctrine of public policy) (*see infra* Part C), and issues about involuntary servitude (relating to specific enforcement and negative injunctions in employment contracts) (*see infra* Part D).

These various contracting scenarios raise complex and nuanced issues surrounding the issue of whether contract law has helped to perpetuate racial discrimination and the disempowerment of racial minorities or to minimize it. Since these core contracting issues arise throughout every casebook, they provide ample opportunities to raise issues related to the role of race in legal analysis throughout the course, even where these issues are not highlighted in the cases. Some of the issues arise repeatedly or in various places throughout the course, while other suggestions are relevant to particular doctrines typically covered in a single class period. But all the suggestions have an overarching theme regarding the effect of race-neutral contract doctrine on people of color and the relevance of race to the legal analysis. The sub-sections that follow set forth arguments and counterarguments regarding the relevance of race to the legal analysis, providing tools for students to use in crafting legal arguments. These arguments are followed by specific questions that can be posed to stimulate the conversation. The subsections describe ways in which to discuss the race-based issues associated with the doctrine that are meant to enhance, rather than interfere with, teaching the doctrine.

A. Racial Discrimination in the Marketplace

A basic tenet of contract law is that courts will not inquire into the adequacy of consideration. This notion presumes that the parties know better than the courts how they value the goods and services they are bargaining for. This foundation of the doctrine of consideration is based on neo-classical economic assumptions that people act rationally and in their own best interest, that people and resources are freely movable, and that there are no artificial restrictions on entry into the marketplace. However,

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[32] Angela Mae Kupenda, *Making Traditional Courses More Inclusive: Confessions of an African American Female Professor Who Attempted to Crash All the Barriers at Once*, 31 U.S.F. L. REV. 975, 983 (1997). Indeed, when the race of the parties is explicit in an opinion, it appears that disproportionately the case involves a contract defense such as unconscionability, and the African American party is portrayed as a victim being taken advantage of by the dominant white party. Inclusion of these defenses cases in a contracts casebook therefore does not ameliorate the problem of the invisibility of African Americans as actors in the mainstream commercial marketplace.

studies show that these presumptions are not always correct.[33] In some industries, pricing in the United States tends to vary according to the race, class, and gender of the consumer. Systems of disparate pricing can result from isolation from wider markets, traditional practice, or discrimination, among other things. How should contract law account for class, gender, or race-based price disparities, if at all?

1. Disparate Pricing

"Consumer Racial Profiling" (CRP) is a term used to describe "differential treatment of consumers based on race or ethnicity that constitutes a denial or degradation in the product or service offered to the consumer."[34] In the retail context CRP manifests as outright confrontation such as removing customers of color from the store or the use of racial epithets, or more covert forms of harassment such as surveillance, slow or rude service, complete neglect, or being required to pre-pay.[35]

There are a limited number of empirical studies that assess racial discrimination in the marketplace, outside of the housing and employment markets. One study of retail car negotiations sent testers of different races and genders into car dealerships to buy a new car using the same bargaining strategy.[36] The study revealed that black men paid more than twice the markup than white men, and that black women had to pay more than three times the markup than white men.[37] The study also revealed several forms of non-price discrimination based on race, such as: the steering of testers to salespersons of their own race or gender; testers being asked different types of questions (e.g. about occupation and financing); and salespersons disclosing different qualities of the car or employing different sales tactics.[38] For example, salespersons asked black female testers more often about their occupation than white male testers, and they asked black male testers less often than white male testers if they wanted to test drive the car.[39] Salespersons also offered black male testers the sticker price as an initial offer more often than they did with white male testers, and were less willing to disclose to black testers what the dealer paid the car manufacturer for the car.[40]

Federal court cases also provide some insight into the pervasiveness of racial discrimination in the consumer market. Cases show that consumers of color are denied entry to hotels, are refused taxi service, and wait longer than white customers for service in restaurants.[41] In one case, the Fourth Circuit decided that the plaintiff had made a prima facie case of discrimination when it presented evidence that a Staples had accepted the out-of-state checks of white customers as payment for goods but refused to accept the out-of-state check of the African American plaintiff because of his race.[42]

These studies have begun to debunk the neoliberal theory that competition will eliminate, or at least make unprofitable, racial discrimination in the marketplace. The neoclassical theory purports that:

> rational market participants responding to market forces should . . . eliminate irrational racial discrimination. Competitive markets . . . punish those market actors indulging in

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[33] *See, e.g.*, Larry A. DiMatteo, *Penalties as Rational Response to Bargaining Irrationality*, 2006 MICH. ST. L. REV. 883, 920 (2006) (discussing the role of irrationality in the negotiation of contracts).

[34] Anne-Marie G. Harris, *Shopping While Black, Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling,* 23 B.C. THIRD WORLD L.J. 1, 4 (2003).

[35] *Id.* at 4.

[36] Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991) [hereinafter, Ayers, *Fair Driving*].

[37] *Id.* at 819, 829. A follow-up study revealed that black male testers were actually charged higher prices than black female testers. Ian Ayers, *Further Evidence of Discrimination in New Car Negotiations and Estimates of it Cause*, 94 MICH. L. REV. 109, 110 (1995) [hereinafter, Ayers, *Further Evidence*].

[38] Ayers, *Fair Driving*, *supra* note 36, at 833–36.

[39] *Id.* at 834.

[40] *Id.* at 835.

[41] Hila Keren, *"We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133, 136 (2005).

[42] Williams v. Staples, Inc., 372 F.3d 662, 668 (4th Cir. 2004).

> racism . . . because economically motivated, perfectly informed actors . . . seize arbitrary opportunities and profit advantages left behind by racist participants.[43]

The free-market system operates under the questionable premise that people have access to complete information about a good or service and have the freedom to choose what products they buy or sell. In fact, consumers often do not have access to all the information they need to bargain effectively. For example, a Consumer Federation of America survey found that thirty-seven percent of those who responded did not know that a sticker price on a car was negotiable, and further, that sixty-one percent of blacks versus thirty-one percent of whites did not believe the sticker price on a car to be negotiable.[44]

Civil rights law has acknowledged the disconnect between neoclassical economic theory and the social and economic realities of racism. Several laws have been enacted to remediate the effects of racial discrimination in the employment, housing, and public accommodation markets and in credit transactions, but none specifically address discrimination in the retail context. Title II of the Civil Rights Act of 1964 specifically prohibits discrimination on the basis of race in places of public accommodation. However, retail establishments are absent from the list of "public accommodations" covered by the statute, at least by interpreting case law.[45] Section 1981 of the Civil Rights Act of 1866 provides that all persons have the same right to make and enforce contracts as white citizens. The legislation was enacted to address the ways in which whites continued to treat formerly enslaved people after the Civil War, including "physical violence, price fixing, lifetime contracts, and exorbitant rent and food charges that were equivalent to any wages the former slaves might earn."[46] However, the courts have narrowly interpreted Section 1981 protections and "routinely dismiss . . . claims where defendants' behavior degrades—but does not completely deny—the goods or services plaintiffs sought to purchase."[47]

2. Contracts Solutions

Absent federal legislation regulating discrimination in retail transactions, what role can and should the courts and common law contracts doctrine play in addressing racial disparities and inequality in the marketplace? The common law of contracts holds much promise as an avenue through which jurists can successfully develop and enforce legal norms prohibiting racial discrimination.[48] The promise of contract law lies both in its relative "flexibility" in the courts (as compared to statutory anti-discrimination law) and in the structural responsiveness of contract common law both to the evolution of public policy norms and, more generally, to evolving community norms. Contract law has evolved in a manner that has been both responsive to and constrained by community norms of decency, fairness, and reasonableness,[49] and it can and should evolve towards the recognition of a norm prohibiting racial discrimination in contracting processes. This evolution can be accomplished with a shift in focus from individual weakness or vulnerability in a given transaction to structural inequalities.

If students are invited to think not just in terms of the parties to a dispute but in terms of the groups of people represented in the suit, they begin to see structure. Shifting the focus to structural inequalities requires analysis in some commercial transactions of the reasons for which African

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[43] Steven Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics,* 54 J. LEGAL EDUC. 365, 366 (2004).

[44] Ayers, *Further Evidence*, *supra* note 37, at 140.

[45] Harris, *supra* note 36, at 23.

[46] *Id.* at 26 (quoting John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1141 (1990)).

[47] Harris, *supra* note 34, at 37.

[48] Brown, *supra* note 11.

[49] For an example of common law created to address public policy considerations, see Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 378 (1985) (adopting the public policy exception to at-will employment, allowing employers to fire for good cause or no cause, but not for causes that violate public policy, such as failure to commit a crime).

Americans and Latinos pay more than whites. These documented racial disparities arise from both discriminatory practices and overrepresentation of African Americans and Latinos in the lower income levels. Commercial sellers are often free to charge higher prices in markets with limited competition, such as in lower income neighborhoods. Where the market is limited, people have no choice but to bear the higher pricing. Many attribute the pricing disparities to lack of information, but even with full information certain communities will still have no choice but to acquiesce to the higher pricing.

Altering this inequality cannot only occur on an individual consumer basis. Rather, the fundamental structural inequalities that create vulnerable consumers must be altered. This alteration might require some degree of regulatory intervention but contract law can also play a role. The current legal construct generally looks at individuals, not structure, and the neo-classical underpinnings of contract law generally allow sellers to charge what the market will bear. When sellers charge women more for haircuts than men, it is argued that it is because women are willing to pay more. When credit card companies charge higher rates (and include exploitative terms) to poor communities, it is because the market, which is not competitive in those communities, will allow it. With either individual or class-based complaints, should courts take into account personal characteristics of the party such as race and ethnicity? Are courts capable of fairly considering race in the context of structural inequalities that exist between members of that race or ethnicity and the dominant race or ethnic group without unfairly advantaging certain parties?

Perhaps inequalities can be addressed through the doctrine of consideration. Core to analysis of issues of consideration are the motives of the parties. Both parties must exhibit a bargain motive as opposed to a gratuitous motive. In arms length market exchanges, bargain motive is all but presumed. To challenge this presumption, ask the class whether pricing disparities among different communities are a result of rational economic behavior on the part of the consumers. Is the choice between bargain or gratuitous motive a false choice? Is economic behavior always driven by either autonomy, rationality, and efficiency or by generosity and charity? What else might drive and influence human behavior? To what extent do racial or class-based inequalities affect this analysis? Because of the strong presumption that individuals with full capacity engaging in market transactions are acting rationally, consideration might be a difficult avenue through which to remedy price disparities.

The unconscionability doctrine is the more likely avenue under which "unfair" contracting prices can be remedied because of its mission to invalidate grossly one-sided bargains. Current doctrine requires focus on one party's oppressive conduct, and/or the other party's vulnerability in finding the terms of a contract inherently and grossly unfair.[50] Problematically, discussions about an individual party's vulnerability often promotes raced reasoning in which the reader is encouraged to conflate social and economic marginalization with incompetence, lack of education, and an absence of savvy. In some cases, although race is not explicitly mentioned, racial messages are covertly conveyed through details given about a person.[51] These details become raced, meaning that a person's actions, possessions, and views are used to implicitly convey what race the person is.[52] Without any discussion of systemic, structural racism, the implication is that it is ultimately the complaining party's own defects that necessitate the court's protection.

For example, in the leading unconscionability case, *Williams v. Walker-Thomas*,[53] Ora Lee Williams, a black, single mother on welfare, was "protected" from her "poor judgment" in entering into a consumer contract with oppressive terms. Students should be encouraged to examine the inherent judgments that come up about Williams presumably because of her gender, race, class, and educational

[50] *See generally* 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 2012).
[51] Kastely, *supra* note 2, at 275.
[52] *Id.*
[53] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

background. Williams's characteristics as a black, single mother on welfare likely played into the Court's analysis of the power disparity between the parties that led to finding the contract unconscionable.[54]

Judge Skelly Wright's opinion in *Williams v. Walker-Thomas* refers, among other things, to "appellant's social worker" and Williams's "obvious education or lack of it."[55] While Judge Wright does not mention race directly, his reasoning in applying the unconscionability doctrine encourages the reader to rely on racial and class-based stereotypes about the vulnerability of poor, single, African American mothers who receive government aid. Professor Amy Kastely explains:

> By failing to include further detail about the contracts between Walker-Thomas and Williams and by resting instead on the vague and broadly associated listing of limited power, little knowledge, limited education, and lack of choice, Judge Wright's opinion allows—even invites—the reader to use raced tropes linking poverty, lack of education, single parenthood, and lack of capacity with black women and to disregard the connection between white racism and exploitative pricing and collection practices.[56]

Professor Kastely argues that in his majority opinion in *Walker Thomas*, Judge Wright failed to note the ways in which the evidence showed Williams to be an intelligent, reliable, and reasonable decision-maker.[57] Similarly, Professor Muriel Spence voices the concern that the stereotypes presented in *Walker-Thomas* run the risk of reifying problematic assumptions about Williams's race and class.[58] She highlights certain stereotypes implicated by the case—in particular that African American women are "disproportionately on welfare, irresponsible with money and likely to raise large families as single parents"[59] noting that, in fact, most people on welfare in the United States are not black.[60] If courts are explicit about the role of racism and racial disparities in contracting, it will take the focus away from perceived deficiencies of individual contracting parties.

In her article "*Making Traditional Courses More Inclusive*," Professor Angela Mae Kupenda writes about her indecision to teach *Walker-Thomas* for fear that it does more harm than good. Ultimately, Professor Kupenda decides that it is helpful to teach this case with a focus on how specific groups may be more affected by unconscionable contracts than others.[61] Focus on structure eliminates the need or inclination to make stereotypical judgments about poor people or people of color as actors in the marketplace.

Certainly, application of the unconscionability doctrine does not always involve issues of race. The real question is whether race is, and ought to be, a consideration in the framework of the legal doctrine being applied. A compelling argument could be made that the response should be completely excluding race from the discussion if it is not the material reason for the court's decision. This is especially true where invoking race requires the court to make broad assumptions and perpetuate stereotypes. On the other hand, ignoring race, and in particular ignoring structural racial inequalities, in some cases may fail to get at the root of the problem.

Of course, racism in consumer contracts is an enormous problem to tackle in a class about consideration or unconscionability, and you cannot resolve the complex question of the role of contract law in correcting racial disparities. But you can certainly raise the issues when you teach the rules about adequacy of consideration. Indeed, even where the parties in the cases you are teaching are not people of color, you can remind students of price disparities that exist in poor communities and highlight the

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[54] Morant, *supra* note 3, at 899.

[55] *Williams*, 350 F.2d at 448–49.

[56] Kastely, *supra* note 2, at 306.

[57] *Id.*

[58] Muriel Morisey Spence, *Teaching* Williams v. Walker-Thomas Furniture Company, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 90 (1994).

[59] Spence, *supra* note 58, at 90.

[60] *Id.* at 95.

[61] Kupenda, *supra* note 32, at 988.

studies about racial price disparities. How, if at all, can contract law regulate these types of disparities? Ask the class why normal market mechanisms may not cure the problem of pricing disparities and whether the government has a role in mediating disputes of value. Revisit these issues when covering the doctrine of unconscionability. Professors might ask students to what extent the protections provided by the doctrine of unconscionability address or resolve these issues. At a minimum, it will help them understand the contours and limits of the consideration and unconscionability doctrines, while simultaneously considering their real-world application.

B. Issues of Assent and the Use of the Objective Test

Other doctrinal areas ripe for illustrating racial implications are offer, acceptance, and contract interpretation, the application of each depending on the objective test. The objective theory, a cornerstone in liberal contract law, is reinforced by neo-classical economic theory and its assumptions about rationality and autonomy. The objective theory, together with the doctrines that tend especially to reinforce its intellectual, ethical, and legal legitimacy, operate functionally to conceal racial dimensions of contract law. In effect, the objective theory frequently, but erroneously, sends the message that while particular individuals may be racist, the law itself is race-neutral.

Professor Amy Kastely summarizes this argument eloquently:

> [T]he objective theory in contract law . . . [is] one instance, among many, in which race functions as a foundational element of legal doctrine. By featuring the understandings and expectations of privileged white men as the standard for contract interpretation, the objective theory establishes and maintains a white, class-privileged, male norm as the governing law of contractual obligation. And, by treating that standard as "normal" and "reasonable," the objective theory treats anyone who has a different understanding or expectation as defective—ill-informed, lacking education and skill, or unreliable. It maintains hierarchies of race, class, and gender, while allowing people to believe that the law is not racist, class-biased, or sexist. Indeed, in those instances where the law extends "special protection" to people of color and to white women, the law can be seen as generous and forgiving, and subordinated groups as not only ignorant, incapable, or dishonest, but also advantaged—perhaps even unduly advantaged.[62]

Contract law is highly contextualized, and knowing the race, ethnicity, or cultural background of the parties and understanding the racial and cultural dynamics between them is often critical to analyzing issues of assent. A simple smirk or nod can make the difference between an acceptance and a refusal, and understanding the relationship between the parties can explain and often justify different interpretations of contract terms. Despite the centrality of context to issues of assent, as if by tacit agreement, the doctrine has little awareness or discussion of issues of race, class, gender, etc. Under the objective test, most courts will consider the relationship between the parties, any prior dealings between them, industry customs, and circumstances surrounding the agreement but not the social identity of the parties to the contract and the extent to which cultural and ethnic differences can affect the contracting process.[63]

Factors such as ethnicity and national origin can play a major role in contract formation and interpretation.[64] The unique experiences and vocabularies of different communities can affect individual business practices and therefore can affect the subjective intent of parties entering into a contract.[65] For

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[62] Kastely, *supra* note 2, at 293–94.

[63] *Id.* at 297–300 (arguing that the objective theory looks at reasonableness only from the white male perspective, which suggests that courts do not individualize their evaluation of reasonableness based on cultural differences and also pointing out that "[a]n original purpose of [objective theory] . . . was to enforce dominant norms as a way to encourage people to abandon minority beliefs and practices").

[64] Nancy S. Kim, *Reasonable Expectations in Sociocultural Context,* 45 WAKE FOREST L. REV. 641, 652 (2010).

[65] Trakman, *supra* note 7, at 1089.

example, in a situation where the parties have reached an agreement on certain portions of a contract but not the entire contract, it is said that Argentinian contracting parties will not treat the fully negotiated portions as finalized—the assumption is that each portion of the contract is subject to renegotiation until the time the entire contract is agreed upon.[66] In Germany, once a decision is made, it is considered unchangeable, regardless of the status of any formal written contract,[67] whereas in Japan, contracts are generally never perceived as final agreements but rather as agreements that may be renegotiated by either party at any time.[68] In France, eye contact is frequent and intense, and can affect a party's understanding of assent.[69]

In some cultures, "yes" can mean anything from "I agree," to "maybe," to "I hope you can tell from my lack of enthusiasm that I really mean 'no.'"[70] For example, in Honduras, Mexico, and other Latin American countries, the desire to please means that business people might tell the other party what they want to hear, and couch their disagreement in generally positive terms. Thus, "maybe" or "we will see" generally means "no," and a verbal "yes" may be given out of politeness and may not be considered binding.[71] Similarly, in Indonesia, Malaysia, and other Asian countries, it is considered impolite to disagree with someone, which may make it difficult for a Westerner to distinguish between a polite "yes" (which really means "no") and an actual "yes."[72] Indeed, the Indonesian language includes at least twelve ways to say no and many ways to say, "I'm saying yes but I mean no."[73] In addition, Indonesians often pause respectfully for up to fifteen seconds to ponder what was said, which Westerners might misinterpret as acceptance or rejection.[74] Maybe because of these nuances, a deal is generally not considered complete until the paperwork is signed.[75] Relatedly, in Hong Kong, the word "yes" does not necessarily mean "I agree with you," but rather, "I heard you," potentially creating confusion about assent.[76]

The context of negotiations can also affect reasonable perceptions of assent. In Greece, for example, business is often conducted in a coffee house or *taverna,*[77] whereas such an informal setting might prevent negotiations from being perceived as final in other cultures. Culture can also affect contract interpretation. For example, in Germany, products may be delivered late without any explanation or apology.[78] Thus, based on custom, a seemingly precise contract delivery term might be interpreted as being loose rather than firm, and a "late delivery" might be seen as actually conforming to the contract.

There is also an increasing awareness of the effects that race may have on an individual's experience and thus on a given party's judgment and perception of what is "reasonable." [79] Professor Patricia Williams aptly describes how race (and gender) inform everyday transactions and how in an effort to achieve the same contracting goals, members of different groups may act completely differently,

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[66] TERRI MORRISON ET AL., KISS, BOW, OR SHAKE HANDS: HOW TO DO BUSINESS IN SIXTY COUNTRIES 124 (1994).

[67] *Id.* at 128.

[68] *Id.* at 205.

[69] *Id.* at 123.

[70] *Id.* at 222.

[71] MORRISON ET AL., *supra* note 66, at 150.

[72] *Id.* at 179, 222.

[73] *Id.* at 179.

[74] *Id.* at 180–81.

[75] *Id.* at 180.

[76] MORRISON ET AL., *supra* note 66, at 157.

[77] *Id.* at 138.

[78] *Id.* at 130.

[79] Ruth L. Gana, *Which "Self"? Race and Gender in the Right to Self-Determination as a Prerequisite to the Right to Development*, 14 WISC. INT'L L.J. 133, 140 (1995) (discussing, for example, how the issues surrounding Anita Hill and her testimony against Clarence Thomas's confirmation as a Supreme Court justice brought to light the question of the "reasonable black woman").

although all actions are based on "reasonable" assumptions.[80] Professor Williams describes, from her perspective as a black woman, the experience of renting an apartment, and compares it to the parallel experience of her white male colleague.[81] She explains how, in their common quest to be trusted and respected by their new landlords, she insisted on a formal, signed contract, while her colleague gave a $900 deposit to strangers without signing a lease, asking for a receipt, or even receiving a key.[82] While Professor Williams's colleague, a white male attorney, may feel the need to make himself appear trusting and approachable, as a black woman who grew up in a neighborhood where black families were routinely refused leases and required to pay in cash, it was important for Professor Williams "to show that [she could] speak the language of lease" in order to build trust in her business transactions.[83]

The question then becomes how best to weigh and apply racial and cultural differences.[84] Should such differences be relevant to the legal analysis at all? Contract law's supposedly neutral objective test may perpetuate inequality by ignoring important cultural factors, especially when the "reasonable person" is actually construed as the "reasonable white man."[85] On the other hand, more culturally sensitive theories increase judicial discretion and may be seen as unfairly shifting bargaining power to the "outsider" party.[86] Some have advocated a "reasonable woman" standard or a standard based on the "reasonable black woman" to help the court understand a party's "outsider" position.[87] Discussions surrounding such questions hit their peak during and in the years following the Clarence Thomas/Anita Hill controversy, stemming from the question of whether then-nominee Thomas's comments would have been offensive to a reasonable woman or a reasonable black woman. However, such modified standards have been criticized as being difficult to apply and as improperly essentializing women and black women.[88]

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[80] Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406–08 (1987); *see also* Kastely, *supra* note 2, at 296.

[81] *Id.* at 406–08.

[82] *Id.*

[83] *Id.* at 407. Gender can also have an effect on assent and contract interpretation in some cases. Gendered perceptions have been studied most fully in cases involving sexual harassment and other situations involving violence against women. Much has been written, for example, about how women experience allegations of sexual harassment in the workplace differently from men. For example, a woman might feel that pornography or sexually explicit jokes in the workplace constitute sexual harassment, even though her reasonable male coworkers are not upset by the same material. Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice,* 77 CORNELL L. REV 1398, 1409 (1992) (describing the effective use of a "reasonable woman" standard in sexual harassment and battered woman syndrome cases). Similar gendered differences may also exist in perceptions in contracting.

Similarly, a person's religion and physical and mental ability undoubtedly also play a role in the way that any given individual approaches a contract. For example, under some Muslim law, where a party breaches a contract, there is a concept similar to the excuses of duress, fraud, and unconscionability. Jacqueline McCormack, *Commercial Contracts in Muslim Countries of the Middle East: A Comparison with the United States*, 37 INT'L J. OF LEGAL INFO. 1, 11, 25–26 (2009) (describing excuses for non-performance in Islamic contract law). However, rather than treat these concepts as excuses for the breaching party, there is a concept of "equality and balance between the parties, rather than fairness." *Id.* at 11. Fundamentally, Islam is a religion based on laws, whereas Christianity, the religion most influential to American law, has arguably little effect on commercial transactions. *Id.* at 28. Thus, members of certain Muslim groups may see their role in a contract, and the ways that it binds them, very differently from contracting parties of other faiths.

[84] Trakman, *supra* note 7, at 1091.

[85] *Id.* at 1086–87.

[86] Daniel D. Barnhizer, *Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions,* 45 WAKE FOREST L. REV. 607, 608–09 (2010) (arguing that high-context contract law approaches are attempts to balance power between the apparently strong and the apparently weak parties).

[87] *Id.* at 615–16.

[88] For example, some low-income women questioned the fact that a black woman with Professor Hill's background would be powerless against oppressive conduct. *See generally* Cornel West, *Black Leadership and the Pitfalls of Racial Reasoning, in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON THE ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992) (describing the effects of guilt and closed-ranks mentality on reactions within the black community to criticisms of Clarence Thomas during the confirmation hearings).

This tension between competing values can be seen in *Acedo v. State Department of Public Welfare*.[89] In this case, an unmarried eighteen-year-old woman voluntarily signed a contract in which she agreed to give up her six-month-old baby for adoption.[90] Acedo had been advised that no adoption would be final until six months after the adoption petition was filed.[91] She believed, based on this information, that she had six months to change her mind about the adoption.[92] About two weeks after signing the contract and three days after the baby had been placed with a family, the young mother attempted to revoke her consent based on her understanding of the contract.[93] When she was told she had relinquished her right to change her mind, she sued, claiming there was no manifestation of mutual assent and no enforceable contract.[94] The court held that the contract language was clear and unambiguous and the only reasonable—objectively correct—interpretation was that Acedo unconditionally relinquished her right to the baby.[95] A reasonable person observing Acedo's words and conduct would have believed she manifested her assent to such relinquishment by reading and signing the unambiguous contract.[96]

How can assumptions of autonomy and rationality (and thus assumptions of assent) be challenged in this case? Using neoclassical economic principles, the court held Acedo to the background, knowledge, and life experience of a "reasonable person," and assumed that she was acting rationally, in her own best interest, and with perfect information when she signed the contract. Despite Acedo's young age, she was not a minor. Instead, the court reasoned that she was a high school graduate of normal intelligence, who voluntarily signed the contract after having full opportunity to read it.[97] This perspective honors the stability of the contract and, accordingly, stability of the adoption process. The court did not explicitly mention, as relevant factors, Acedo's race, class, gender, or any other personal characteristics that might have affected her understanding of the contract.

Would it be legitimate to challenge the assumption that Acedo was able to protect her best interests? What role might race play in answering that question? It is possible there were some racial differences that contributed to the bargaining dynamic and cultural differences that contributed to Acedo's understanding of the terms. For example, given the location of the case, Arizona, and the plaintiff's name, Herlinda Acedo, it would be reasonable to assume that the plaintiff and her family were Mexican-Americans. We know that many Mexican Americans, even those who were born in the United States or who are permanent residents, are politically and economically vulnerable.[98] We can ask students to consider Acedo's family structure and cultural tradition that might make children a gift but unwed pregnancy a shame. Statistics show that Hispanic girls become pregnant at a rate more than twice as high as that of white, non-Hispanic girls between the ages of fifteen and nineteen.[99] If Acedo was a recent immigrant from Mexico, or generally had a different experience with, and relationship to, pregnancy from that of a middle class, white teenager or young woman, then mutual assent is less obvious. Understanding the racial dynamics in the case, the cultural perspective, and the political context becomes crucial to understanding the court's perspective and whether there was or should be an enforceable contract.

On the other hand, making race relevant to the question of assent might lead to unintended harmful consequences for parties of color in future cases. Protecting vulnerable parties based in part on

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[89] Acedo v. State Dep't of Pub. Welfare, 513 P.2d 1350 (1973).

[90] *Id.* at 1351.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Acedo*, 513 P.2d at 1351.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 86 (1995) (discussing discrimination against undocumented Mexican immigrants as well as "documented" Mexican Americans).

[99] Brady E. Hamilton, Joyce A. Martin & Stephanie J. Ventura, *Births: Preliminary Data for 2010*, 60 NAT'L VITAL STAT. REP. 1, 9–10 (2011), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_02.pdf.

their identities could lead to reluctance to contract with minorities. Although the party of color in the particular case at hand may benefit from court intervention, in the long term, parties who appear to be vulnerable, financially and otherwise, may suffer if sellers are discouraged from doing business with them because of the contract's lack of reliability, thereby paving the way for even harsher contract terms with the diminished number of sellers who are willing to take risks on such buyers.

Ask the class whether racial and cultural differences might be relevant to how a party reads and interprets a contract. If so, to what extent should courts take into account those differences in their legal reasoning? Are courts equipped with the knowledge, insight, and objectivity to identify such racial differences and to evaluate the effect those differences can have on reasonable perceptions regarding assent without resorting to stereotypes? Be sure not to limit this discussion to the one case involving a party of color. In classes about offer and acceptance in which the race of the parties in the assigned cases is unclear or white, you probably already discuss the fact that perceptions of intent depend on whether the contracting actor is engaging in an arms-length bargain; follow up such discussions with a question about the effect race or cultural difference might have on that intent. Discussions about race and assent can continue naturally into analysis of the contract defenses, which generally question the voluntariness of a party's assent. Analysis of the racial dynamics can be equally important in understanding the limits to freedom of contract and to fully understanding the contours of the defenses available.

C. Alternative Reproductive Technology Contracts and Public Policy: Special Issues Facing Women and Families of Color

Many Contracts casebooks use cases involving surrogacy contracts to illustrate the rules and issues relating to the public policy defense. Public policy issues about surrogacy or other alternative reproductive technology (ART) tend to focus on the problem that surrogacy (or other ART) contracts can circumvent the requirements of a best-interest-of-the-child analysis; the concern about exploitation of the surrogate, who typically has less bargaining power than the intended parents; concerns about the denigration of human dignity when decisions about custody of a child are made through contract. For example, in *In re Baby M*,[100] the court suggests that the decision to act as the surrogate is generally uninformed (since the surrogate cannot know the strength of the bond she will form with the baby) and not truly voluntary (because of the monetary incentive). There is also a concern for class privilege, when surrogacy is used by people with money at the expense of the poor, and gender privilege, when the man is treated as a natural parent but the woman giving birth is treated merely as a service provider. Often left out of the discussion, however, are the particular effects of surrogacy on people of color.

Competing narratives can and should focus on families of color. Though these families are perhaps not the dominant or primary consumers of the technology, their interests are still relevant. Women of color, particularly African American women, have a higher rate of infertility than white women despite a popular myth that African American women are overly fertile.[101] Accordingly, contracting and contract law may be used to improve the welfare of some African American women. However, women of color are increasingly more likely to act as surrogates[102] and therefore more likely to be exploited through the surrogacy process. In addition, market rhetoric has resulted in race-based disparities in the pricing of genetic material, raising concerns about the net benefits of enforcing surrogacy contracts.[103] How should the law deal with these competing values and concerns?

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[100] 537 A.2d 1227 (N.J. 1988).

[101] June Carbone, *If I Say "Yes" to Regulation Today, Will You Still Respect Me in the Morning?*, 76 GEO. WASH. L. REV. 1747, 1749 (2008) ("African Americans have higher fertility rates at every age until twenty-five, and have lower fertility rates at every age thereafter.").

[102] Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 41, 46 (Michele Bratcher Goodwin ed., 2010).

[103] José Gabilondo, *Heterosexuality as a Prenatal Social Problem: Why Parents and Courts Have a Taste for Heterosexuality*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 118, 121 (Michele Bratcher Goodwin ed., 2010).

This section suggests ways to highlight such disparities in the course of teaching the class on the public policy defense or any class involving surrogacy or other ART contracts. The Section discusses whether such issues about race should be relevant to whether a contract violates public policy and it also suggests ways in which students can incorporate these issues into their legal reasoning about public policy while simultaneously enhancing their overall understanding of the goals and effects of the public policy doctrine. In teaching these issues, you can thread back to earlier discussions about the ways in which a free market based on race-neutral principles can have harmful effects on people of color in contracting and the role race should play in legal analysis generally.

1. Changing the Narrative

Recent societal trends have taught women that they must reach emotional maturity and gain financial independence before having children, meaning that many women begin trying to conceive well after fertility has begun to decline.[104] The current average age of American mothers giving birth to their first child is twenty-five years old.[105] At every age after twenty-five, African American women exhibit higher rates of infertility than white women, which may be a result of lesser access to healthcare services.[106]

Nevertheless, women of color are significantly less likely to address their own infertility through assisted reproduction than are white women.[107] Even where covered by insurance, the women using ART tend to be wealthy, white, and well-educated.[108] According to COTS, a British-based volunteer surrogacy organization, only five percent of couples looking for a surrogate through its program are non-white.[109] Cultural reasons may contribute to the disparity, since infertility is a particular area of shame for many women of color due to a false perception that "infertility is for white people."[110]

On the other hand, women of color are increasingly more likely to act as surrogates for white women.[111] Potential parents might prefer to use a surrogate of another race because of "the temptation to regard the child as a 'product' wholly separate and distinct from the pregnant woman."[112] In addition, it is arguably easier for surrogate mothers to give up a baby of a different race.[113]

Of course, money plays a role in both minority access to ART treatment and in ability to serve as a surrogate. First, the high cost of ART makes it unattainable for many poor women.[114] In states that do not mandate ART insurance coverage, availability is limited to those who can afford to pay out-of-pocket.[115] Limiting surrogacy fees may help improve accessibility for minority groups.[116] Second, even

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[104] Carbone, *supra* note 101, at 1748.

[105] *Id.* at 1763.

[106] *Id.* at 1749–50.

[107] Janelle Richards, *Cost and Culture Keeping Black Women out of Infertility Centers,* THE GRIO (Mar. 10, 2011, 8:16 AM), http://www.thegrio.com/health/cost-and-culture-keeping-black-women-out-of-infertility-centers.php.

[108] *Id.*

[109] Helen Weathers, *I'm a White Woman but I've Become a Surrogate Mother for an Asian Couple*, DAILY MAIL (Mar. 1, 2008, 3:31 PM), http://www.dailymail.co.uk/femail/article-522670/Im-white-woman-Ive-surrogate-mother-Asian-couple.html.

[110] Richards, *supra* note 107.

[111] Krawiec, *supra* note 102, at 46.

[112] MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 121 (2001).

[113] Weathers, *supra* note 109.

[114] Carbone, *supra* note 101, at 1765.

[115] John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 191, 192 (Michele Bratcher Goodwin ed., 2010).

[116] Kevin Tuininga, *The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law*, 41 CREIGHTON L. REV. 185, 201 (2008).

though two-thirds of women waiting to become surrogates earn less than $30,000 per year,[117] poor women are sometimes not chosen as surrogates because of fear that the situation will feel coercive.[118]

When people of color are chosen to be surrogates, it can be argued that their choice to use their bodies in this manner, based on a monetary incentive, ultimately reduces them to a slavery-like status, exploiting their vulnerability and compromising their dignity.[119] On the other hand, given the history of slavery in the United States, African Americans arguably are significantly aware of harms that can be associated with treating bodies as property or "private" objects, particularly when there is no capacity for self-ownership. The fact that the body and its constituent parts have long been traded, bonded, and insured, belies the claim that human bodies are incompatible with market valuation.

Overall, anti-commodification arguments supporting findings that surrogacy contracts are against public policy are meant to protect "vulnerable" people with low income. But left out of the dialogue is how people of color can also be consumers in these transactions, and how the market can work to their advantage. Certainly in some cases, donors and surrogates, driven by economics, may enter potentially harmful contracts to which they would otherwise not agree, leading to the exploitation of poor people and, often, people of color. However, providing an incentive for donors will increase options for the disproportionate number of infertile African Americans. Arguably people of color have as much to gain as to lose through the use of ART, as both donor, benefiting from the compensation, and recipients, benefiting from the increased supply.

2. Market Rhetoric and Pricing

There are other racial consequences of ART that can be raised in a discussion of public policy. Intended parents can often use the market to make a child resemble the non-biologically related family as closely as possible,[120] which can be beneficial in many ways but can also perpetuate racial hierarchies. An unregulated market creates competitive prices according to donor characteristics, which often include racial features. Simple supply and demand allow for competitive pricing, in which people will pay a premium to have kids that share their racial heritage. Since ART are primarily used by white people, the result is that white genetic material often commands a higher market value than African American gametes. This can lead to the commodification of genetic material and the children it produces.

It has been suggested that the economic value of a child can be found by subtracting the total anticipated cost from the total of all expected benefits.[121] In this equation, one such benefit may be social capital for the parent, meaning that a blond-haired, blue-eyed child might be worth more, whereas a

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[117] *Id.*

[118] Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES, Nov. 28, 2008, *available at* http://www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html. Racial minorities are not the only groups that have been discriminated against in this field. Even though laws mandate insurance coverage of ART in some states, the same laws may limit LGBT access by requiring a woman's eggs to be fertilized by her spouse or by requiring her to demonstrate infertility by engaging in unprotected intercourse for a designated period of time. Bebe J. Anderson, *Lesbians, Gays, and People Living with HIV: Facing and Fighting Barriers to Assisted Reproduction*, 15 CARDOZO J.L. & GENDER 451, 460–61 (2009) (describing various state laws governing donor eligibility for insurance coverage). Furthermore, FDA guidelines specifically discriminate against gay men by recommending that any man who has had sex with another man in the past five years be ineligible for sperm donation. *Id.* at 457–58 (explaining the FDA's recommendations for determining donor eligibility). This is theoretically meant to protect against the risk of HIV, yet a man who has engaged in heterosexual intercourse with a woman known to have HIV is only banned from donation for one year. *Id.*

[119] This argument has been made in the context of the sale of organs. *See, e.g.*, Dan Brock & Douglas Hanto, Presentation at the MIT Hippocratic Society Conference: The Organ Trail: The Science and Ethics of Tissue Engineering, Organ Transplantation, and Organ Trafficking (Mar. 10, 2007) (surveying perspectives for and against organ transplantation). For details about the conference, see *Conference 2007: The Organ Trail: The Science and Ethics of Tissue Engineering, Organ Transplantation, and Organ Trafficking*, MIT HIPPOCRATIC SOCIETY, http://web.mit.edu/Hippocratic/www/2007.html (last visited Dec. 6, 2012).

[120] Debora L. Spar, *As You Like It: Exploring the Limits of Parental Choice in Assisted Reproduction*, 27 LAW & INEQ. 481, 484–85 (2009) (describing the market for various desirable characteristics in sperm and eggs).

[121] Gabilondo, *supra* note 103, at 120.

minority child would be discounted.[122] Though this kind of market rhetoric is uncomfortable, it is also hard to refute. In the United States, for example, it is currently more expensive to adopt a white child than to adopt a black child, indicating that price may have more to do with parental demand than with the welfare of the child.[123]

An unregulated market for genetic material in ART may also foster eugenic practices, which may raise additional ethical issues relating to race. Eugenics is defined as the science of improving a human population by controlled breeding to increase the occurrence of desirable heritable characteristics.[124] Most U.S. sperm banks provide information regarding donor skin color and some even organize donor catalogues by race.[125] California Cryobank, America's largest sperm bank, allows potential parents to choose from traits including, among other things, height, weight, education, occupation, religion, eye color, hair color, race, medical history, and SAT scores.[126]

In discussions about *Baby M*, have the class consider the potential long-term effects of enforcing surrogacy contracts in an unregulated market. What if the existing paradigm (upper middle class white families looking to make a baby that is either genetically related to them or has similar traits as them) results in a pricing scheme under which white gametes command a higher price than black gametes? Should users of donated genetic material be able to select gametes on the basis of race, or might contract law have a place in limiting the enforceability of certain contracts on that basis? Are there ethical concerns with allowing intended parents to choose the specific traits, including eye, hair, and skin color, of a potential baby? What are the far-reaching results of such self-selection?[127]

The very nature of the legal issues in cases about ART contracts—the policy based question of surrogacy, for example, and the inevitable consideration of societal attitudes toward reproduction—links the question of race in some cases directly to the court's reasoning process. Decisions about public policy, by their definition, depend in large part on the political and social views of the court, and the facts can be spun in different ways to support different legal conclusions. A court's view about issues related to race (and class and gender) can ultimately affect the rule of law. Openly analyzing racial issues in the discussion of public policy (particularly in cases involving ART) will help students understand the social world in which we live and the relationships and assumptions in the cases. This, in turn, will undoubtedly lead to flexible and relative ways of thinking about the doctrine.

D. Specific Performance and Negative Injunctions: Involuntary Servitude and the Thirteenth Amendment

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[122] *Id.* at 121.

[123] Michele Bratcher Goodwin, *Baby Markets*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 2, 8 (Michele Bratcher Goodwin ed., 2010).

[124] THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

[125] Dov Fox, *Racial Classification in Assisted Reproduction,* 118 YALE L.J. 1844, 1846 (2009).

[126] *Id.* at 1850.

[127] To the extent regulation of surrogacy is a good thing, you might also have the class consider any ethical issues that may arise when intended parents choose to go abroad to avoid the high costs and regulation that exist in the United States. The heavy regulation and cost of surrogacy contracts in the United States has led to new globalization concerns that affect women of color. In recent years there have been thriving surrogacy markets created in other countries, markets used by wealthy Americans (and Europeans) seeking unregulated use of wombs. These thriving markets, most notably in India, provide opportunities for exploitation, since they involve monetary transactions in which women are putting their bodies at risk in exchange for money. The issues, however, are complicated because of the conflicting claims about non-discrimination and human dignity—those made by gay couples, for example, who have to use a surrogate if they wish to be parents with biological connections to their children, and those made about the exploitation of Indian women.

Overall, women's rights advocates are split over whether the outsourcing of surrogacy to India serves only to reinforce the perception of women as mere child bearers or whether it serves as a healthy expansion of fertility options. The racial implications regarding circumventing American regulation at the expense of Indian women can be incorporated seamlessly as a follow up thought question if the class concludes that regulation is necessary to protect various interests in the process.

According to Restatement (Second) of Contracts, "[a] promise to render personal service will not be specifically enforced."[128] A court's refusal to grant specific performance in a personal service contract is partially based in part on the fact that such compulsion results in involuntary servitude.[129] While a court will not specifically enforce a contract for personal services through an affirmative order, a party may, in some cases, prevent an employee from working elsewhere through a negative injunction.[130] In doing so, the employer's objective is typically to pressure the employee to return to work by straining her means of making a living elsewhere. Such injunctions are most commonly awarded in service contracts involving athletes and entertainers because of the notion that their services are unique. Considering the ties to slavery and the concerns of the Thirteenth Amendment, critics see injunctions against African American athletes and entertainers as especially egregious. Since the injunction forces the employee to work, it is tantamount to involuntary servitude.

Beverly Glen Music, Inc. v. Warner Communications, Inc., [131] is used in some Contracts casebooks to illustrate the limits of injunctions. In *Warner*, Anita Baker, at the time an unknown African American singer, signed a contract with Beverly Glen.[132] After recording a successful album for Beverly Glen, Baker was offered a better deal by Warner Communications and notified Beverly Glen that she was no longer willing to perform under the contract.[133] After unsuccessfully trying to enjoin Baker individually from performing elsewhere, Beverly Glen sought an injunction against defendant Warner Communications to prevent it from employing her.[134] The California court denied defendant's request for an injunction, holding that preventing others from employing Baker was an impermissible attempt "to deprive Ms. Baker of her livelihood and thereby pressure her to return to plaintiff's employ."[135] The court reasoned that "[d]enying someone his livelihood is a harsh remedy."[136]

This principle of law under the Restatement and as exemplified in *Warner* was first developed in cases following the passage of the Thirteenth Amendment, which bars involuntary servitude.[137] While not all early cases have explicitly analyzed the Thirteenth Amendment, most have referenced the Amendment in spirit, as a pillar on which our society has evolved. These references are often used to substantiate a judge's reasoning for denying an order of specific performance or an injunction that would otherwise result in involuntary servitude.[138] This line of reasoning now permeates our courts and has become the foundation on which cases that equate specific performance and injunctions to involuntary servitude rest. Such cases referencing the Constitution (directly or indirectly) are intermittent. However, they nevertheless illustrate that the trend against ordering specific performance or injunctions that result in involuntary servitude is deeply rooted in the Constitution.

There is, however, a line of cases typically involving athletes and entertainers in which negative injunctions are awarded. These courts reason that because athletes and entertainers are especially unique, monetary damages are more likely to be inadequate for the non-breaching party. The most notable case

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[128] RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981).

[129] *Id.* § 367(1) cmt. a (1981).

[130] *Id.* § 367(2) cmt. c (1981).

[131] Beverly Glen Music, Inc. v. Warner Communications, Inc., 178 Cal. App. 3d 1142 (1986).

[132] *Id.* at 1143

[133] *Id.* at 1143–44.

[134] *Id.* at 1144.

[135] *Id.* at 1145.

[136] *Warner*, 178 Cal. App., at 1145.

[137] Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2076–78 (2009).

[138] *See*, *e.g.*, Ford v. Jermon, 6 Phila. 6, 7 (Dist. Ct. 1865). (holding that a negative injunction that would prevent an actress from performing elsewhere would be a mitigated form of slavery); *See also*, Poultry Producers of Southern California v. Barlow, 189 Cal. 278, 288 (1922) ("[A] contract for service will not be specifically enforced, either directly by means of a decree directing the defendant to perform it or indirectly by an injunction restraining him for violating it.") (held that such a decree would place a person in "a condition of involuntary servitude"); *See also, Warner,* 178 Cal.App.3d at 1144 ("[A]n unwilling employee cannot be compelled to continue to provide services to his employer either by ordering specific performance of his contract, or by injunction. To do so runs afoul the Thirteenth Amendment's prohibition against involuntary servitude.")

is the English case, *Lumley v. Wagner*. In that case, the defendant, Wagner, was a German opera singer who contracted to perform exclusively for three months at plaintiff, Lumley's, opera house.[139] During the course of the contract, Wagner was offered higher pay to sing at another opera house, and thus abandoned her contract with Lumley.[140] Based on the language of the parties' agreement, Lumley sought an injunction against Wagner to prevent her from performing at another opera house.[141] The court recognized that it had no "means of compelling [Wagner] to sing," but that it could "compel her to abstain from the commission of an act that she has bound herself not to do, and thus possibly cause her to fulfill her engagement."[142] Though it had no power to enforce the specific performance of the contract, the court found a semantic backdoor, so to speak, through which it could facilitate fulfillment of the original contract.

The *Lumley* rule came out of an opera house dispute. However, it has been widely used in American sports law, largely because the individual natures of athletic and artistic talents and contracts are quite similar.[143] That is, the production manager and franchise owner face strikingly similar problems when the star cellist or quarterback suddenly becomes recalcitrant. Such talents are not easily replaced and traditional damages are insufficient to remedy the problem.

Despite *Lumley* and its progeny, courts are generally loathe to issue injunctions in personal services cases. Observations about the genesis of the *Lumley* rule and historical disparities in its application lend some insight. Professor VandeVelde has noted that "the *Lumley* rule originally gained its hold on American law in a series of cases involving efforts by male theater managers to control the lives of female performers."[144] This historical observation suggests how the *Lumley* rule might affect, or be affected by, the race of the party attempting to breach. While sweeping parallels between race-based and gender-based forms of discrimination are not justified here, it is nonetheless true that "[i]n creating the image of an individual, gender, like race, has been one of the most important signifiers in American culture."[145] In the late nineteenth-century, when a male broke a performance contract, he could be sued for damages, but was rarely, if ever, subject to *Lumley* rule injunctions.[146] But, "[b]ecause late nineteenth-century society imposed cultural bounds on the roles open to women, it was unthinkable that women could be fully free laborers."[147] A similar argument could be made about black entertainers of the era, as similar cultural bounds on opportunities for black performers no doubt existed. And while the more refined argument has limited its scope to gender, the contention that the "image of the independent, yeoman-free laborer [as] distinctly masculine" could likely be narrowed further to distinctly *white* and masculine without much stretch of the imagination.[148]

On its face, a rule prohibiting negative injunctions in personal service contracts seems to make sense; at first blush, it is easy to see how the enforcing a negative injunction might give the impression of

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[139] *See generally* Lumley v. Wagner, 42 Eng. Rep. 687 (1852).

[140] *Id.* at 687–88.

[141] *Id.* at 688.

[142] *Id.* at 693.

[143] *See, e.g.*, Lemat Corp. v. Barry, 275 Cal.App.2d 671 (1969) (granting one year injunctive relief against former basketball player); Central New York Basketball, Inc. v. Barnett, 181 N.E.2d 506, (Ohio Com.Pl. 1961) (awarding injunction to prevent professional basketball player from playing basketball for another club in another league in violation of his contract with the plaintiff); Phila. Ball Club v. Lajoie, 51 A. 973 (Pa. 1902) (enforcing an injunction preventing a baseball player from seeking employment on another team); Boston Celtics Ltd. P'ship v. Shaw, 908 F.2d 1041, 1048–49 (1st Cir. 1990) (enforcing an inunction against a basketball player); *See generally* Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law*, 16 MARQ. SPORTS L. REV. 261, 265 (2006).

[144] James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1523 (2010).

[145] Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775, 829 (1992).

[146] *Id.* at 830.

[147] *Id.*

[148] *Id.*

legally sanctioned involuntary servitude. However, in most situations, specific performance of a personal service contract does not violate the Thirteenth Amendment.[149] Arguably, because the Thirteenth Amendment was a response to the social conditions of its time, it "was intended to eliminate just such conditions of the worst off."[150] The "worst off" of that era were subject to "degrading and slave-like domination."[151] Indeed, in the approximately 150 years since the Thirteenth Amendment was enacted, interpretation of it has adhered to its original intent;[152] in order for a personal service contract to run afoul of the Thirteenth Amendment, it would have to amount to involuntary servitude in the darkest historical sense. Typically, however, the contracts at issue involve well-compensated "elites such as entertainers, athletes, coaches, and professors," who enter their contracts voluntarily and "free from direct physical coercion."[153] These kinds of contracts, therefore, are arguably beyond the concern of the Thirteenth Amendment.[154] Indeed, courts have granted injunctions more readily over the years with seemingly little protest.[155]

It is uncertain whether race has played a catalytic role in this area of contract law. Given that much of the debate over injunctions in personal service contracts centers on the Thirteenth Amendment, surprisingly little is made of the issue of race when courts enforce negative injunctions. But while the social climate giving rise to the Thirteenth Amendment is a far cry from the squabbles "between a multi-millionaire athlete and a sports franchise owned by multi-millionaires," the same social repercussions that led to abolishing involuntary servitude of slaves cause courts to steer clear of any suggestion of similar conditions, no matter how much money a breaching party may have.[156]

Though the relationship between the specific enforcement of injunctions in personal service-type contracts and racial concerns may be primarily historical, it is worth exploring with your class whether, in their use of specific performance and negative injunctions, courts should be more sensitive to the "intertwined dynamics of racial subordination."[157] Ask the class what effect historical contractual injustice should have on the enforcement of personal service contracts, if any. As far as sensitivity to such enforcement goes, maybe such a question is better posed as a sociological one? It is easy to speculate that an affirmative injunction forcing a black entertainer to complete a performance might awaken some deep-seated pain or other intense emotion. But should courts take into account such sensitivities? Should the race of the party from whom performance is sought matter? Should it matter if that person is wealthy and does not lack market power?

Take it one step further, and ask your class whether negative injunctions should be treated differently from affirmative injunctions. Would an injunction preventing a black athlete from working with one team until he finishes his contract with another trigger racial alarms similar to those triggered by an affirmative injunction? Perhaps "involuntary servitude," *per se*, is not the concern so much as memories of coercion and limited opportunities plaguing black communities. Maybe the *Lumley* rule avoids the pitfalls American courts have tried to avoid. Or maybe it is simply a semantic improvement over affirmative injunctions, whose constitutional hazards the rule claims to sidestep.

These are questions well worth exploring with your Contracts class, even if briefly, as you teach damages and the specific performance doctrine. At a minimum, providing the historical background that gave rise to the public policy arguments against injunctions, and posing questions relating to cultural and racial sensitivities, will help students appreciate the limits of the use of injunctions and help them better

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[149] *Id.* at 2023.

[150] Lea S. VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855, 856 (2007).

[151] Oman, *supra* note 137, at 2025.

[152] *Id.*

[153] *Id.* at 2099.

[154] *Id.*

[155] Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 692 (1990) (concluding that the rule allowing specific performance only upon a showing of no adequate remedy at law is effectively dead).

[156] Rapp, *supra* note 143, at 278.

[157] *Id.*

understand the scope of the rule itself. This, in turn, may underscore essential values underlying the American system of contract damages, which seeks to compensate rather than to punish.

IV. CONCLUSION

Law professors have a great deal of power because we teach students what to include and what to exclude in their analysis of the law.[158] It is incumbent upon law professors to make people of color visible in contracting. For any given case, there are many different rules embedded in values that are often in conflict with each other. To resolve these varying legal values requires teachers, as those with power, to make what are inherently political choices that often legitimize and reflect the social values and power of the dominant class.[159] In this role, we should encourage students to challenge ideas and the inherent political choices and influences within the law, rather than accepting information no matter how it is framed.[160]

It is impossible to teach law without awakening racial and cultural conflict and it is best to be prepared to include discussions of race so that one may do so in a purposeful and constructive way.[161] Those marginalized by the white, male perspective of law school are usually forced to learn the dominant perspective while already possessing a keen understanding of the "margin."[162] However, those who are not outsiders will not likely see other perspectives unless they are taught or happen to come to law school with some experience that has given them some other perspective.[163]

Students cannot truly understand the law, how it operates in our society, and most importantly, how to use it on behalf of clients and society without seeing how race has influenced its creation and continues to be a factor in the way that the law is applied.[164] For students of color to understand doctrine in a way that does not contradict their histories, values, and experiences, and for white students to understand the law more holistically and comprehensively, other perspectives must be acknowledged and taught.[165] Encouraging students to examine their own assumptions and be mindful of other perspectives helps them contextualize the inherent racism in the law and understand its effects.[166]

The reality of the limits of race-neutral doctrine is often much clearer to law students of color who experience exclusion as they learn the doctrine. Many white students whose beliefs and values are reinforced by law school are confused by why African American students do not feel similarly.[167] There is an assumption that white students and professors, by not directly referring to race, are neutral and that their perspectives are not racialized.[168] This lack of perspective masks a "white middle-class world view,"

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[158] Williams, *supra* note 80, at 88.

[159] Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 343 (2006).

[160] Francis Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511, 1580 (1991).

[161] David Dominguez, *Beyond Zero-Sum Games: Multiculturalism as Enriched Law Training for all Students*, 44 J. LEGAL EDUC. 175, 181 (1994).

[162] Ansley, *supra* note 160, at 1528–29.

[163] *Id.* (discussing the "false sense of universality that can so easily come to those in the center"); *see also* Alice K. Dueker, *Diversity and Learning: Imagining a Pedagogy of Difference*, 19 N.Y.U. REV. L. & SOC. CHANGE 101, 104 (1991–92) (discussing how difference is subtly rejected in favor of the idea that we are all the same and that the most powerful standard is set by the heterosexual white male).

[164] Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 544, 549 (1996).

[165] Kimberlé Williams Crenshaw, *Forward: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 2–3 (1988–1990); *see also* Dark, *supra* note 164, at 544 (discussing how the inclusion of, race, among other issues "aids substantially in the intellectual depth and breadth of the law student").

[166] Susan Bisom-Rapp, *Contextualizing the Debate: How Feminist and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law*, 44 J. LEGAL EDUC. 366, 369 (1994) (arguing that including various perspectives, specifically in the teaching of employment discrimination law, "help[s] students appreciate that abstract legal principles have concrete consequences for specific groups of employees").

[167] Chase, *supra* note 2, at 58.

[168] Crenshaw, *supra* note 165, at 6.

that requires students of color to adopt and speak on behalf of a perspective that is not their own.[169] The problem for students of color is compounded by the fact that if they mention this major flaw in the law, they may be judged as self-interested, inappropriate, or as taking the classroom conversation in irrelevant "tangential" directions.[170]

The results of this situation can be far-reaching. Students who feel "at home" or comfortable in the academic environment may be more likely to access a range of services such as professors, teaching assistants, academic support services, and writing centers. A contextualized analysis of the law that challenges the normalized assumptions inherent in the teaching of the law can help to reduce the classroom alienation of women, students of color, and students who may be marginalized for a variety of reasons, and ultimately have a positive effect on their academic performance.

[169] *Id.* at 3.

[170] Chase, *supra* note 2, at 58.