Modern contract law is rife with ideas about race and slavery and cases involving African Americans, but that presence is very hard to see. This Article recovers a hidden history of race in contract law, from its formative era in the 1870s, through the Realist critiques of the early 1900s to the diverse intellectual movements of the 1970s and 80s. Moving beyond recent accounts of “erasure,” and complementing Critical Race Theorists’ insights about law’s role in constructing, naturalizing, and justifying racial inequality, the Article offers a historically rich account of when, where, and why legal professionals have highlighted race in contract law. It positions African
Americans as legal thinkers and active contributors to the development of legal rules, not just as objects of law. It shows that contracts scholars, judges, and lawyers have frequently relied on what I call “colored’ cases”—cases involving African Americans, hypotheticals and cases deploying racial metaphors and analogies, and hypotheticals and cases using theories about slavery—to develop common-law rules and to think through major doctrinal and theoretical problems in contract. Drawing on a range of archival sources, including a hand-collected sample of 9,113 civil cases heard in county-level trial courts, it offers a nuanced account of what I call “doctrinal passing”: a complex interplay between the imperatives of legal advocacy, the normal flow of “doctrinal distillation,” and changing ideas about Black people and slavery. Again and again, “colored’ cases” enabled legal professionals to position slavery and race as exceptions within the world of contract relations: useful for theorizing issues they deemed more fundamental, yet peripheral to contract law itself and therefore liable to be stripped of their racial facts, except in the most marginal doctrinal areas. Whitening contract law enabled it to emerge as a distinct, coherent body of law but at a steep cost to its doctrinal and conceptual integrity and to the law school curriculum. The Article concludes with recommendations for modifying the structure and implicit assumptions of the law school curriculum, offers methods for identifying cases involving racial minorities, and offers suggestions about when law teachers and other legal professionals today should consider talking about race in contract law.

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INTRODUCTION

Law schools are once again wrestling over whether and how to incorporate race and slavery into first-year courses. Legal scholars have grappled with the relationship between race and law for a long time but, until recently, little of that scholarship has focused on the place of race in contract law. Discussing race in the private law domain of contract is difficult for several reasons: because many faculty feel unprepared to discuss race; because matters relating to race are typically taught in electives and in public law courses such as criminal and constitutional law; and because race is usually treated as context—so tangential to the substantive doctrinal rules and concepts that many faculty are expressing concern that they will have to skim on the doctrine to make room. But incorporating race is also difficult for a reason


2 See Yearlong Series Examines Race in the Context of Subjects Foundational to First-Year Curriculum, supra note 1 (expressing Professor Darrell Miller’s worry that “the demands of the first-year curriculum” often stifle classroom discourse on race). The zero-sum worry has been discussed previously. See, e.g., Sanford Levinson, Slavery in the Canon of Constitutional Law, 68 CHI.-KENT L. REV. 1087, 1091 (1993) (“I . . . present my reasons for allocating so much time and casebook space to slavery.”); William R. Trail & William D. Underwood, The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools, 48 BAYLOR L. REV. 201, 215-16 (1996) (arguing that law schools should favor electives with clear practical application over courses peripheral to legal practice); Kim Forde-Mazrui, Learning Law Through the Lens of Race, 21 J.L. & POL. 1, 21 (2005) (noting that some law professors may object to discussing race in class, noting that “they have limited time” during the course); Paul Brest, Derrick Bell’s Experience Sparks Change at Stanford, SALT EQUALIZER (Soc’y of Am. L. Teachers, Tempe, Ariz.), Apr. 1988, at 1-4 (describing
few have fully appreciated: because over time judges and scholars have selectively played up, played down, and forgotten the presence of Black people in American contract law.

This Article is the first to investigate systematically the role of African Americans and race in the development of modern contract law. It offers three interlocking arguments. First, drawing on a range of archival sources, including a large sample of civil cases heard in county-level trial courts, the Article shows that African Americans have engaged vigorously and routinely with contract law for more than 150 years. This finding challenges the dominant scholarly assumption that, before the civil rights revolution of the 1960s, state and local law functioned as tools of social control against African Americans, who were kept ignorant of legal rules and alienated from legal institutions. By demonstrating that Black people exercised the civil right of contract and that southern state and local courts before the 1960s recognized those claims, this Article reveals Black people as legal actors and users of law, suggesting new ways of linking race with private law while deepening the contention that law is more than politics, more than a tool of subordination wielded by dominant groups. For African Americans, the rights associated with contract were among what I have elsewhere called “rights of everyday use.”

For decades, historians, sociologists, and legal scholars have started from the premise that Black southerners before the 1950s lived under “Negro law,” a separate and unequal criminal justice system designed “for enforcing caste

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3 See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 42, 59 (2004) ("[B]lacks' rights were nullified, not by statute, but through administrative discrimination" by low-level county officials, which in turn was protected by federal courts' willingness to nullify the sub-constitutional rules that governed proof of administrative discrimination); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 37 (2020) (describing U.S. segregation law as "a system of control [to] ensure a low-paid, submissive labor force").


rather than securing justice," one that left Black people alienated and fearful of courts, and ignorant of law.\(^6\) But precisely because federal law barred the creation of a separate body of contract law for African Americans, legal professionals have frequently relied on what I will call "colored' cases"—cases involving African Americans, hypotheticals and cases deploying racial metaphors and analogies, and hypotheticals and cases using theories about slavery—to develop common-law rules and to think through major doctrinal and theoretical problems in contract. The term "colored" comes from a bygone historical era. I use it purposefully here, for three reasons. First, unlike "Black," "colored" reminds us that perceptions of race rely heavily on context as well as phenotype; you can't necessarily tell who is "colored" just by looking. Second, the term signals that these dynamics were not unique to cases involving people of African descent.\(^7\) Finally, the dynamics this Article describes are not limited to the bygone past, and this concept, with its historically specific terminology, reminds us how important it is to think historically when thinking about contract law.

Indeed, history has become central to recent discussions of race and law, as a small but growing number of legal scholars revive a longstanding critique that prevailing modes of legal education and legal scholarship hide the profound influence that slavery, the violent dispossession of Native Americans, and cases involving racial minorities have had on contract law.\(^8\)


\(^7\) See for example Western Union Telephone Co. v. Chouteau, 115 P. 879 (Okla. 1911), discussed infra note 191. I have kept the word "colored" in quotation marks throughout in order to emphasize its historicity, and to signal that it should be vocalized only with great care, and only as part of the phrase "colored' cases."

\(^8\) See Blake D. Morant, The Relevance of Race and Disparity in Discussions of Contract Law, 31 NEW ENG. L. REV. 889, 896-99 (1997) (urging contract scholars and teachers to pay attention to race whenever it is relevant); Justin Simard, Citing Slavery, 72 STAN. L. REV. 79, 82 (2020) (showing that modern courts "routinely cite" "slave cases" in ways that both impose dignitary harms and undermine doctrinal coherence). My inquiry into the formative influence of cases involving racial minorities on legal theory and doctrine complements, but is distinct from, scholarship exploring law's role in constructing, naturalizing, and justifying racial inequality. See, e.g., Abbye Atkinson, Borrowing Equality, 120 COLUM. L. REV. 1403, 1410-11 (2020) (explaining how Congress "encourag[es] debt among marginalized communities" through policies that wrongly presume credit is "a catalyst for equality"); Mehrsa Baradaran, Closing the Racial Wealth Gap, 95 N.Y.U. L. REV. ONLINE 57, 58-60 (2020) (theorizing constitutional rights violations as breaches of contract amenable to compensatory damages); Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1494-95 (2005) (reviewing and applying implicit bias scholarship to FCC grants of broadcast licenses); Emily M.S. Houh, Critical Interventions: Toward an Expansive Equality Approach to the
property,\(^9\) and civil procedure,\(^{10}\) as well as public law domains not conventionally associated with race.\(^{11}\) But these works tend to focus on cases that explicitly discuss race. In fact, as this Article will show, many of the most influential cases involving Black people are the ones that do not talk about race. It is not enough to show that race has disappeared from the casebooks and the Restatement. We must also ask why and how it disappeared, how it got there in the first place, and what we really mean when we say it has been

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“erased.”12 Answering such questions requires going beyond well-known cases and standard electronic searches on keywords such as “Negro” or “slave”13 or “Indian.”14 It means looking at trial court records, and sometimes at archival or even oral sources. And it means considering racial minorities not only as


13 Some historians of slavery in the United States, as well as some government agencies and educational organizations, have recently urged substituting the words “enslavement” and “enslaved person” for “slavery” and “slave,” which they contend rob historical figures of any identity beyond the dehumanizing one imposed on them. Similarly, they urge substituting “enslaver” rather than “slaveowner” and “owner,” which are said to obscure the violence and immorality that enslaved people suffered. In this Article, I sometimes use the new terminology. But often, the words “slave” and “slaveowner” and “former slave” convey exactly what I mean to say. Generally, I have followed the approach recently outlined by Tiya Miles. Miles uses the words “slave” and “slavery” when she is “referring to categories defined and imposed by southern owners of people, to societal as well as legal dictates, and to racial systems of capture,” reserving “enslaved” or “unfree” for passages where she “designate[s] a person from their perspective, the perspective of their community, or our perspective as researchers and readers.” She also uses “established terms from historical study such as ‘slave society’ [and] ‘slave narrative.’” She uses the term “slave mother” because “it has a particular literary and historical valence” within Black women’s literature. Finally, she sometimes uses “shorter words or word combinations for the sound or rhythm in the sentence rather than performing linguistic acrobatics to avoid using the word ‘slave’ or ‘owner.’” It is worth noting that in both Native American history, as Miles points out, and in African history, many scholars and community members are moving toward the words “slave” and “slavery.” TiYA MILES, ALL THAT SHE CARRIED: THE JOURNEY OF ASHLEY’S SACK, A BLACK FAMILY KEEPSAKE 287-89 (2021); see also Dylan C. Penningroth, The Claims of Slaves and Ex-Slaves to Family and Property: A Transatlantic Comparison 112 AM. HIST. REV. 1039, 1048-53, 1060, 1068-69 (2007) (discussing the ideological and legal valence of terminology associated with racialized systems of exploitation and subordination in Ghana and the United States); Rebecca Onion, Why Grammarly’s New Suggestions for Writing About Slavery Were Always Going to Miss the Mark, SLATE (Feb. 8, 2022, 11:38 AM), https://slate.com/technology/2022/02/grammatically-slavery-language-suggestions.html [https://perma.cc/QE5L-HBTJ] (gathering critical responses from several leading historians regarding the new terminology). Finally, the assertion that using certain terminology restores enslaved people to their full humanity evinces an understanding of the history of slavery that I do not share, and it implies a theoretical stance toward the concepts slavery and freedom that uncomfortably resembles the liberal individualism that this Article critically examines. Slavery in the United States stood upon the exploitation of slaves’ humanity. As Walter Johnson has stated, their humanity did not need to be restored and it does not now, either. It should be taken as given. Walter Johnson, On Agency, 37 J. SOC. HIST. 113, 113-14, 119-21 (2003).

14 For an example of this deep engagement, see Maggie McKinley, Petitioning and the Making of the Administrative State, 127 YALE L.J. 1538, 1555-94 (2018). For examples of the famous-case and keyword-search approach, see Justin Driver, Recognizing Race, 112 COLUM. L. REV. 404 (2012); History Wars, supra note 9, at 1072, 1142-53. Notably, one historian has recently used electronic keyword searches to build a large database of appellate cases involving Black litigants between 1865 and 1920. MELISSA MILEWSKI, LITIGATING ACROSS THE COLOR LINE: CIVIL CASES BETWEEN BLACK AND WHITE SOUTHERNERS FROM THE END OF SLAVERY TO CIVIL RIGHTS 8, 12, 16 (2018).
objects of law or as stand-ins for “race,” but also as legal thinkers and users of law.\textsuperscript{15}

This wide-angle, archivally-informed approach makes possible the Article’s third contribution: to explain what has happened to race in contract law, and why. Race now seems absent from all but the most marginal areas of contract law but appearances can be deceiving. Rather than a straightforward response to the imperatives of white supremacy\textsuperscript{16} or a decision made in classroom\textsuperscript{17} or casebook,\textsuperscript{18} race has appeared and disappeared from blackletter law over time and at all stages of the legal process, through what I call “doctrinal passing”: a complex interplay between the imperatives of legal advocacy, the normal flow of “doctrinal distillation,”\textsuperscript{19} and changing ideas about Black people and slavery. Similar to the way some “colored” people were allowed to “pass” as white,\textsuperscript{20} “colored” cases were “passed” silently into the heart of contract law and naturalized as white when legal professionals elided the fact that a litigant was Black, and when they turned slavery into an abstraction, detached from race. The very thing that made Black people’s cases such useful vehicles for doctrinal development during the formative era of American contract law—the space they afforded for manipulating the materiality of race—tended to make them invisible.

One important difference, of course, is that people, unlike cases, have volition. But we should not overstate this. People don’t always choose to pass. Sometimes, they get passed, unwillingly.\textsuperscript{21} Moreover, just as light skin was

\textsuperscript{15} Indeed, historians have been writing about race and law since the 1930s, but legal scholars have more readily picked up historiography about law’s impact on racial minorities than about minorities’ use of law and legal knowledge. See, e.g., infra note 45.

\textsuperscript{16} See History Wars, supra note 9, at 1072-91 (arguing that early property casebooks “erased” “the histories of conquest and slavery in the property-law curriculum and canon” but declining to explain “how and why erasure . . . occurred”).

\textsuperscript{17} For a chronicle of the in-class origins of Critical Race Theory, see Kimberlé Williams Crenshaw, The First Decade: Critical Reflections, or a Foot in the Closing Door, 49 UCLA L. REV. 1343, 1344-51 (2002).

\textsuperscript{18} See, e.g., Levinson, supra note 2, at 1091 (expressing the zero-sum worry); This Land Is Not Our Land, supra note 9, at 1992-2005, 2013-15 (describing the “erasure” of “the histories of conquest, slavery, and race” in “legal scholarship, legal education, and legal practice”).

\textsuperscript{19} See Risa L. Goluboff, The Lost Promise of Civil Rights 238 (2007) (defining “doctrinal distillation” as a process of “filter[ing] out factual scenarios, sites of legal contestation, doctrinal theories, and experienced harms”).

\textsuperscript{20} See, e.g., Daniel J. Sharfstein, The Secret History of Race in the United States, 112 YALE L. J. 1473, 1476, 1490 (2003) (arguing that the notion of race as social construction was widely understood during Jim Crow because everyone knew there were vast numbers of white people with Black ancestry). Cheryl Harris introduced her pathbreaking analysis of property in whiteness with a family story about passing. See Harris, supra note 9, at 1710-13.

neither necessary nor sufficient for people to pass as white, 22 doctrinal passing has depended heavily on context (for example, whether a case was discussed or cited alongside cases that were “about” race); context, in turn, has had its strongest effect locally and became attenuated with distance (for example, as a case moved to an appellate court); and it could be resurfaced without warning at any time.

Again and again, “colored' cases” enabled legal professionals to position slavery and race as exceptions within the world of contract relations: useful for theorizing issues they deemed more fundamental, yet peripheral to contract law itself and therefore liable to be stripped of their racial facts. As widely as legal professionals have relied on Black people's cases, they gradually stopped mentioning—or even realizing—that Black people were involved, except in the most marginal doctrinal areas. Whitening contract law enabled it to emerge as a distinct, coherent body of law but at a steep cost to its doctrinal and conceptual integrity and to the law school curriculum. The problem of race in contract law is not how to make room to discuss race without skimping on the substantive doctrinal rules and concepts of contract law. The problem is that some of the doctrines and concepts are not quite what they seem.

Consider Harrington v. Taylor, 23 one of a trio of cases widely used 24 to teach the principles governing promises based on past consideration. Harrington raises important questions about how racial minorities have perceived and used contract law, how canonical cases get chosen and presented, and how contract law gets taught. The case was an action to recover the case around a person whose "colored blood [was] not discernible" to a white person, they actually had to alert the conductor that Homer Plessy was "colored").

22 See Harris, supra note 9, at 1710-11 (describing the importance of context for observers' ability to interpret phenotypical features as "white" or "Black"); White v. Clements, 39 Ga. 232, 235-36 (1869) (assessing person's race in part by "seeing him several times in the company of colored persons"); NELLA LARSEN, PASSING 19 (1929) (mocking white people's inability to "know" who was a “Negro” without the helping cues of context); PASSING (Netflix 2021) (same).

23 36 S.E.2d 227 (N.C. 1945).

damages based on Lee Walter Taylor’s oral promise to pay Lena Harrington, whose hand had been maimed when she stopped Taylor’s wife, Arnisea, from killing him with an axe. Twenty-five The issue was whether Taylor’s reneged promise was consideration for Harrington’s sacrifice of her hand. Twenty-six The court held that it was not. Twenty-seven A contracts teacher who wants to incorporate race might ask, “would the court have decided differently if Harrington had been black?” But this is the wrong question because, in fact, Harrington was black and so was everyone else at her house that night—her daughter Dorothy Strickland, her baby grand-daughter Ruby, and the Taylors. Twenty-eight In assuming that Harrington was white, the casebooks are unwittingly teaching students a racial hypo. And this matters to the rule of Harrington. Twenty-nine

The trial record, available by request from the state archives, reveals that Arnisea Taylor was a victim of domestic violence and suggests that the parties were trying to use contract law as a substitute for an unresponsive criminal justice system. The night before, she had gone to the police to report that her husband had beaten and threatened to kill her, but the police shrugged it off and simply dropped her off at Harrington’s house a few doors down. Thirty When Lee Walter Taylor pushed his way in and assaulted Arnisea again, Thirty-one Arnisea picked up the axe Harrington kept for cutting stovewood, knocked him down

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25 Harrington, 36 S.E.2d at 227.
26 Id.
27 Transcript of Record at 7-8, Harrington v. Taylor, 36 S.E.2d 227 (N.C. 1945) (No. 594) (State Archives of North Carolina, Raleigh [hereinafter SANC]) [hereinafter Transcript of Record No. 594].
28 Id. at 4; U.S. DEPT OF COM., BUREAU OF THE CENSUS, SIXTEENTH CENSUS OF THE UNITED STATES: 1940: POPULATION SCHEDULE FOR NORTH CAROLINA, RICHMOND COUNTY, MARK'S CREEK 12B (listing Lena Harrington's race as black); see also Brief for Defendant-Appellee, Transcript of Record at 29, Harrington v. Taylor, 40 S.E.2d 367 (N.C. 1946) (No. 593) (SANC) [hereinafter Transcript of Record No. 593] (“The defendant seems to be a courteous negro”).
29 The materiality of race can run in the other direction, too. See PAMELA BRANDEWIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 154-56 (2011) (showing scholars and judges have erroneously assumed that an important state-action case, United States v. Harris, 106 U.S. 629 (1883), involved Black victims).
30 Transcript of Record No. 593, supra note 28, at 2; Transcript of Record No. 594, supra note 27, at 4. On the problems that under-policing imposes on racial and gender minorities, see MCMILLEN, supra note 6, at 205-06, which concludes that Jim Crow era “law enforcement, with rare exception, served the needs of caste”; BRANDWEIN, supra note 29, at 11-14, 206, which describes the concept of “state neglect” whereby the federal government could “punish private individuals whose race-based violence and intimidation went unpunished by states”; Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 HARV. L. REV. 904, 913-14 (1962), which discusses the “calculated nonenforcement of certain laws against the Negro population”; JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 35 (2011); and Deborah Tuerkheimer, Underenforcement as Unequal Protection, 57 B.C. L. REV. 1287, 1288-89, 1293-94, 1299-1303 (2016), which observes underenforcement by police in cases of sexual violence and arguing that recent Justice Department enforcement reflects “the (re)emergence of federal power [that] should be understood to possess deep historical roots.”
31 Transcript of Record No. 594, supra note 27, at 4-5.
with the flat of it, hit him again on the neck, and then swung at his head blade-first, saying “Let me kill him! . . . If I don’t kill him, he will kill me!” Harrington grabbed for the axe handle trying to stop her, caught the blade instead, and it severed her fingers against the door.32 By the time of the trial, Harrington had paid $59 for doctor’s bills (not including medicine) even as her income—previously $26.75 a week, all from washing clothes—dried up. The bargain at issue in Harrington arose because, faced with a racist and sexist criminal justice system, private law was the only way to make Lee Walter Taylor pay for his violence.33 If the rule of Harrington is that a promise is not enforceable if it is made after the benefit is received, then shouldn’t we wonder why Harrington, a Black woman in violently segregationist small-town North Carolina,34 thought she could enforce that promise and why she resorted to a bargain in the first place?

Answering such questions requires a reimagining of Black people’s legal knowledge and the vibrant world from which it came. Part I of this Article recovers African Americans’ engagement with contract law between the 1880s and the 1950s, a period that was, in a seldom-noticed coincidence, both the heyday of American apartheid and the formative era of American contract law. Drawing from my sample of 9,113 cases from trial court dockets at twenty-two county courthouses and five state archives, this Article shows for the first time that Black people participated vigorously in county and state courts across the South, even as their constitutional rights came under attack, and that contract law was for them a tool of everyday use. Parts II and III chart the rise and significance of “colored’ cases” during the late nineteenth and early twentieth centuries, when contract emerged as a distinct legal topic in Anglo-American law.35 Part II argues that key principles of the Classical (formalist) approach to contract arose from the struggle to define freedom after the Civil War—a struggle aimed at destroying slavery without disturbing other forms of power and authority. As judges embraced freedom of contract as the bedrock

32 Id. at 4–6, 11. See also Transcript of Record No. 593, supra note 28, at 8 (describing Lee Walter Taylor as angrily shouting, “I thought I told you to come on home,” grabbing her by the arm, and dragging her across the room).

33 See Transcript of Record No. 593, supra note 28, at 12–15 (describing Lena Harrington’s medical debt and lost earnings, remarking “[w]ell, how can I wash white folks’ clothes with two fingers?”).


35 See DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 207 (2006) (“In 1867, there was no Anglo-American literature on the theory of contract.”); GRANT GILMORE, THE DEATH OF CONTRACT 6 (1974) (describing the “birth” of “a general law—or theory—of contract” around 1870); Janet Halley, What is Family Law?: A Genealogy, 23 YALE J.L. & HUMANS. 1, 11 (2011) (“[T]he emergence of contract as a distinct legal topic was produced in part through the gradual exile of marriage from its domain”).
principle of the modern legal order, they re-absorbed Black people as the exception that proved the rules, defining voluntariness, prudence, and capacity by reference to Black slavery, ignorance, and weakness.

Part III describes the impact of “’colored’ cases” on Legal Realism.36 Most Realists ignored issues of race but they, too, used Black people, racial metaphors, and slavery as tools to think with. At a time when white scholars and lawmakers used stereotypes of Black ignorance and incapacity to justify stripping away their constitutional rights,37 Black people’s widespread legal activity produced contradictory impulses in private law, including in contract theory. On one hand, Blackness became the paradigmatic non-fact for objectivists: the prime example of a fact whose exclusion as non-material illustrated objectivism’s core premises of voluntariness and formal equality. On the other hand, Legal Realists used Black people’s relative powerlessness and disadvantage to attack objectivism’s presumptions of voluntariness, capacity, and formal equality. But Realists did not criticize racial inequality itself. And thus, in pursuing their critique of Classical legal thought, they suppressed race or even deployed racist stereotypes.

Part IV charts the fate of race in contract law since the 1940s. It shows why, even as cases involving Black people still silently dotted the casebooks, law schools’ explicit engagement with race shrank to one case, Williams v. Walker-Thomas Furniture,38 a case that was not typical of Black people’s dealings with contract law and was already doctrinally marginal. The unconscionability cases made it difficult for legal liberals to mount a race-conscious structural critique of voluntariness. In the law of duress, legal liberals’ efforts to cabin off race led them to distort the case law itself, a distortion that persists in the Restatement (Second) of Contracts. And when the first significant cohort of Black law students arrived at top law schools in the early 1970s, they found a curriculum that treated Black people as a categorical exception to the rules of contract law: incapable and irrelevant except as victims in “the law of the poor.” That treatment—which ignored African Americans’ routine engagement with the full range of contract law, far beyond unconscionability—alienated Black students, a story I tell partly through the eyes of my mother, who enrolled at the University of Pennsylvania Law School in 1972.

The article’s normative stance resides in its descriptive approach, but Part V offers some explicit recommendations for modifying the structure and implicit

36 The Article focuses especially on Robert Hale, Jerome Frank, Joseph Hutcheson, and to a lesser extent, Karl Llewellyn, Arthur Corbin, Felix Cohen, and Max Radin.


assumptions of the law school curriculum, and discusses when law teachers and other legal professionals today should talk about race in contract law.

The fact that Black people participated in contract law before the 1960s does not mean that Black people had power equal to white people, nor does it mean that law generally was colorblind—much less that it should be colorblind now. It does mean that it was easier to segregate some areas of law than others—that it was easier to padlock the railcar and voter rolls than the deed books or even the courts. Current debates about colorblindness are too narrowly confined to public law and wrongly cut off from a rich history of African Americans using and helping to forge private law rules. To paraphrase the late Toni Morrison, the question is not, “why are Black people virtually absent from the canon of contract law?” Instead, we should be asking, “what intellectual feats had to be performed by legal professionals to erase Black people from a world of contracts seething with their presence, and what have those intellectual feats done to the law of contract?”

I. EVERYDAY USE: AFRICAN AMERICANS’ ENGAGEMENT WITH CONTRACT LAW

Harrington was not Lena Harrington’s first encounter with private law. “[R]ight here in this courthouse twelve years ago the ninth of July,” she testified, she had separated from her husband.40 The same day the North Carolina court decided Harrington, it affirmed a different Black woman’s contract for child support payments from her ex-husband.41 Two months later, Lena Harrington filed another suit against Taylor—this time in tort—and it went to the state supreme court, too.42 In fact, Harrington’s two civil suits in the winter of 1945 were part of a very long history of Black participation in private law, one that went back to the 1600s.

39 Toni Morrison, *Unspeakable Things Unspoken: The Afro-American Presence in American Literature*, 28 Mich. Q. Rev. 1, 11-12 (1989) (“Looking at the scope of American literature, I can’t help thinking that the question should never have been ‘Why am I, an Afro-American, absent from it? It is not a particularly interesting query anyway. The spectacularly interesting question is ‘What intellectual feats had to be performed by the author or his critic to erase me from a society seething with my presence, and what effect has that performance had on the work?’”).


42 Harrington v. Taylor, 40 S.E.2d at 367 (N.C. 1945) (per curiam) (affirming nonsuit on ground that Taylor could not have foreseen being injured).

Already by 1873, when Justice Samuel Miller nullified the Privileges and Immunities Clause by affirming the primacy of states in “the entire domain of civil rights,”44 Black people were actively participating in the South’s county and state courts, amplifying and extending a pattern set during slavery.45 And they continued to do so during the era of Jim Crow, when they lost the right to vote and were violently subjugated in public life. In my sample of trial courts in Virginia and Mississippi, Black people filed 13% (49/390) of the civil suits in 1872 (when they made up 48% of those two states’ combined population), 30% (104/350) in 1912 (when they were 44% of the population), and 20% of them (55/282) in 1952 (when they were 34% of the population).46 Black people used the local courts for all kinds of things. They

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45 See, e.g., Rowland v. Burton, 2 Del. 288, 288-89 (1837) (allowing a “negro” plaintiff to prove debt owed by white employer by using the plaintiff’s notched stick recording the hours worked); see also Luther Porter Jackson, The Virginia Free Negro Farmer and Property Owner, 1830–1860, 24 J. NEGRO HIST. 390, 398-400, 407, 414-16 (1939) (recounting how free Black men in Virginia exercised their rights to own property in the early to mid 1800s); MARTHA S. JONES, BIRTHRIGHT CITIZENS 41, 111-19 (2018) (“Debt, even that which could not be satisfied, provided an entrée into the rituals of rights.”); MELVIN PATRICK ELY, ISRAEL ON THE APPOMATTOX 85-90, 262-67 (2004) (“[M]ost lawsuits by free blacks, like those of whites, revolved around money and property.”); KIMBERLY M. WELCH, BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH 84-88, 115-33 (2018) (“Black clients were a regular and ordinary part of [white southern lawyers’] practice.”); LAURA F. EDWARDS, ONLY THE CLOTHES ON HER BACK: CLOTHING AND THE HIDDEN HISTORY OF POWER IN THE NINETEENTH-CENTURY UNITED STATES 15 (2022) (“[L]aw was central to [working-class white women's] lives, long before they acquired rights.”).
46 These figures come from a purposive interval sample of county, circuit, and justice of peace court dockets and “order books” in Illinois, Virginia, Mississippi, New Jersey, and the District of Columbia. I visited circuit clerks’ offices in 22 counties; other dockets are held in state or regional repositories. New Jersey’s Chancery Court was statewide until 1947; thereafter, equity cases went to a division of the state Superior Court. I transcribed docket entries either on site or afterward, with help from research assistants, from photographs I took on site. I sampled 25 cases per decade per county, from both “Law” and “Chancery” dockets, for years ending in two, beginning in 1872 through 1962, evenly across a calendar year whenever possible. For each sampled case, we coded the names of parties, cause of action, and other relevant information into a FileMaker database. We then searched party names in the manuscript Census on Ancestry.com, coded each party as either “no match,” “low-confidence match,” or “high-confidence match,” and filled in demographic information. To date, we have coded 17,307 cases. Of these, we have low- or high-confidence matches for at least one party in 9,113 cases, and for 6,819 plaintiffs. In both the percentages of cases involving Black plaintiffs and the mix of case types, the findings here differ sharply from statistics derived from keyword searches of state supreme court reports. Compare this Article with MILEWSKI, supra note 14, at 8, 207 (finding that less than 1% of civil cases involved Black litigants in eight appellate courts between 1865 and 1950 and that 71% of those cases were against a white opponent).
sued for divorce. They sued insurance companies, both Black and white-owned. Black-owned insurers sued Black policyholders. Black people sued over car accidents, railroad accidents, workplace accidents, farms, unpaid rent, and personal property. They swore out writs to get “satisfaction” from white neighbors who assaulted them, from town officials who damaged their property, and to hush up a daughter’s out-of-wedlock pregnancy. They used private law in more routine, non-adversarial ways, too: they sold easements on their land; “made out . . . will[s]” and got them probated; had cars towed off their property; sorted out homebuilding contracts, drunk driving charges, and landlord-tenant disputes; and bought, sold, and gifted land.

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60 Petition of Morning Star Colored Baptist Church, Case No. 1919-007 (Isle of Wight Cnty. Va. Ch. Jan. 21, 1919) (Office of Circuit Clerk).


65 See Deed, R. F. Blanton to Jackson Holcombe, Deed Book 33, at 59 (Apr. 9, 1883) (conveying a one hundred acre tract of land to Jackson Holcombe for $200, with possession and rents, but not timber rights, to remain in Blanton through end of year) (Office of Circuit Clerk, Cumberland
Even as white local officials cut them off from formal schooling,66 Black people developed a working knowledge of contract law because they dealt with it all the time: when a wife “ran a farm” “in her own name” to avoid her husband’s debts,67 when they sold butter, eggs, chickens, and other wares to richer white women on credit (carefully balancing the accounts each winter);68 when they organized associations to set regular pay scales and hours for their work;69 and when they ran their own financial institutions,70 churches,71 colleges,72 and bar associations.73 Black tenant farmers took pride in having what Nate Shaw called “goat-sense”74—the working legal knowledge, for example, that each party to a joint note is liable for the others’
debt,\textsuperscript{75} that a husband's mortgage did not cover household goods unless his wife signed too,\textsuperscript{76} and that a renter at the end of his lease had the "right" and "privilege" to take "[a]nything that aint tied down."\textsuperscript{77} That "goat sense" was refined through daily experience and discussed in churches,\textsuperscript{78} schools,\textsuperscript{79} and Black-owned newspapers.\textsuperscript{80}

With few exceptions,\textsuperscript{81} Black people's legal activity did not challenge white supremacy\textsuperscript{82} in any substantive way because, outside of a handful of statutes in northern states regarding public accommodations, there were no state laws barring race discrimination.\textsuperscript{83} Nor did their lawsuits challenge white supremacy in any symbolic sense because there was nothing unusual about a Black person going to court, not even in Mississippi. Black people routinely had contract dealings with white people but most of their lawsuits

\textsuperscript{75} See id. at 151 ("A joint note is a bad note . . . My stuff is subject to your transaction, your stuff is subject to my transaction."); \textsuperscript{76} see ROSENBERGER, supra note 74, at 32 (Nate Shaw noting that he "didn't let [his wife] go on no notes," believing that doing otherwise would "give [creditors] a chance to go in the house and get her stuff"); 2 ALA. CODE § 4486 (1997) (current version at ALA. CODE § 30-4-1) (stating that property held by wife before marriage or acquired after marriage is wife's "separate property . . . not subject to" her husband's liabilities).

\textsuperscript{77} ROSENBERGER, supra note 74, at 230-31; see CHRISTOPHER G. TIEDEMAN & EDWARD J. WHITE, THE AMERICAN LAW OF REAL PROPERTY, pt. 1, ch. 2, §16, 20 (3d ed. 1906) (stating that a tenant may remove fixtures that he "affixed to the soil" and that are associated with "trade," "agriculture[,]" and "domestic use and convenience," so long as removal does not permanently injure premises).

\textsuperscript{78} See Penningroth, supra note 5, at 878-80, 893-96 (noting that churches held meetings to discuss finances and logistics, and that Black parishioners often considered both the "Rights of the Church" and the "privileges and rights of [church] membership").

\textsuperscript{79} See, e.g., TUSKEGEE NORMAL & INDUS. INST., CATALOGUE OF THE TUSKEGEE NORMAL AND INDUSTRIAL INSTITUTE 42, 45 (1895-96) (describing courses on "Rural Law and Farm Accounts," "Lessons in making out bills of material," "Estimates," and "Contracts").

\textsuperscript{80} See, e.g., Business Law, CHRISTIAN RECORDER, Aug. 9, 1877 ("All contracts and agreements should be made in writing and in proper [form], that is, in such form as to express the intention of the parties, and nothing more."); Pitt and Point, HUNTSVILLE GAZETTE, June 10, 1882 ("Don't leave to memory what should be written; it makes lawsuits."); Robert Flipping Jr., Flip's News Beat, PITTSBURGH COURIER, Oct. 30, 1976, at 9 (announcing workshops on "Starting and Managing a Small Business" and "Women and the Law"); The New Landlords, EBYON, July 1965, at 112-15 (discussing Black churches' push to sponsor housing in the Dallas area).

\textsuperscript{81} See, e.g., Habeas Petition, Redmond v. Hartfield, No. 4102 (Lafayette Cnty. Miss. Ch. May 25, 1911) (Office of the Circuit Clerk) (accusing sheriff of depriving him of his rights to legal representation and witnesses by moving court to magistrate's private home); see also SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1886-1915 4-8 (2015) (tracing the organizational and conceptual early development of "civil rights" advocacy).

\textsuperscript{82} White supremacy was the principle that "the white race" was "superior" to "the negro" and should have the superior position in all matters except those civil rights that secured natural rights. Abraham Lincoln, First Lincoln-Douglas Debate, Ottawa, Illinois (Aug. 12, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1832-1858 512, 636 (Don E. Fehrenbacher ed., 1989); see also ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 262 (2d ed. 1995) [hereinafter FONER, FREE SOIL].

\textsuperscript{83} KLARMAN, supra note 3, passim.
were against other Black people, indicating that private law did not itself address racial inequality. Yet, Black people clearly cared about private law, as some Critical Race Theorists have asserted. Indeed, even in the worst years of segregation, prominent African Americans expressed a wary faith in contract and property as a lever to “uplift the race.” “When we own railroad stock we can have the Jim Crow car taken from the road,” the A.M.E. Church Review predicted. “[B]uy land. . . . Be a free holder, and no powers on earth can keep you down,” preached a leading minister. In short, by removing civil rights from contract law and conflating it with nondiscrimination under federal and constitutional law, we have missed an enormous part of Black people’s experiences and ideas about the law. For them, contract law was civil rights law.

II. RACE IN LEGAL FORMALISM

A. The Reconstruction Roots of Lochnerism

This Black legal activity was one outgrowth of a long struggle over the limits of lawful coercion in a market society, a struggle that helped define contract as a distinct and coherent body of law by treating slavery and race as exceptional in Anglo-American law. This exceptionalist theorizing took serious effort. It was hard to theorize slavery away because so many of the concepts and doctrines that underpinned slavery were tangled with other areas of law, from inheritance

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84 Of the 1,188 civil suits in my sample involving at least one party who was Black, 336 featured a Black individual party on both sides, 117 were ex parte, and 9 featured a Black party against a Black corporate entity (usually a church or business). In another 365 cases we could not match one party. Thus, only 361 (30%) featured a Black individual or entity against a white individual or entity.

85 WILLIAMS, supra note 4, at 146-65.

86 KEVIN K. GAINES, UPLIFTING THE RACE: BLACK LEADERSHIP, POLITICS, AND CULTURE IN THE TWENTIETH CENTURY i-5 (1996) (arguing that “uplift” ideology linked individual improvement with fate of “the race” while constructing notion of authentic blackness); see also Kenneth W. Mack, Rethinking Civil Rights Lawyering and Politics in the Era Before Brown, 115 YALE L.J. 256, 272-80 (2005) (“Race uplift narrowed the scope of the black bar leaders’ constitutional and civil rights vision and increased attention to cultural and institutional work to be done within African-American communities.”).

87 From the Field, 7 A.M.E. CHURCH REV. Q. 334, 334 (1891).


89 One leading jurist called slavery an “astounding anomaly.” 1 CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES, CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANPOINT 74 (1900).
to bailment to corporations, and because still other legal areas—especially “master-servant” law (what would eventually become employment law) and the law of domestic relations (what would become family law)—vested employers, husbands, fathers, and masters with enormous powers to discipline and control workers, wives, children, and slaves. It was hard to theorize race away because, as the country slid toward a civil war over slavery, law intensified the connection between race and rights, increasingly treating “negro” as a synonym for “slave,” a person who lacked the “civil rights” of contract, property, and standing. In the 1850s, antislavery politicians depicted such rights in moralistic, evangelical religious terms as the fundamental rights that “all men” were entitled to and that marked the line between freedom and slavery. Ignoring contrary


92 See CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580-1865 527-37 (2010) ("[E]ach of Taney’s three races [in Dred Scott] is rendered entirely homogeneous in its external aspect by the precision of its location vis-à-vis the others."); 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 327 (1857) ("The law recognizes only freedom . . . and slavery; and there is no intermediate status."); [hereinafter PARSONS (1857)]; see also Girod v. Lewis, 6 Mart. (o.s.) 559, 559 (La. 1819) ("[S]laves have no legal capacity to assent to any contract. With the consent of their masters they may marry, and their moral power to agree to such a contract . . . cannot be doubted; but, whilst in a state of slavery it cannot produce any civil effect, because slaves are deprived of all civil rights."); Susanna L. Blumenthal, The Default Legal Person, 54 UCLA L. REV. 1135, 1156 (2007) (noting “the primary divisions of persons” in antebellum treatises).

evidence, legal theorists declared that enslaved people did not and could not make contracts because a contract is an agreement between “two perfectly free agents . . . under no compulsion either to refuse it or accept it.” Just as the inability to contract was the badge of a slave, they argued, “liberty of contract” was the “badge of a freeman.” And in the 1890s and 1900s, they would write that antislavery ideal into the Constitution, the social sciences, and the law school curriculum.

But although jurists and pundits in the mid-1800s were converging on the idea that slavery and freedom were absolute opposites defined by the presence or absence of coercion, they bitterly disagreed about how to conceptualize the coercion involved in employment contracts—the kind of contract that was coming to dominate white peoples’ lives. Labor union leaders in northern cities echoed proslavery theorists like George Fitzhugh, arguing that the white working man was just “a slave without a master,” “comp[elled]” by “Capital” to either “work or starve.” Faced with these disturbing critiques, leading Republicans came to view Black emancipation as the ultimate test of free market

94 See e.g., FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 318-20 (1855) (reflecting that as a self-hired slave, “I . . . made my own contracts, and collected my own earnings” and handed them to master); JOHN BELTON O’NEALL, THE NEGRO LAW OF SOUTH CAROLINA 17, 22-23 (1848) (discussing “[s]laves, their [c]ivil [r]ights, [l]iabilities, and [d]isabilities”); Broadhead v. Jones, 39 Ala. 96, 97 (1863) (arguing over a promissory note for services performed by enslaved man who “made his own [work] contracts”); Shanklin v. Johnson, 9 Ala. 271, 275 (1846) (stating a promise to sell lot for enslaved people creates “moral duty” to pay over proceeds, which “impose[s] a legal obligation”; defendant was free Black man); HENDRIK HARTOG, THE TROUBLE WITH MINNA: A CASE OF SLAVERY AND EMANCIPATION IN THE ANTEBELLUM NORTH 9-11, 55-59 (2018) (suggesting that “contracting ‘infected’ the field of slavery in New Jersey”); MORRIS, supra note 90, at 193-94 (enslaved people lacked civil liberties but had a “limited range of civil rights” which “they could not enforce . . . at law”).

95 See GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 61-62 (1827).

96 AMY DRU STANLEY, FROM BONDAGE TO CONTRACT 2 (1998) (quoting E. L. Godkin, The Labor Crisis, 105 N. AM. REV. 184 (1867)).

97 Id. at 74 (quoting CHRISTOPHER TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES 315 (1900)); see also Hall v. United States, 92 U.S. 27, 30 (1875) (Swayne, J., rejecting Black man’s claim to valuable cotton on grounds that the claimant’s “color was presumptive proof of bondage” and that enslaved people could not enter contracts).

98 See Nelson, supra note 93, at 556-57 (discussing antislavery ideas in jurisprudence and scholarship); STANLEY, supra note 96, at 75 (“By the late nineteenth century, the abolitionist view of wage labor . . . had become a conceptual foundation for the social sciences as well as for the law.”).

99 STANLEY, supra note 96, at 20 (quoting GEORGE FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS 32 (1857) and William West, Wages Slavery and Chattel Slavery, LIBERATOR (1847)); see also TOMLINS, supra note 91, at 223-26 (1993) (showing the pervasiveness of this definitional logic in the early 1800s). Legal scholars have recognized the potentialities of historians’ work on these doctrinal developments. See, e.g., Jack M. Balkin & Sanford Levinson, The Dangerous Thirteenth Amendment, 112 COLUM. L. REV. 1459, 1465-77, 1488-96 (2012) (synthesizing historical scholarship to recover a capacious original meaning for the word “slavery” as used in the Thirteenth Amendment).
principles. So, close on the heels of the Union army, northern entrepreneurs fanned out across the South to re-make the national economy on freedom of contract. Four million newly-freed Black people would prove to the world that Fitzhugh was wrong—that wage work was inherently voluntary—by settling down to work the cotton fields for money.

Black southerners’ responses to the free-labor entrepreneurs starkly presented what contract theorists would later call the “baseline problem”: the fact that, when we call an offer coercive, we are already implicitly assuming “either that the coerced party had a baseline entitlement to be free of such pressure or that the coercer had a baseline duty not to impose it.” Economists and jurists were surprised to discover that freedpeople viewed labor contracts not as divine salvation, but rather as practical tools to be handled warily, and that many freedpeople thought, like white northern workers did, that the labor contract threatened “a practical return to slavery.” Freedpeople bargained pragmatically and knowledgeably, and they desperately tried to strengthen their bargaining positions by pursuing alternatives to the cotton fields: subsistence farming, hunting, fishing, skilled trades, and schools.

For the antislavery Republicans, freedpeople’s hard-nosed market behavior posed a problem—what one leading historian has called “the problem of freedom.” And it provoked them to write compulsion into the baseline legal rules of market relations, first in the South, then nationwide, an effort that came to be known as “Lochnerism.”

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100 STANLEY, supra note 96, at 20.
101 WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT (1964); FONER, RECONSTRUCTION, supra note 66, at 50-60.
103 STANLEY, supra note 96, at 20.
105 FONER, RECONSTRUCTION, supra note 66, at 161 (quoting HENRY EDWIN TREMAIN, TWO DAYS OF WAR: A GETTYSBURG NARRATIVE, AND OTHER EXCURSIONS 267-76 (1995)).
107 See THOMAS C. HOLT, THE PROBLEM OF FREEDOM: RACE, LABOR, AND POLITICS IN JAMAICA AND BRITAIN, 1832-1938 143-76 (1992) (showing British officials perceived Black Jamaicans’ economic behavior once freed from slavery as a “problem” to be solved through law).
108 See William E. Forbath, The Ambiguities of Free Labor: Labor and the Law in the Gilded Age, 1985 WIS. L. REV. 767, 770 (“[T]he language and jurisprudence of Antislavery . . . supplied the key words and concepts for construing the Reconstruction Amendments in a way that secured Northern labor’s freedom from ‘unnatural’ and ‘paternalistic’ legislation.”).
First, jurists waved aside the realities of wildly unequal bargaining position by drawing a sharp, highly formal line between voluntariness and coercion, with coercion defined—by reference to their idealized definition of slavery—as a deprivation of all choice or an overpowering of the will. Second, antislavery Republicans redefined slavery as personal, race-based coercion, enabling them to “justify . . . impersonal[,]” market-based forms of exploitation, as well as personal, non-market forms of domination based on gender, age, and disability. And in the Fourteenth Amendment’s equal protection clause, antislavery Republicans tried to surgically remove the slavery-era tradition of racialized rights from state law without disturbing principles of federalism. Third, they used the law of admiralty and of equity to carve out a capacity-based racial exception to the common-law rules of formation, an exception I will call “the ignorant Negro.” This “jurisprudence of Antislavery” has had an enormous impact on American contract law down to today, and each of these moves was rooted in white jurists’ encounter with Black bargainers in the wake of emancipation.

Formalistic reasoning about coercion enabled judges to reconcile the ideal of contractual equality with the post-slavery South’s vast racial inequalities. They assumed that, under the benevolent supervision of Freedmen’s Bureau agents, former slaveowners—rich in land, equipment, and guns, and still dominating the South’s state legislatures—would negotiate agreements with newly-freed Black people. Formally, those freedpeople were free and equal bargainers but in fact they were so poor, so cut off from alternatives, and so obviously the weaker parties in transactions that only magical thinking

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110 Fried, supra note 104, at 48–56.
111 DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823 350, 381-82 (1975); WELKE, supra note 91, at 63-82.
112 STANLEY, supra note 96, at 127; Perrone, supra note 90, at 125, 128; GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY 41-43 (2013).
113 Forbath, supra note 108, at 770.
114 See, e.g., Samuel R. Bagenstos, Consent, Coercion, and Employment Law, 55 HARV. C.R.-C.L. L. REV. 409, 410-13 (2020) (arguing that the Roberts Court “has replicated a key aspect of Lochner-era jurisprudence” by “ignor[ing] . . . limits on an employee’s choice”).
115 See JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES 302-04 (2d ed. 1964) (summarizing structure and purposes of the Bureau).
116 See, e.g., ROGER L. RANSOM & RICHARD SUTCH, ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION 40-55 (2d ed. 2001) (showing that region’s transportation and manufacturing sectors recovered within five years of war’s end).
could absorb them into the will theory of Classical contract law. The Freedmen’s Bureau supplied that magical thinking. Echoing almost verbatim the rhetoric of antislavery Republicans before the war,119 the Bureau announced in 1865 that freedpeople would “be enjoined to work” or else be arrested for vagrancy, “and [that] in doing so, they will . . . enter into free and voluntary contracts with employers of their own choice.”120 The Bureau induced Black people to sign work contracts by applying what Commissioner Oliver O. Howard later called “a little wholesome constraint.”121 Bureau judges thought they were leveling the playing field. On the one hand, they thought that, by ruling that freedpeople’s work created a lien on the growing crop, they were protecting freedpeople from the risk that white employers would refuse to pay them their wages at the end of the year. Then on the other hand they thought they could soothe white employers’ fear of Black laziness by decreeing specific performance—a remedy that is rarely granted in contracts for personal services because it looks so much like slavery.122 And beyond these coercive measures, Bureau officials undermined Black people’s bargaining position by taking away any alternatives that might “upset the market mechanism”;123 collective bargaining, strikes, land redistribution, and better jobs in towns.124

Black southerners’ resistance to these early free-labor contracts of 1865–1866 posed a stark question, one with significant implications for contract theory at a key moment in its historical development: how “voluntary” could a contract be when one of the parties was barred from any other way of making a living, “coerced by troops and Bureau agents if they refused to sign, and fined or imprisoned if they struck for higher wages?”125 And because

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119 William Jay, An Inquiry into the Character and Tendency of the American Colonization, and American Anti-Slavery Societies 198 (1835) (predicting that “voluntary,” “free labor” would end slavery cheaply and easily, because Black people attach great symbolic value to “the very name of wages” even if paid only a “pittance”).

120 Stanley, supra note 96, at 123-24 (quoting Orders Issued by the Commissioner and Assistant Commissioners of the Freedmen’s Bureau, 39th Cong., 1st Sess., House Exec. Doc. 70 at 155, 139 (1865)).

121 Stanley, supra note 96, at 123-24 (quoting 2 Oliver Otis Howard, Autobiography of Oliver Otis Howard (1907)); see also Donald G. Nieman, To Set the Law in Motion: The Freedmen’s Bureau and the Legal Rights of Blacks, 1865-1868 162-68 (1979) (describing Bureau officers’ “carrot-and-stick approach” to “getting both sides to enter contracts”).


123 Nieman, supra note 121, at 168-71.

124 See Julie Saville, The Work of Reconstruction: From Slave to Wage Laborer in South Carolina 1860-1870 18-49, 60-71, 79-87, 188-95 (1994); Foner, Reconstruction, supra note 66, at 102-10, 137-75 (describing northerners’ efforts to impose contract labor on freedpeople and freedpeople’s efforts to resist it).

125 Foner, Reconstruction, supra note 66, at 166.
Republicans had cast the relationship between “the freedmen” and “their former masters” as the test case of “the relation of Labor to Capital,” that question could not be cabined off as unique to the South. In short, Black people’s contractual behavior during Reconstruction revealed “the baseline problem.”

The antislavery jurists’ second and most famous response to the “problem of freedom” was to write colorblindness into the baseline legal rules. Congress enshrined this formalist antidiscrimination principle in the Civil Rights Act of 1866 and in the Fourteenth Amendment’s Equal Protection Clause. Congressional Republicans cast those two enactments as direct responses to the infamous Black Codes, which also focused on baseline rules but which discriminated on “account of color,” resurrecting the slavery-era tradition of racialized rights. That, the Republicans contended, was impermissible. “Liberty and slavery are opposite terms,” said Senator Lyman Trumbull during the floor debate over the Civil Rights Act of 1866, and civil rights—generally understood at the time as encompassing rights of contract, property, interstate movement, and standing—“draw the precise line . . . where freedom ceases and slavery begins.” But the antidiscrimination principle carefully targeted only those kinds of compulsion that treated people differently “on account of color”; it was never meant to disturb the myriad forms of compulsion woven into state law and into the Bureau’s own policies.

The third response to the “problem of freedom” looked beyond federal law and antidiscrimination, piecing together a race-conscious theory of civil rights

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126 KESSLER, supra note 122, at 266 (quoting N.Y. TIMES (Dec. 1865)).
127 FRIED, supra note 104, at 59.
129 U.S. Const. amend. XIV § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).
130 See Reports of Assistant Commissioners of Freedmen, and Synopsis of Laws on Persons of Color in Late Slave States, S. EXEC. DOC. No. 6, 39th Cong., 2d Sess. (1866), at 170-230 (excerpting state session laws for freedpeople regarding civil procedure, property, and contract; defining vagrancy; outlawing possession of arms; defining Black family relations and obligations; requiring proof of gainful employment; specifying rights and duties of farmworkers).
132 Id. at 474 (statement of Sen. Lyman Trumbull).
133 Id. at 474 (statement of Sen. Lyman Trumbull).
134 See STANLEY, supra note 96, at 125-27 (describing how “Northerners responded selectively to the coercions aimed at the freedpeople,” objecting to the Black Codes, but failing to criticize “Yankee free labor policy” because the former discriminated explicitly on the basis of race while the latter was “formally” colorblind); FONER, RECONSTRUCTION, supra note 66, at 134 (emphasizing how narrow the Bureau’s prohibition on coercion was, given that white planters used their “privileged access to the productive land of the plantation belt” to “control black labor”).
under state law, the arena that overwhelmingly defined Black people’s experiences with contract. Bureau officials were formalists, but they understood that race mattered in the South. So, when contract disputes came before them, they tried to align standard contract principles of voluntary bargaining between equals with the realities of poorly drafted contracts between unequal parties. It was not enough for a contract to be “satisfactory” to both parties, Bureau officials held, if one party had taken advantage of the other’s “ignorance” and “induce[d] them,” by hiding or “misrepresent[ing] facts,” to sign “unfair and unjust” contracts. Like civil judges exercising their “equitable” powers, Bureau officers were to nullify any contract that did not meet their “standard[s].” In this way, they would ward off “fearful,” economically destructive “collisions . . . between the ignorant freedmen and governing [white] race.”

But this equitable theory of Black civil rights raised troubling questions about the judicial role in general, far beyond cases involving freedpeople, questions that would eventually animate certain Legal Realists and progressive law and economics thinkers. Equitable remedies had long been seen as dangerous because they enabled judges to act like tyrants: to impose their personal values, untethered from statutes and common-law rules. Bureau officers justified using equitable remedies here, in the occupied South, by arguing that freedpeople were categorically different from other kinds of contracting parties: they were wards “under the guardianship of the Nation.” And what would rein in the judges, the Bureau asserted, was an older, pre-Civil War model of contract law, one that was organized not around consideration or assent but around common-law status relationships. That model, where contractual obligations were defined largely by custom and usage rather than by the contracting parties, helps explain why treatises had traditionally sandwiched a chapter on the contracts of enslaved people in between chapters on those of infants, married women, bankrupts, aliens,

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137 Id. at 360.
138 Id. at 93, 99.
139 KESSLER, supra note 122, at 266 (quoting N.Y. TIMES (Dec. 1865)).
140 See KESSLER, supra note 122, at 19, 112-32, 301-02 (describing the tensions between common law courts and equity courts, and how historically, equity courts were depicted as tools of “the royal will”).
141 FREEDOM: A DOCUMENTARY HISTORY, supra note 136, at 99.
142 Joseph William Singer, Legal Realism Now, 76 CALIF. L. REV. 465, 477 (1988) (explaining that early nineteenth-century market relations were structured by status-based relationships whose “terms and obligations . . . were substantially predefined by the state through the common law”).
143 See id. at 477 (in a market “heavily regulated by custom and law,” parties had “little or no power to alter the terms of the relationship by contract”).
“persons under duress,” and corporations.\textsuperscript{144} The paradigmatic example was sailors on long voyages. Those men were “wards of the admiralty,” Justice Joseph Story declared in 1823, uniquely vulnerable to their captains and others who held “a mastery over them,” and therefore their contracts were subject to “the most rigid scrutiny,” with “any undue inequality in the terms, any disproportion in the bargain” constituting prima facie proof “that the bargain is unjust” and should be nullified.\textsuperscript{145} By treating freedpeople as “wards . . . of the Nation,” antislavery judges set a pattern that far outlasted the short-lived Freedmen’s Bureau: race would open a door into equity, but it could be invoked only in exceptional circumstances and only by treating Black people as incapable.\textsuperscript{146} Moreover, rather than empowering judges to do substantive justice towards parties holding wildly unequal bargaining positions, the Fourteenth Amendment’s Due Process Clause promised only an adversarial procedure.\textsuperscript{147} The wardship idea provided a way to align the Republican Party’s insistence on Black rights with its casual faith in white supremacy and traditional contract defenses: incapacity, duress and undue influence, inadequacy of consideration, and what would eventually become the law of unconscionability.

In this era of crisis, when “the entire structure of American institutions—from the government to the economy—seemed to be up for grabs,”\textsuperscript{148} white appellate judges, labor leaders, and academics repeatedly ignored actual Black people’s contractual thought and instead used Black people and slavery as thinking tools: ideal tropes for developing their visions of a modern industrial economy. In a series of decisions culminating in \textit{Lochner v. New York},\textsuperscript{149} conservative judges—many of whom had been associated with antislavery politics before the Civil War—\textsuperscript{150} fashioned the twin doctrines of “substantive due process” and “liberty of contract” from the characteristic antislavery mix of Christian ideals, notions of higher law and natural rights, and faith that


\textsuperscript{145} \textit{See} Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6,047) (invalidating a clause added to shipping articles stating “[w]e further agree and bind ourselves to pay for all medicines and medical aid,” despite the “general doctrine” that expenses of sick seamen were to be borne by ship-owners).

\textsuperscript{146} \textit{See} \textit{Jaynes}, \textit{supra} note 69, at 309 (quoting William Pickens (1923)).

\textsuperscript{147} \textit{Kessler, supra} note 122, at 322.

\textsuperscript{148} \textit{Beverly Gage, The Day Wall Street Exploded: A Story of America in Its First Age of Terror} 8 (2009).

\textsuperscript{149} \textit{See generally} \textit{Lochner v. New York}, 198 U.S. 45 (1905) (holding that a New York statute prohibiting bakers from working more than sixty hours per week violated the Fourteenth Amendment’s Due Process Clause).

\textsuperscript{150} \textit{Nelson, supra} note 93, at 551-52.
property and contract marked the bright line between slavery and freedom. Regulation that violated the “sacred” “right of free labor” was intolerable, wrote Justice Stephen Field in his influential 1873 *Slaughter-House* dissent, because it instituted a “[s]lavery of white men.” By the 1890s, judges were using the antislavery ideal of contract freedom to strike down health and safety regulations, the federal income tax, and to enjoin strikes. They brushed aside warnings that decreeing specific performance of labor contracts would put white men into “a state of slavery” by comparing unions to slave-drivers and “autocratic” Chinese secret societies. By contrast, to labor leaders, the antislavery ideal of contract freedom looked like a dangerous mirage, one that mistook the very essence of the bargain. Workers “do not consent” when they sign contracts, warned one unionist; driven by hunger, “they submit but they do not agree.” And that lack of real agreement made white men into “itinerant chattel,” the “slaves” of their employers. Even a former president of the American Economic Association warned that “the wages system is but one step removed from the slavery system.” In short, the ghost of slavery hovered over the rise of *Lochner*-style formalism, as white people with sharply different interests and backgrounds—but little acquaintance with Black people—argued over what it meant to be “free” in a society newly purged of slavery. Perhaps, then, it is not surprising that Black people’s litigation in state courts began to shape contract doctrine.

**B. The Materiality of Race**

Cases involving African Americans are flecked across the pages of some of the leading law journals, treatises, dictionaries, and annotated codes from

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151 See Forbath, *supra* note 108, at 770, 783-86 (1985) (arguing that abolitionists accepted the notions that human labor could be treated as a “vendible commodity,” that the “labor of an individual who owns nothing and is absolutely dependent on his employer” is somehow “voluntary,” and that ultimately, the ability to “freely . . . sell one’s labor” was “one of the ‘core rights’ of abolitionist jurisprudence”).

152 *Slaughter-House* Cases, 83 U.S. (16 Wall.) 36, 90, 110 (1873) (Field, J., dissenting).

153 See *In re Jacobs*, 98 N.Y. 98, 106 (1885) (“Liberty . . . means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right . . . to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.”); *Lochner*, 198 U.S. at 61 (striking down a health regulation as “illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best.”).

154 Nelson, *supra* note 93, at 556.

155 Id. at 556-57.

156 Id. at 557.


159 Id. at 811.

160 HENRY C. ADAMS, DESCRIPTION OF INDUSTRY: AN INTRODUCTION TO ECONOMICS 115 (1918).
the late 1800s and early 1900s, the formative era of modern contract law. Such cases were cited on the doctrine of fraud, accord and satisfaction, the

161 See 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 922 (4th ed. 1918) (citing Hodges v. Wilson, 81 S.E. 340, 345 (N.C. 1914) (describing the plaintiffs as "poor and half-witted people; formerly slaves . . . .")); id. at § 926(b) (citing Hodges, 81 S.E. 340); id. at § 926(d) (citing Stephens v. Ozbourne, 64 S.W. 902 (Tenn. 1901) ("old darkey"), Chance v. Chapman, 70 So. 676 (Ala. 1915) (plaintiff's race confirmed at U.S. DEP'T OF COM., BUREAU OF THE CENSUS, THIRTEENTH CENSUS OF THE UNITED STATES: 1910: POPULATION SCHEDULE FOR ALABAMA, MOBILE COUNTY, GRAND BAY 19B), Alfrey v. Colbert, 104 S.W. 638 (Indian Terr. 1907) ("[P]laintiff, being a citizen of the Creek Nation and on the Creek freedman roll . . . ."), McCaskill v. Scotch Lumber Co., 44 So. 405 (Ala. 1907) (only plausible Census match is at U.S. DEP'T OF COM., BUREAU OF THE CENSUS, TWELFTH CENSUS OF THE UNITED STATES: 1900: POPULATION SCHEDULE FOR ALABAMA, CLARKE COUNTY 7), and McPhaul v. Walters, 83 S.E. 321 (N.C. 1914) (only plausible Census match is at U.S. DEP'T OF COM., BUREAU OF THE CENSUS, FOURTEENTH CENSUS OF THE UNITED STATES: 1920: POPULATION SCHEDULE FOR NORTH CAROLINA, Hoke County, Blue Spring Township 4A)); id. at § 928 (citing Kirby v. Arnold, 68 So. 17 (Ala. 1915) ("appellee was an ignorant negro woman"), Abercombie v. Carpenter, 43 So. 746 (Ala. 1907) ("ignorant colored people"), and Stephens, 64 S.W. 902); id. at § 937 (citing Dickerson v. Thomas, 7 So. 503 (Miss. 1890) ("illiterate and confiding negro"); id. at § 942 (citing Hodges, 81 S.E. 340); id. at § 947 (citing Bond v. Branning Mfg. Co., 52 S.E. 929 (N.C. 1906), and Hodges, 81 S.E. 340); id. at § 948 (citing Alfrey, 104 S.W. 638, and Yarbrough v. Harris, 52 So. 916 (Ala. 1910) ("old negro man"); id. at § 950 (citing Gilmore v. Hunt, 73 S.E. 364 (Ga. 1911) (race confirmed at U.S. DEP'T OF COM., BUREAU OF THE CENSUS, TWELFTH CENSUS OF THE UNITED STATES: 1900: POPULATION SCHEDULE FOR GEORGIA, WASHINGTON COUNTY 4)); see also 2 ZECHARIAH CHAFEE, JR. & SIDNEY POST SIMPSON, CASES ON EQUITY: JURISDICTION AND SPECIFIC PERFORMANCE 1186 (1934) (citing Beaden v. Bransford Realty Co., 232 S.E. 958 (1921)).

162 See, e.g., Accord and Satisfaction, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA (8th ed. 1914) (citing Brunswick & W. Ry. Co. v. Clem, 7 S.E. 84 (Ga. 1888) (determined plaintiff’s race from Transcript of Record at 55, Brunswick & W. Ry. Co. v. Clem, 7 S.E. 84 (Ga. 1888) (Georgia State Archives, Morrow, Ga. [hereinafter GA])).
parol evidence rule,\textsuperscript{163} the meaning of the word “deed,”\textsuperscript{164} duress,\textsuperscript{165} mistake,\textsuperscript{166} breach,\textsuperscript{167} insurance,\textsuperscript{168} implied contracts,\textsuperscript{169} delivery of gifts,\textsuperscript{170} landlord and


\textsuperscript{164} See Deed, BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA (8th ed. 1914) (citing West v. Wright, 41 S.E. 602 (Ga. 1902) and Lowdermilk Bros. v. Bostick, 3 S.E. 844 (N.C. 1887)).


\textsuperscript{166} See 12 AM. JUR. 626 § 141 (citing Hoy v. Hoy, 48 So. 903 (Miss. 1909) and Ala. & Vicksburg Ry. Co. v. Jones, 19 So. 105 (Miss. 1895); POMEROY, supra note 161, at § 849 (mistakes of law affecting contract formation); WILLISTON, supra note 165, at § 1551 (citing Ala & Vicksburg Ry. Co., 19 So. 903); see also WILLIAM ALBERT KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 320-21 (1893) (discussing, with respect to services rendered gratuitously without mistake as to material fact, Alfred v. Marquis of Fitzjames, (1799) 170 Eng. Rep. 518 (NP) and [Negro Andrew] Franklin v. Waters, 8 Gill. 322 (Md. 1849) (omitting the words “Negro Andrew”), and citing Hickam v. Hickam, 46 Mo. App. 496 (Mo. Ct. App. 1891) (concerning a Black woman held in slavery until 1889 because master suppressed news that slavery was over) alongside Boardman v. Ward, 42 N.W. 202 (Minn. 1889) (involving a white orphan who worked years under mistaken belief that she was considered member of family)).

\textsuperscript{167} See Breach, BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA (8th ed. 1914) (citing Cleary v. Morson, 48 So. 817 (Miss. 1909), in which both parties were white and the dispute was precipitated by breach by Black vendee, Wilson).

\textsuperscript{168} See Thomas v. Am. Workmen, 14 S.E.2d 886, 887 (S.C. 1941) (discussing the effect of insurance agent’s misrepresentation to “illiterate negroes . . . utterly without experience in business transactions” and citing with approval Crosby v. Metro. Life Insurance Co., 166 S.E. 266 (S.C. 1932) (involving a “colored” plaintiff)).

\textsuperscript{169} See, e.g., Hickam, 46 Mo. App. 496 (cited in, among other places, Note, Fraudulent Concealment of a Right of Action and the Statute of Limitations, 43 HARV. L. REV. 471, 473 (1930); Arthur M. Catheart, Law of Quasi-Contracts, in 7 MODERN AMERICAN LAW 363, 385-86 (1944); and C.J.S. Implied Contracts § 48 (2021)). Hickam, in turn, cited two antebellum freedom suits: Jarrot v. Jarrot, 7 Ill. (2 Gilm.) 1 (1845) and Peter v. Steel, 3 Yeates 250 (Pa. 1801) (involving a free Black man who recovers damages from a white defendant who held him as a slave). For citations of Peter in
tenant, inadequacy of consideration, failure of consideration, the law of church property, the statute of frauds, and more. Black people's cases appeared even more frequently as secondary, indirect citations, as lawyers and judges borrowed rules and theories to apply in cases involving only white people and corporations. They almost never mentioned that Black people

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171 Sadler v. Jefferson, 143 Ala. 669 (1905) (cited in Landlord and Tenant, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA (8th ed. 1914) and 52 C.J.S. Landlord & Tenant § 19 (1919)); see also State v. Smith, 100 N.C. 466 (1888) (cited in Forcible Entry or Detainer, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA (8th ed. 1914)).

172 CODE OF THE STATE OF GEORGIA § 3659 (1895) (current version at GA. CODE ANN. § 13-3-46) (citing Bowden v. Achor, 22 S.E. 254 (Ga. 1895)).


were parties to these suits,\(^{177}\) silently “passing” them into legal doctrine. In doing so, they stripped away facts that were vital not only to the parties but also to the doctrinal rules these cases established.

And legal professionals were perfectly free to do so. Federal law seemed to say that no state could create separate bodies of contract law for people of different races,\(^ {178}\) but Congress never said that judges had to ignore race. Ever since, case by case, legal professionals have been making up their own minds about when race matters in contracts. In the late 1800s, during the same years when public law increasingly segregated people by race, legal professionals’ decisions about race-marking in private law helped consolidate Contracts as a distinct, coherent body of law.

Their starting presumption was that, in contract law, race had no legal meaning of its own. To borrow a term from chemistry, they treated race as what we might call a “doctrinal catalyst of opportunity.” It became material only when bound to a particular rule or category, catalyzing arguments that legal professionals wanted to advance. Race’s characteristic as a doctrinal catalyst of opportunity discouraged lawyers and judges from considering it as a matter of structural inequality, and instead tempted them to invoke race opportunistically, depending on which position suited their goals in the case. For example, in the *Slaughter-House Cases*, Justice Samuel Miller insisted that “the one pervading purpose” of the three Reconstruction amendments was “the freedom of the slave race, the security . . . of that freedom, and the protection of the newly-made” free citizens from their former masters.\(^ {179}\) By contrast, the lawyers for the ex-Confederate butchers talked about everything except race, including a potted history of oppressed white people, from ancient Roman coloni to medieval French peasants.\(^ {180}\)

The *Slaughter-House Cases* showed that, by manipulating the materiality of race, lawyers and judges could widen or narrow the scope of a constitutional

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177 In another type of case, African Americans’ actions precipitated a controversy between white people. See, e.g., *Jackson v. Seymour*, 71 S.E. 2d 181 (Va. 1952) (buyer of the disputed land, Tazewell Wilkins, was Black; race confirmed at U.S. DEP’T OF COM., BUREAU OF THE CENSUS, SIXTEENTH CENSUS OF THE UNITED STATES: 1940: POPULATION SCHEDULE FOR VIRGINIA, BRUNSWICK COUNTY, MEHERRIN, ENUMERATION DISTRICT 13-4 at 3A). *Jackson* is a note case in *Dawson* (11th), supra note 24, at 529-32 and in *Friedrich Kessler & Grant Gilmore, Contracts: Cases and Materials* 449-53 (2d ed. 1970); it is cited in *Knapp*, supra note 24, at 628; and discussed in *Mary Joe Frug, Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1085-87 (1985). These scholars do not note that the precipitating buyer was Black, probably because the opinion does not, either.


179 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68, 71 (1873) (emphasis added).

180 *Id.* at 47-48; Brief of Plaintiff at 3-8, 17-31, *Slaughter-House Cases*, 83 U.S. 36 (1873) (Nos. 475-480), 1872 WL 15118.
The same opportunities existed in private law, too. Consider *Southern Express Co. v. Byers,* where the United States Supreme Court barred contract damages for mental anguish as a matter of federal law—an issue that is once again before the Court today.182 John Byers sued the railroad for failing to deliver “a silver gray casket, robe, gloves, [and] hose” in time to bury his wife, who had died suddenly while “visiting her mother” in South Carolina.183 The question was what his damages should be under the contract. The railroad argued that all they owed him was either the cost of the casket or $50, the maximum spelled out in the fine print of the bill of lading he’d signed. The jury disagreed and awarded Byers another $200 for “mental anguish.”184 A divided North Carolina Supreme Court upheld their verdict, relying on another recent case that also happened to feature a Black plaintiff.185 At the time, courts all over the country were wrestling with similar questions, and many of these mental anguish cases explicitly stood on racial facts.186

Did it matter to the Buncombe County jury or to the North Carolina Supreme Court that this case was about the wounded feelings of a Black man? Was it a material fact, “a fact that makes a difference” to the outcome of the case?187 Byers’s lawyer must have thought so because he made sure to get it into the record. The first sentence of Byers’s testimony read: “That he was

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181 240 U.S. 612, 613 (1916).
183 Transcript of Record at 11, S. Express Co. v. Byers, 240 U.S. 612 (1916) (No. 201) [hereinafter Transcript of Record].
184 Id. at 15-16.
Penn, in turn, cited at least two cases lodged by Black plaintiffs: *Woods v. Western Union Telegraph Co.,* 148 N.C. 1 (1908) and *Forney v. Postal Telegraph-Cable Co.,* 152 N.C. 494 (1910). Penn, 75 S.E. at 17-20.
186 See Campbell v. Pullman Palace-Car Co., 42 F. 484, 485-86 (N.D. Iowa 1890) (awarding $11,000 in damages to a white woman who assumed a “colored” porter’s wake-up call was prelude to an “indecent assault”); Paul v. S. Ry. Co., 155 S.E. 884, 884-85 (S.C. 1930) (showing that $325 in damages were awarded to a “colored woman” forced off train, with her two children, into a thunderstorm).
188 See *Material Fact, BLACK’S LAW DICTIONARY* (10th ed. 2014); *Materiality, BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA* (8th ed. 1914) (defining “materiality” as the “[c]apability of properly influencing the result of the trial”).
about 50 years of age; that he was not a slavery darkey, but was born right after the war.”

The rest of the testimony—and the legal question at issue—was about Byers’s anguish. His lawyer aimed to show that he “suffered in mind and body” when he “got down there and found that the casket was not . . . there.” “I was hardly able to attend to anything on account of the loss of my wife,” Byers testified, “I was kinder broke down.”

Writing for the Court, Justice James McReynolds had to decide how much a Black man’s feelings were worth. By dismissing John Byers’s anguish without mentioning his race, McReynolds was able to lay down a broad principle: that “mental suffering” was “too vague for legal redress” through contract damages when it was not connected to any “injury” “to [the] person, property, health, or reputation.”

Treating Byers’s race as material would have limited the holding to cases with similar facts—to Black shippers rather than shippers in general; to Native American telegram senders rather than telegram senders in general, much the way Justice Miller narrowed the scope of the Thirteenth Amendment to “African slavery.”

Justice McReynolds covered up a fact that at least one of the parties (Byers) had purposely put into the record. Although McReynolds frequently used racist language in other contexts—indeed, he was one of the most virulently racist people ever to sit on the Court—he suppressed race in Byers, “passing” John Byers into case law. He did so for the same reason he declared it immaterial.

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188 Byers Transcript of Record, supra note 183, at 21.
189 Id. at 21–22.
190 See Byers, 240 U.S. at 615 (claiming a “long-recognized common-law rule”) (quoting 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ArISE INDEPENDENTLY OF CONTRACT 94 (3d ed. 1906)). McReynolds also silently ignored the fact that Byers was claiming damages for breach of contract, not tort. See also Calvert Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. REV. 1033, 1067 (1936) (claiming that recovery is often denied for “mere negligence” (citing Byers)).
191 In his Byers opinion, 240 U.S. at 616, Justice McReynolds prominently cited Western Union Telegraph Co. v. Chouteau, 115 P. 879 (Okla. 1911), which likewise did not disclose that John Chouteau was a Shawnee Indian. Interview by Indian and Pioneer Historical Collection with John Chouteau in Vinita, Okla. (Mar. 26, 1937) (No. 2147). See also Simard, Citing Slavery, at 93–94 (“By classifying [Osborn v. Nicholson, 80 U.S. (13 Wall.) 654 (1871)] as involving a contract rather than a contract for the sale of a person, the Court avoided confronting difficult questions about the meaning of the Civil War and Emancipation.”).
193 See Walter F. Murphy, In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments, 1961 SUP. CT. REV. 159, 166 (“[McReynolds was] selfish to the last degree, an able man, but fuller of prejudice than any man I have ever known . . . .” (quoting William Howard Taft to Helen Taft Manning, June 11, 1923)); Robert L. Carter, In Tribute: Charles Hamilton Houston, 111 HARV. L. REV. 2149, 2153–54 (1998) (recalling that during Charles Hamilton Houston’s oral argument before the Court, McReynolds swiveled his chair to turn his back on Houston, perhaps the country’s most prominent African American lawyer at that time).
in criminal\textsuperscript{194} and voting rights cases,\textsuperscript{195} and for the same reason that Byers and his lawyers invoked it: because it suited his doctrinal goals. It enabled his denial of contract damages for mental anguish to sweep wider than it would have if it were seen as applying only to Black plaintiffs. Justice Miller highlighted race and Justice McReynolds suppressed it, but each Justice’s choice illustrates an important way that race has been treated in law: as a free-floating doctrinal catalyst, rather than as something integral to the legal system.

C. \textit{Blackness and the Creation of the “Reasonable Man”}

Racial metaphors and cases involving Black litigants figured significantly among the cases—now grouped under the headings duty to read, mistake, and assent—that helped enshrine the objective theory and its closely allied concept of the “reasonable man” at the heart of what is now known as Classical Legal Thought, or Legal Formalism. Many casebooks today explain the rise of the objective theory in functionalist terms: objectivism supplied the uniform, predictable legal rules that a modernizing national economy needed.\textsuperscript{196} But of course this national economy stood atop a racially segregated workforce and its leaders took it for granted that “the white race[]”

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\footnote{194} Aldridge v. United States, 283 U.S. 308, 316-18 (1931) (McReynolds, J., dissenting) (asserting that jury racism “in practice is not really important” compared to crime menace).

\footnote{195} Nixon v. Condon, 286 U.S. 73, 105 (1932) (McReynolds, J., dissenting) (arguing that a Texas statute empowering political parties to decide primary voter qualifications does not violate the Equal Protection Clause when the statute is facially neutral with respect to race); see also Anthony V. Alfieri, \textit{Gideon in White/Gideon in Black: Race and Identity in Lawyering}, 114 YALE L.J. 1459, 1468 (2005) (noting that Abe Fortas “specifically wanted to find out . . . whether [Clarence Gideon] was a Negro”).

\footnote{196} See, e.g., \textit{Dawson} (11th), supra note 24, at 351; \textit{Farnsworth} (9th), supra note 24, at 161-63; \textit{Restatement (Second) of Contracts}, § 17, cmt. C (Am. L. Inst. 1981). The Restatement and casebook authors are relying on an influential body of legal history scholarship whose functionalist interpretation has since been greatly challenged. \textit{Compare Morton Horwitz, The Transformation of American Law, 1780-1960: The Crisis of Legal Orthodoxy} 48-49 (1977) (claiming that individual will theory was abandoned in favor of formalized legal doctrine in pursuit of “collective social objectives”) with Blumenthal, \textit{supra} note 92, at 1144-47 (discussing the conventional, functionalist narrative of this transformation and arguing that other factors complicate this narrative). But see Joseph M. Perillo, \textit{Origins of the Objective Theory of Contract Formation and Interpretation}, 69 FORDHAM L. REV. 427, 428 (2000) (“[O]bjective approaches have predominated in the common law of contracts since time immemorial.”).}
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was “superior” to “the negro.”

Was a Black person “an average, ordinary,” “prudent man”? Did it really not matter, as NYU Law Dean Clarence Ashley asserted in a revealing hypothetical, whether one party to a bargain was “a white man and not black”?

Consider Union Mutual v. Wilkinson, once a leading case on equitable estoppel and an important, indirect step in the development of the objective approach. In 1869, a Black man named Henry Wilkinson sued his insurance company for its refusal to pay on a $2,000 life insurance policy held by his late wife, Malinda Wilkinson. The company denied his claim on the ground that she had given false answers to two questions on the application form: she failed to disclose an accident she had as a teenager in 1862, and she misstated her mother’s age and cause of death. Both incidents had occurred while she was enslaved. Henry Wilkinson won a jury verdict of $2,304.33 and the company appealed. Justice Samuel Miller used the equitable doctrine of estoppel to get around the company’s parol evidence objection to the jury hearing about how the statements got into Malinda Wilkinson’s application. The jury was entitled to hear that testimony, Miller held, because it showed that the writing embodied the agent’s representations, not the Wilkinsons'. And the company was liable for its agent’s act because, as

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197 Lincoln, supra note 82; see also Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“The white race . . . [is] the dominant race in this country . . . in prestige, in achievements, in education, in wealth, and in power.”). Cotton produced by Black people formed a significant fraction of that economy, and it is notable that the casebook classic Raffles v. Wichelhaus was first introduced to the canon in 1875 by Judah Benjamin, the former Secretary of State of the Confederate States of America, who had been preoccupied with wartime cotton price volatility at the very time Raffles was decided. See Raffles v. Wichelhaus (1864) 159 Eng. Rep. 375, 2 Hurl & C. 906; A. W. Brian Simpson, Contracts for Cotton to Arrive: The Case of the Two Ships Peerless, 11 CARDOZO L. REV. 287, 302, 329 (1989).

198 HORWITZ, supra note 196, at 35.

199 Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 HARV. L. REV. 417, 418 (1899); see also Gibbs v. W. Union Tel. Co., 146 S.E. 209, 213-14 (N.C. 1929) (affirming damage award to “old colored woman” and declaring that “[m]ental suffering is as real as physical. This is the experience of every normal person”).


201 80 U.S. (13 Wal.) 222 (1871).


204 Id. at 70-71.

205 Id.

206 Wilkinson, 80 U.S. (13 Wall.) at 231-33.

207 Id.
everyone knew, the modern insurance industry encouraged customers to rely on the representations of the traveling salesmen who sold them policies.\textsuperscript{208}

Justice Miller framed his opinion broadly. He never mentioned that the Wilkinsons were Black, even though, as a prominent antislavery Republican, he emphasized race and slavery in constitutional cases like \textit{Slaughter-House}.\textsuperscript{209}

But, as the transcript reveals, the reason the parol evidence issue came up at all was precisely because the Wilkinsons had been enslaved. When Ball had asked Malinda Wilkinson for her parents’ ages at death, she had replied “that she knew nothing . . . more than hearsay” about them.\textsuperscript{210} And Henry Wilkinson had warned Ball that there was “no use asking any one about there [sic] parents who had been in slavery.”\textsuperscript{211} Nevertheless, agent Ball and the doctor went ahead and “put the age down at 40 years, believing it to be as near as we could ascertain.”\textsuperscript{212}

The \textit{Wilkinson} doctrine—allowing parol testimony to be heard to estop the insurer from benefiting from its own misrepresentation—quickly became the majority rule, adopted by all but two states,\textsuperscript{213} and stubbornly persisted even after the Supreme Court practically reversed it in 1902.\textsuperscript{214} \textit{Wilkinson} was popular because it stood upon a realistic description of the practical workings of the insurance industry. Yale’s William R. Vance observed in 1951 that everyone knew that insurance agents filled out the forms for applicants; that they “frequently” glossed or even “falsifie[d]” applicants’ answers;\textsuperscript{215} and that “ordinary prudent persons”\textsuperscript{216} and “even careful business men”\textsuperscript{217} typically signed the “applications without reading them”\textsuperscript{218} and then stuck them

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\textsuperscript{208} Id. at 233-36.
\textsuperscript{209} See BRANDWEIN, supra note 29, at 58-59 (discussing Justice Miller’s opinion in \textit{Slaughter-House} in the broader context of his advocacy of “full political and legal rights,” protected primarily by the states, for Black men (quoting MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA (2003))). And he must have been familiar with Keokuk’s Black community, having practiced there from 1850 until he joined the Court in 1862. Charles Fairman, \textit{Samuel F. Miller, Justice of the Supreme Court, 1862-1890}, 10 \textit{VAND. L. REV.} 193, 196-97 (1957). The Court’s syllabus did say the Wilkinsons “had been slaves.” \textit{Wilkinson}, 80 U.S. (13 Wall.) at 223.
\textsuperscript{210} \textit{Wilkinson} Transcript of Record, supra note 203, at 77.
\textsuperscript{211} Id. at 83.
\textsuperscript{212} Id. at 77-78.
\textsuperscript{213} WILLIAM R. VANCE, HANDBOOK ON THE LAW OF INSURANCE 516 (3d ed. 1951).
\textsuperscript{214} See N. Assurance Co. v. Grand View Bldg. Ass’n, 183 U.S. 308, 364 (1902) (emphasizing the benefit to the parties and the broader community in “preserving written contracts from change or alteration by verbal testimony”); VANCE, supra note 213, at 523-27.
\textsuperscript{215} VANCE, supra note 213, at 534.
\textsuperscript{216} O. B. Triplett, Jr., \textit{The Insurance Contract—Should a Duty to Read Be Imposed on the Insured?}, 9 MISS. L.J. 293, 302 (1937) (quoting WILLIAM R. VANCE, HANDBOOK OF THE LAW OF INSURANCE 515 (2d ed. 1930)).
\textsuperscript{217} Id. at 296.
\textsuperscript{218} VANCE, supra note 213, at 534.
\end{footnotesize}
“unread in [their] bureau drawer[s]” and company safes. By contrast, Wilkinson’s critics insisted that its “peculiar circumstances”—the fact that “[t]he insured and her husband had been slaves and the insurance agent was a white man”—made it a bad precedent, that there should be no “separate departments” in contract law for literate and nonliterate people, and that, “when buying insurance, as in anything else, people should read what they sign.” Yet most scholars and courts thought that it was the contract, not the person, that was distinctive, and, like Miller, they did not mention that the Wilkinsons were Black. Unlike “ordinary commercial contracts,” insurance contracts were “contract[s] of ‘adhesion,’” which purchasers “could not understand” even if they tried. The courts’ “pragmatic approach” treated the “ordinary prudent person[]” as functionally illiterate when it came to insurance contracts. By downplaying the Wilkinsons’ race and their heart-wrenching experiences of slavery, Justice Miller rendered them “precisely” the kind of ordinary prudent people for whom “modern” common-law courts had created “the doctrine of equitable estoppels.”

Miller’s opinion made the Wilkinsons available for an objective approach to formation by turning them into abstractions. Farkas v. Powell, a less famous case, turned another Black person into an abstraction and then made that “prudent man” do normative work. Bartow Powell borrowed a horse from...
Sam Farkas, a white livestock dealer, to visit his girlfriend, four miles away.\textsuperscript{231} She wasn’t there, and he rode on another three miles to see her before the horse stumbled and got injured.\textsuperscript{232} It died a few days later.\textsuperscript{233} Farkas sued Powell in bailment; Powell, Farkas complained, was guilty of conversion—a civil theft—because he had ridden the horse further than they had agreed.\textsuperscript{234} But the county judge charged the jury that if they believed Powell “used ordinary care & diligence, such as an ordinarily prudent man would use . . . [with] his own horse,”\textsuperscript{235} “it did not make any difference whether he rode it” further “than he had hired [it] to go.”\textsuperscript{236} And although the Georgia Supreme Court reversed the jury’s verdict for Powell,\textsuperscript{237} there is no mistaking that this was the objective theory in action: that, whatever it was doing for Wall Street, objectivism was also a way of coping with the practical realities of a world where white people routinely made bargains with Black people.\textsuperscript{238} Did an elderly Black man have “sense enough to make a deed”? wondered a witness in a different case.\textsuperscript{239} “[H]ow much sense [was] necessary” for anyone “to make a contract”?\textsuperscript{240} Objectivism required the presumption that people were free and equal market actors, trading to their own “best advantage” and trusting that others were “able to take care of” themselves.\textsuperscript{241} It wasn’t enough to say that someone was old, or Black, or suffered from “weakness of mind.”\textsuperscript{242} That is why the opinion in \textit{Farkas v. Powell} did not mention that Powell was Black.

\begin{thebibliography}{99}
\item \textsuperscript{231} Transcript of Record at 12, 19, Farkas v. Powell, 13 S.E. 200 (Ga. 1891) (GA) [hereinafter \textit{Farkas Transcript of Record}].
\item \textsuperscript{232} \textit{Id.} at 17-18.
\item \textsuperscript{233} \textit{Id.} at 15.
\item \textsuperscript{234} \textit{Farkas}, 13 S.E. at 200-201.
\item \textsuperscript{235} \textit{Farkas Transcript of Record}, supra note 231, at 32.
\item \textsuperscript{236} \textit{Farkas}, 13 S.E. at 201 (1891). \textit{Farkas} is not a particularly important case, but it is still occasionally cited today. See Swish Mfg. Southeast v. Manhattan Fire & Marine Ins. Co., 675 F.2d 1218, 1220 (11th Cir. 1982) (citing \textit{Farkas} as a case “following the common law principle that unauthorized use which results in damage to a chattel constitutes a conversion”).
\item \textsuperscript{237} \textit{Farkas}, 13 S.E. at 201.
\item \textsuperscript{238} As well as bargains \textit{about} Black people. Although the court did not mention it, in four of the five cases it cited, the “property” wrongfully converted were enslaved people, who had been rented out by masters and either killed in workplace accidents or worked to death by their lessees. \textit{Id.} (citing Mayor & Council of Columbus v. Howard, 6 Ga. 213 (1849) (enslaved person at issue); Gorman v. Campbell, 14 Ga. 137 (1853) (same); Lewis v. McAfee, 32 Ga. 465 (1861) (same)). See generally Simard, supra note 8, at 81 (“Slave cases, that is, cases involving human property, are still commonly cited in the twenty-first century.”).
\item \textsuperscript{239} Transcript of Record at 38, Bond v. Branning Mfg. Co., 52 S.E. 929 (N.C. 1906) (SANC) (Black plaintiff) [hereinafter \textit{Bond Transcript of Record}].
\item \textsuperscript{240} \textit{Id.}
\item \textsuperscript{241} Transcript of Record at 43, Hodges v. Wilson, 81 S.E. 340 (N.C. 1914) (No. 309) (SANC) (Black plaintiffs; testimony by white witness).
\item \textsuperscript{242} Hodges v. Wilson, 81 S.E. 340, 344 (N.C. 1914).
\end{thebibliography}
The “standard” was whether “the party ‘knows what he is about.’”243 The American economy needed Black people to participate in the world of contract, and local institutions and practices encouraged them to do so, but in an era dominated by the principles that Black people were inferior and that business investment required predictable, clear rules,244 their contracts sharply tested the objective theory and its necessary hero, the “reasonable man.” The objectivist solution was not only to declare that race didn’t matter,245 as Dean Ashley of NYU had done,246 but to pretend that it didn’t exist,247 other than in exceptional circumstances suitable for equity.248

243 That is, whether the party has the mental capacity to contract. Bond v. Branning Mfg. Co., 52 S.E. 929, 929-30 (N.C. 1906). In King v. Cohorn, 6 Yer. 75, 75-77 (Tenn. 1834), where an elderly free Black woman sold her home to her husband’s owner in a desperate effort to buy his freedom, the Tennessee supreme court see-sawed between both approaches in formulating an early version of unconscionability doctrine. Declaring that determinations of fraud must consider “the mental, physical, and pecuniary condition of the parties,” the court emphasized the complainant’s special vulnerability as an “ignorant,” alcoholic, “negro woman,” “‘wrapt up’ in” “anxiety” for her husband, and concluded that “[n]o woman in her circumstance, if . . . not under delusion, would make it.” But the court also insisted that “[m]any white persons more enlightened than this complainant, are unable to comprehend the import of technical instruments by hearing them read only . . . without any explanation in plain language.” Later commentators interpreted Cohorn as setting up a test of “the intrinsic nature and subject of the bargain itself, or the attending circumstances.” KENT, supra note 144, at 487 n.(d). By the early 1900s, Cohorn had become an early example of American unconscionability doctrine, as commentators assimilated its racial facts to a general test, taken from an old English equity case, of a “bargain . . . such as no sane person would make.” 27 THE AMERICAN DECISIONS: CASES OF GENERAL VALUE AND AUTHORITY DECIDED IN THE COURTS OF THE SEVERAL STATES 793 (1910). See also WILLIAM F. ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS 280 (1913) (“An unconscionable contract is usually defined as one ‘such as no man in his senses and not under a delusion would make on the one hand, and such as no honest and fair man would accept on the other’”).

244 N. Assurance Co. v. Grand View Bldg. Ass’n, 183 U.S. 308, 364 (expressing concern that “permitting . . . parol evidence to modify written contracts” would discourage capital investment in fire insurance companies).

245 Cole v. Hunter Tract Improvement Co., 112 P. 368, 369 (1910) (noting that the seller’s mistaken belief that the buyer was white and not “a negro” did not justify rescission because it was “not of the essence of the contract”); see also Richard R.W. Brooks, Incorporating Race, 106 COLUM. L. REV. 2023, 2025-26, 2094 (2006) (explaining in economic terms courts’ changing willingness to attribute race to corporate persons).

246 See infra Part II.D.

D. Capacity: the “Ignorant Negro”

Sometimes, legal professionals chose not to pass “colored’ cases.” Judges and lawyers acknowledged the impact of race more often in areas of law governed by the subjective “meeting of the minds” approach, because it allowed them to get results in cases involving Black people without violating either racial norms or legal rules. Freedmen’s Bureau judges had pointed the way in 1865-1866, when they justified their use of freewheeling equitable powers by casting formerly enslaved people as “wards” who were “under the guardianship of the nation.” The old equitable defenses of mistake, fraud, duress, incapacity, and unconscionability had been devised centuries earlier to protect the interests of specially vulnerable categories of people—those who were not considered to be reasonable (or men), or who lacked free will. Importantly, of all the grounds that treatises listed for questioning someone’s capacity to make a contract—too drunk, too young, too insane, too overawed by a husband or ship captain—being Black was not one of them. There was no separate “Negro law” even in the equitable realm of contract defenses. And yet these defenses were perfectly pitched to harmonize with the era’s reigning sex and race stereotypes—and sometimes reverse white people’s interest in those stereotypes.

Unlike the duress defense, which tended to cast respondents as objectively reasonable people making rational choices under hard circumstances, the “ignorant negro” defense required African Americans and their lawyers to adopt a subjective approach, emphasizing the distinctive qualities of particular individuals in order to deny that the minds had truly met. They explained away X marks and spidery signatures by playing up the clients’ ignorance and illiteracy. Those seeking to enforce contracts needed to prove that their opponents had signed those contracts freely and knowingly, an

250 Blumenthal, supra note 92, at 1217-19.
251 Id. at 1218.
252 See, e.g., Joel Prentiss Bishop, Commentaries on the Law of Contracts, 390-416 (2d ed. 1907) (explaining how various factors, including youth, insanity, marriage, and drunkenness can affect the validity of contracts); PomeroY, supra note 161, at 1944 (pointing out that “weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other . . . may easily induce a court to grant relief”).
253 Here I am adapting to private law an argument first made by Derrick Bell about public law. See generally Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980) (noting Brown as an instance where the interests of Black and white people converged to advance the rights of Black people).
254 See also Gabriel J. Chin, Race and the Disappointing Right to Counsel, 122 Yale L.J. 2236, 2241 (2013) (arguing that the right to counsel arose in criminal law as “help for the ‘ignorant negro’”); MileWSki, supra note 14, at 10-11, 123-27, 135-43 (noting that between 1900-1920, Black litigants’ arguments at southern appellate courts “played to white expectations of black ignorance” as well as Black “vulnerability” and dependence).
argument more compatible with the objective approach. They needed to show that illiterate signers were smart enough and informed enough to know what they were doing. So they insisted that they had gone out of their way to get “some able and reputable lawyer to draw up the . . . papers” and that the other party had heard these documents read to him so “that there could be no misunderstanding as to what he was signing.” They pulled courtroom stunts to try and show that their opponents were faking ignorance. Edgar Webster, the lawyer for a Mississippi druggist named W. A. Stinebeck, tried to prove that George Reno understood the deed he and his wife had signed over to Stinebeck: he made Reno read the deed out loud, even lending him a pair of eyeglasses, but Reno spotted the trap. “Well sir, Mr. Webster,” Reno demurred, “I am no lawyer sir.” Reno freely admitted that he knew “what it means to sell,” and he admitted that he had signed his X mark to the paper he had just read in open court. The “ignorant negro,” as he played the character, was a tricked man, not a stupid man. His defense was that he thought the paper was “security” for a loan—not a deed of sale but a deed of trust, the mortgage-like agreement that people signed all the time for short-term money needs. Confronted with stories of “ignorant negroes” up against “well informed . . . white m[e]n,” white people and their lawyers

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255 Brief for Appellee at 7-8, Johnson v. Michaux, 66 S.E. 823 (Va. 1910) (LVRC) (arguing that a party who was Black had “sufficient capacity to understand the nature of [the] business”); see also MILEWSKI, supra note 14, at 134-43 (describing Black litigants’ use of fraud defense and white opponents’ insistence on individual Black litigants’ “intelligence”).

256 See Transcript of Record at 36, Reno v. Stinebeck (Miss. Cir. Ct. Lafayette Cnty. 1916) (No. 4692) [hereinafter Reno Transcript of Record] (explaining that a “reputable lawyer” was hired to draft the contract).

257 Id. at 17 (arguing that the contract was understood by both parties); see also Answer of Respondent at 2, Toles v. Stowers, (Miss. Cir. Ct. Lafayette Cnty. 1915) (No. 4533) (arguing that the deed was read aloud and explained to the plaintiff); Bond Transcript of Record, supra note 239, at 44-45 (presenting testimony by multiple witnesses averring that the deed was read out to the decedent).

258 Transcript of Record at 32b, Beaden v. Bransford Realty Co., 232 S.W. 958 (Tenn. 1921) (No. 4162) (Tennessee State Library & Archives [hereinafter TSLA]).

259 Transcript of Record at 16, Scott v. Raub, 14 S.E. 178 (Va. 1891) (LVRC) (noting lawyer’s request that a witness read the names inscribed on inside cover of family Bible); Transcript of Record at 209-10, In re Estate of John H. White (Orphans Ct., Camden Cty., N.J. 1897) (New Jersey State Archives, Trenton [hereinafter NJSA]) (proving illiteracy by asking witness to write her name and address in open court).

260 Reno Transcript of Record, supra note 256, at 25.

261 Id. at 26.

262 Id. at 29.

263 Id. at 29-30; see also Deposition of Felix Brown at 63, Brown v. McWilliams, No. 14579 (Miss. Cir. Ct. Coahoma Cnty. 1909) (“This writing looks like a track on the ground to me, I don’t know it.”).


265 Amended Bill of Complaint at 3, Houston v. Ellis, No. 631 (Miss. Cir. Ct. Coahoma Cnty. 1903) [hereinafter Houston Complaint].
bent over backwards to say how smart those “negroes” were. White Mississippian Oliver M. Ellis praised Ben Houston to the skies as “away above the ordinary nigger; about as sharp a nigger as I ever met; he has been so dog-gone sharp that I have not been able to keep up with him.”

The “ignorant Negro” defense treated race as opportunistically as Justice Miller did in his handling of estoppel and the privileges and immunities clause, and as Justice McReynolds did with mental anguish. Its genius was that it enabled Black people and their lawyers to wring a tactical advantage from the ideology of white supremacy without challenging that ideology or accusing whites of wrongdoing. Indeed, many Black litigants and witnesses went out of their way to avoid even implying bad faith on the part of their white opponents. Like Captain Renault in *Casablanca*, Ben Houston said he was shocked, shocked that Ellis “would knowingly and designedly . . . [de]fraud” him. This defense worked wonders on southern juries and judges during the early 1900s. In case after case, courts sided with African Americans who presented themselves as “poor, hard-working, humble” people, “ignorant negro[es], unacquainted with the formalities and usages of law.” And these tactics spread fast enough that by 1890, the “shrewd, designing white man” defrauding “an illiterate and confiding negro” had already become stock characters in a “pathetic[]” drama “set forth in the [lawyers’] pleadings.” In lauding Ben Houston’s intelligence, Ellis did not

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266 Transcript of Record at 27, in Houston v. Ellis, No. 631 (Miss. Cir. Ct. Coahoma Cnty. 1903) [hereinafter Houston Transcript of Record].

267 *CASABLANCA* (Warner Bros. Pictures 1942) (“I’m shocked, shocked to find that gambling is going on in here!”).

268 Houston Complaint, supra note 265, at 15-16.

269 Royal Dumas, Commentary, *The Muddled Mettle of Jurisprudence: Race and Procedure in Alabama’s Appellate Courts, 1901-1930*, 58 Ala. L. Rev. 417, 440-41 (2006) (arguing that paternalist rhetoric mitigated the loss of procedural protections for Black defendants). For specific examples, see *Irwin v. Coleman*, 55 So. 492, 494 (Ala. 1911): “[W]hen a man of superior intelligence has a transaction with one who is ignorant, the utmost good faith must be observed.”; *Kirby v. Arnold*, 68 So. 17, 20 (Ala. 1915), which set aside a deed made by an “ignorant negro woman” on grounds of fraud and duress, and added: “[T]o protect the weak and ignorant from imposition by the strong and intelligent” is the “crowning glory of courts of equity”; *Pearson v. Hyde*, 66 So. 504-505 (Miss. 1914); *Baldwin v. Anderson*, 60 So. 578 (Miss. 1912), which explained that “grossly inadequate” consideration puts purchaser of deed on inquiry notice of defects in title. See also *Milewski*, supra note 14, at 101-11, 123-27 (examining recurring themes in appellate cases brought by Black litigants); *Williams*, supra note 4, at 156-58 (“I found that it helped to appeal to the court’s humanity, not to stress the fullness of hers.”).

270 Dickerson v. Thomas, 7 So. 503, 504-505 (Miss. 1890); see also Brief for Appellant at 9, *Brown v. McWilliams*, No. 14579 (Miss. Cir. Ct. Coahoma Cnty. 1909) (asking court to lay “the strong arm of justice . . . protecting[151] about [the] bent and time worn shoulders” of the “negro”); *Norfleet v. Beall*, 34 So. 328, 328 (Miss. 1903) (arguing that the “old, feeble negro woman . . . stood on no terms of equality with” the defendant). Others have made this point cogently for fraud and criminal cases. See *Milewski*, supra note 14, at 134-42 (examining fraud
mean that Black people were smart—an assertion that would have contradicted white supremacy—it was that this Black man was smart enough to have protected himself in this particular contract. In the South, where contractual dealings with Black people were an ordinary feature of daily life, legal professionals could neither reject nor fully embrace the objective approach.

Thus, the “ignorant negro” was an essential part of contract law, not a separate body of law. It worked because it extended the principles of capacity and assent that arguably defined what a contract was (and was not). White people claimed ignorance, fraud, and duress, too, albeit without the supercharging racial marker. Cases involving African Americans helped refine longstanding rules of formation and construction of promises by illiterate people in general, rules that spelled out the precautions illiterate people should take before signing, as well as the practical ways they could sign. The rules said that those who wrote up deeds and read them aloud
owed a “confidence” to any layperson who did not understand technical legal language. So if an offeror lied about what was in a contract, or hid important provisions in the “fine print,” then “the minds of the parties did not meet” and he could not expect a judge to enforce it. Testimony in trial courts and other documents suggests that this was more than a formal presumption: that adults, including Black people, generally believed that “it was illegal to force a man to sign a note without readin it to him, tellin him what he’s signin,” that a person should say “whether she understood” what she was about to sign, and that a binding signature could be made by “touch[ing] the pen.” In other words, it is likely that the judges and

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275 John T. Castle, Arkansas Supreme Court, 3 THE LAW, 687-88 (1907) (noting that court’s recent refusal to enforce a contract signed by a “densely ignorant negro” when a key provision written in the margins was not read out).

276 See Bill of Complaint at 5, Skinner v. Baker, No. 1457 (Miss. Cir. Ct. Coahoma Cnty. 1912) (alleging that defendant Baker, through false verbal representations and fine-print misdirection, induced Black plaintiffs to sign a trust deed covering their crops and horse rather than just their horse; plaintiffs’ race confirmed at U.S. DEPT’OF COM., BUREAU OF THE CENSUS, THIRTEENTH CENSUS OF THE UNITED STATES: 1910: POPULATION SCHEDULE FOR MISSISSIPPI, COAHOMA COUNTY, BEAT 4 at 11A; see also CHAFFEE & SIMPSON, supra note 161, at 1304 (“[The] plaintiff omitted important clauses of option in reading it to [an] illiterate [white] land-owner . . . .” (citing Van Deusen v. Brown, 132 N.W. 472 (Mich. 1911)); Grimsley v. Singletary, 65 S.E. 92, 93 (Ga. 1909) (holding, in a dispute involving an “illiterate negro” defendant, that “one who cannot read [and] is induced to sign . . . by the . . . other party . . . may, ordinarily, rely upon the representation of the other party as to what the instrument is”); and Bates v. Harte, 26 So. 898 (Ala. 1899) (concluding, in a lawsuit by a white well-drilling contractor against a Black landowner for amount due, that the contractor was entitled to a mechanic’s lien and that the trial court properly admitted the written contract, but that the question of whether the defendant was fraudulently induced to sign the contract, which materially differed from verbal agreements made before the writing, was a factual question for the jury; Bates’ race confirmed at U.S. DEPT’OF COM., BUREAU OF THE CENSUS, TWELFTH CENSUS OF THE UNITED STATES: 1900: POPULATION SCHEDULE FOR ALABAMA, COLBERT COUNTY, BEAT 16 at 89A). Both Bates and Grimsley are cited at 12 AM. JUR. 630 § 137.


278 Transcript of Record at 9-10, 20-26, 18b, Sparks v. Philips, No. 9343 (D.C. 1886) (National Archives and Records Administration, Washington D.C. [hereinafter NARA]) (involving a deed of trust made by Black family for burial expenses to Black undertaker, who also served as notary; Sparks identified at U.S. DEPT’OF COM., BUREAU OF THE CENSUS, NINTH CENSUS OF THE UNITED STATES: 1870: POPULATION SCHEDULE FOR DISTRICT OF COLUMBIA, WASHINGTON CITY 443B; Addison Day identified at U.S. DEPT’OF COM., BUREAU OF THE CENSUS, TENTH CENSUS OF THE UNITED STATES: 1880: POPULATION SCHEDULE FOR DISTRICT OF COLUMBIA, WASHINGTON CITY 33C); see also Reno Transcript of Record, supra note 252, at 46 (“I touched a pen”); F.S. Rosyster Guano Co. v. Hall, 68 F.2d 533, 534 (4th Cir. 1934) (involving an illiterate plaintiff who “signed . . . by ‘touching the pen’”); and BISHOP, supra note 252, at 136-37 (describing the “manner of signing” and “reading at signing” for illiterate parties). Starting in the 1940s, legal scholars predicted change in the duty to read doctrine as boilerplate and contracts of adhesion supplanted “the realities of the bargaining practices of the past.” See John D. Calamari, Duty to Read—
treatise writers derived rules about the duty to read—rules that anticipated the broad outlines of modern consumer protection law—that in part from actual practices in a market that depended heavily on the contractual capacity of people, including Black people, who could not read.

Courts’ treatment of African Americans was a subset of the tensions between idiosyncratic personality and general categories that permeated contract law in general. It was one thing to be “afraid to make contracts” with a person who seemed mentally unstable or drunk, but life’s ordinary business could not go on if you could not make contracts with Black people. White people needed to be able to treat African Americans as competent, reasonable people. They needed Black people to have a working legal knowledge, to be co-participants in the speech community that turned otherwise ordinary behavior, like touching a pen, into legally binding acts. Judges and lawyers used the “ignorant negro” trope because it allowed them to get results in cases involving Black people without disturbing either the majesty of contract law or the principle of white supremacy.

III. RACE IN LEGAL REALISM

We have seen why Lena Harrington, a Black woman in segregated North Carolina, thought she could enforce a promise by going to court. But why did
one of her lawsuits wind up in so many casebooks? The answer is at once banal and significant: because influential legal theorists thought it was useful. In 1945, the doctrine of “past consideration” (or “moral obligation”) was very much in flux. Scholars noticed that many judges were flouting the traditional rule by enforcing promises grounded in the past. They pointed to a recent Alabama decision, Webb v. McGowin, as an example. In 1941, Lon Fuller argued that moral-obligation decisions such as Webb were not only common but theoretically correct. This gap between rule and actual practice, the Realists claimed, proved that law required a context-driven approach rather than the Classicists’ “mathematical or logical” deduction. Judges’ decisions about whether to enforce promises grounded in the past invariably depended on “the mores of the time”—on “community opinion.” By the 1950s, casebook authors were contrasting Webb with Harrington and the older case Mills v. Wyman (whose facts were somewhat different) in order to discern the trend in courts’ treatment of moral obligation. That pairing now also appears in the Restatement Second and in scholarship ever since. Fuller may not have known that Harrington and Taylor were Black, though it would have been easy for him to find out. What is clear is that recognizing race

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283 168 So. 196 (Ala. 1935).
285 Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 821 (1941).
287 Id. § 230.
288 20 Mass. (3 Pick.) 207 (1825).
290 Restatement (Second) of Contracts § 86 cmt. d (Am. Law Inst. 1981).
would have weakened the theoretical contrast Fuller wanted to draw. Instead of exemplifying the doctrinal implications of the two dominant theoretical approaches to contract law, Webb and Harrington would merely have illustrated that, when judges were freed to follow “community opinion,” white plaintiffs did better than Black ones. Even when they relied on Black people’s cases, the Realists’ context-driven approach did not extend to race.

“Colored’ cases” played an under-appreciated role in generating three core elements of Legal Realism: its attack on conceptualism, its theory of judicial decisionmaking, and its critique of market abstraction as cover for publicly-backed private coercion.293 We have seen that ‘types’ like the sailor, the ward, and the “ignorant Negro” had long been the exceptions that proved the rules of capacity and assent at the heart of the objective approach and Classical Legal Thought more generally.294 Realists suppressed those exceptions to attack the inner logic of Classicism. They did not want to show that the market oppressed sailors or Black people; they wanted to show that there was no such thing as “the free market.”295 As a result, although they used Black people’s cases and Black stereotypes to build their critical theory, very few Realists ever seriously engaged with issues of race, an error their intellectual heirs have struggled with ever since.296

A. Realists, Race, and “Situation-Sense”

“Colored’ cases” played an important silent role in the Realist theory of judicial decisionmaking. We saw in Part II that Reconstruction starkly posed the problem of unchecked judicial power and that Freedmen’s Bureau judges ‘solved’ it by treating race as the exception, the escape hatch into equity. Now, sixty years later, the Realists denied that there was any problem in the first place. In doing so, they invited judges to deploy their personal views—

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294 See infra Section II.D.
including their racial views—not as an exception to common-law rules, but as a normal feature of judging. Realists claimed that, whether it came from political, economic and moral “prejudices,” as in *Lochner*, or from “personal biases” regarding “women, or blonde women, or men with beards,” “hunching” performed the function that formalist logic purported to do: it created concepts and sorted the available facts into those conceptual categories. Judges were not tyrants, Max Radin maintained, because they were safely constrained by their “experience as a citizen and a lawyer.” A good judge “cut straight to the desirable result” because he had the same “sense of the situation” that “we” lawyers shared “in common” with “members of the community.” And when it came to something like interpreting a contract, a lawyer’s job was “knowing how two persons—like ourselves—who used certain words ought to be obligated because they used them.” The problem with the Realist theory of judicial decisionmaking, of course, was that there was no “we.” Contract doctrine reflected the “mores [of]... only a section of the people”; “usage” or “business understanding” was often imposed by “dominant” parties onto unwilling “servient contracting parties.” Some “members of the community” were not “like ourselves.” Could they be bound by “certain words”? Realists could not answer the question effectively, in part because they did not seriously engage with race.

297 See *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (“Some of these laws embody convictions or prejudices which judges are likely to share.”).
298 See Joseph C. Hutcheson Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 276-77 (1929) (“I knew that not only was it the practice of good judges to 'feel' their way to a decision of a close and difficult case, but that in such cases any other practice was unsound.”).
301 Id. at 362.
303 Radin, *supra* note 300, at 362.
304 Id. at 361.
307 Id. at 722.
308 Austin Tappan Wright, *Opposition of the Law to Business Usages*, 26 COLUM. L. REV. 917, 930 (1926); see also WILLISTON, *supra* note 305, at 11 (asserting that legal rules are usually informed by the “opinions and mores of the governing class”).
309 Radin, *supra* note 300, at 362.
310 Id. at 361.
311 Id.
That same inability to think about the racial dimensions of their theories also helped prevent the Realist critique of the “voluntaristic fallacy” from moving beyond critique—from germinating a positive approach to legal reasoning that could account for structural inequality. In *Agwilines v. NLRB*, Fifth Circuit Judge Joseph C. Hutcheson vindicated a Black labor union’s complaint of unfair labor practices by drawing on his “situation sense” as a white Texan. The NLRB’s report “of the conditions on the Tampa waterfront seems real and familiar,” Hutcheson wrote. “It is a picture” of a “dominant” white employer (Agwilines Corporation) exercising “an easygoing, kindly tolerance” toward “childlike,” “pleasure loving” Black workers. He knew all this, he said, because he was “familiar with the history and traditions of the deep South”—indeed, so familiar that he once regaled an Association of American Law Schools (AALS) banquet by mimicking Black dialect, complete with “aint,” “dat” and “sumpin.” Much as Freedmen’s Bureau agents had reasoned in 1865, Hutcheson thought that “Southern colored laborers” on at-will contracts “were at [such] a great disadvantage in . . . collective bargaining” that they were, essentially, wards of “their white employers.” And when the employer broke faith with those “traditions,” taking advantage of its “dominant” position to retaliate against Black union members and engage in sham negotiations, those laborers became wards of the nation through its NLRB. Hutcheson was unusually frank about his racial assumptions—certainly franker than Justice McReynolds was in *Byers*. But rather than mount a structural critique of the South’s racially segmented labor market, Hutcheson treated it as normal, its boundaries policed by a wise judge steeped in its unwritten “traditions.”

Even when Realists questioned the Classicists’ “bright-line distinction between voluntariness and coercion,” they tended to rely on Black people’s cases without noting their blackness and to use Black people as theoretical

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312 87 F.2d 146 (5th Cir. 1936).
313 See Llewellyn, *supra* note 301, at 396-98 (noting that judges’ “sense” of a given “situation” is a key element in judicial decisionmaking).
314 *Agwilines*, 87 F.2d at 152.
315 *Id.*
317 *Agwilines*, 87 F.2d at 153.
318 *Id.* at 152.
319 *Id.*
tropes or even as racist stereotypes. They thought through Black people without thinking very much about Black people. We can see this pattern in Realist theorizing about inequality of bargaining power, a problem that had preoccupied jurists, labor leaders, and economists since the days of Reconstruction. Justice Oliver Wendell Holmes had formulated one answer, beginning in 1887 with his passing reference to an 1872 Virginia case involving a Black man who claimed he had signed away his land under a white mob’s duress, and culminating by 1918 in this much-quoted passage: “It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.” By 1923, Columbia’s Robert Hale, a trailblazer in law and economics, was using Black slavery andpeonage as theoretical tools to develop Holmes’ idea into a full-on theory of economic compulsion, which he dubbed the “voluntaristic fallacy.” What

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"We do not often have occasion to speak, as of an indivisible whole, of the group of phenomena involved or connected in the transit of a negro over a rail-fence with a melon under his arm while the moon is just passing behind a cloud. But if this collocation of phenomena were of frequent occurrence, and if we did have occasion to speak of it often, and if its happening were likely to affect the money market, we should have some name, as ‘wousin,’ to denote it by. People would in time be disputing whether the existence of wousin involved necessarily a rail-fence, and whether the term could be applied when a white man was similarly related to a stone wall.


does “a free economy” mean, Hale famously asked in 1943, if we “enter into any given transaction in order to avoid the threat of something worse”?325 “Even a slave makes a choice,” Hale argued; “[h]e makes the ‘voluntary’ muscular movements” the overseer demands “in order to escape some threat.”326 It is because the slave made that choice “under threat” that “his servitude is called ‘involuntary.’”327 And in determining the lawfulness of the breaching party’s choice, there was no a priori way to draw the line between legitimate and illegitimate threats, whether it was a union’s threat to strike, a creditor’s threat to sue,328 a corporation’s threat to breach,329 or a salvor’s threat not to rescue a “ship in distress.”330 For example, Hale pointed out, in the employment context, taking away the power to breach and pay damages turned ordinary hard bargaining into “involuntary servitude,”331 whether it was done through the employer’s “private force,”332 as in Clyatt v. United States,333 or through criminal statute, as in Bailey v. Alabama.334 In Clyatt and Bailey,335 Hale argued, the Court seemed to be saying that there are “degree[s] of compulsion” and that the Thirteenth Amendment barred only some of them.336 After all, under the Peonage Cases, “fear of starvation” was still a valid “form[] of compulsion.”337 Like Hale, Walton Hamilton rejected the Lochner Court’s antislavery reasoning, with its simple slavery–freedom binary of “Political” and “Economic” Compulsion, 35 COLUM. L. REV. 149, 150-54 (1935) [hereinafter Hale, Force and State].

325 Robert L. Hale, Bargaining, Duress, and Economic Liberty, 43 COLUM. L. REV. 603, 606 (1943) [hereinafter Hale, Bargaining].

326 Id.

327 Id.

328 Even the arch-Classicist Williston admitted this. WILLISTON, supra note 165, at § 1615 (1922) (“[T]he line . . . between threats of prosecution by the creditor and the compelling force of circumstances . . . though no threats are made, is often hard to draw.”).


330 Id. at 622 (quoting Frankfurter’s discussion of Post v. Jones in his Bethlehem Steel dissent).

331 Id. at 651 n.16 (identifying labor under a contract without an option to pay damages instead of providing specific performance as involuntary).

332 Id.

333 See Clyatt v. United States, 197 U.S. 207, 215-16 (1905) (holding that peonage, compulsory service to pay off a debt, is a form of involuntary servitude).

334 219 U.S. 219, 244 (1911) (“The State . . . may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.”).

335 Clyatt, 197 U.S. at 215 (holding that the Thirteenth Amendment does not apply to employment contracts of sailors, who are protected as “wards of admiralty” at the moment of making the contract, but “surrender . . . [their] personal liberty during the life of the contract” (citing Robertson v. Baldwin, 165 U.S. 275, 282-83, 287 (1897))). The Clyatt Court’s reference to Robertson is quoted in Bailey, 219 U.S. at 243.

336 See Hale, Bargaining, supra note 325, at 611 n.16, 626, 627 (explaining how compulsion affects people differently with the Thirteenth Amendment only prohibiting excessive pressure to induce performance that destroys the power to choose to breach).

337 Id. at 161 n.22.
(the same binary that the Freedmen's Bureau had used to justify “a little wholesome constraint” on former slaves' attempts to bargain).\footnote{STANLEY, supra note 96, at 123-24 (quoting 2 OLIVER OTIS HOWARD, AUTOBIOGRAPHY OF OLIVER OTIS HOWARD (1907)).} It was impossible to draw bright lines between “good” and “bad” economic institutions. “In the ante-bellum South there were slaves who” held “other negroes” as property, Hamilton pointed out, and white elites had repeatedly experimented with “a wages-system” for enslaved people, as well as “profit-sharing, industrial government, and other modern fads.”\footnote{Lecture by Walton H. Hamilton titled Freedom and Economic Necessity supra Id.} To John Dawson of Michigan Law School, the voluntaristic fallacy appeared most starkly in cases of duress.\footnote{Id. at 268.} Whether it was threats of criminal prosecution or of civil litigation,\footnote{See generally (675) 1994); D. ORTER, BRIDGING THE COMMUNITY IN THE SOUTH 1941-1955 (discussing undue influence in an “extreme case” setting aside conveyance by “an aged colored person to a white man experienced in business”).} modern courts clearly rejected the objectivist axiom that “[i]t is not duress to threaten to do what there is a legal right to do.”\footnote{Cites at 259, 277.} Courts often second-guessed the adequacy of consideration, Dawson contended, even when there was no “confidential” or “fiduciary” relationship[].”\footnote{O. P. B. C. S. (citing at least one Black case: Smith v. Thomas, 1932 606 [Vol. 259].} Far from dying out in the 1800s, judges had “disguised” pre-modern “standards of equivalence” and smuggled them into the modern law of duress and undue influence.\footnote{Id. at 277-82 (citing at least two cases involving a Black plaintiff, one of whom was a free woman of color in slavery-era Nashville: Kirby v. Arnold, 68 So. 17 (Ala. 1915) and King v. Cohorn, 14 Tenn. (6 Verg.) 75 (1834)); see also Note, 41 COLUM. L. REV. 686, 714 (1941) (discussing undue influence in an “extreme case” setting aside conveyance by “an aged colored person to a white man experienced in business”).} 

Whereas antislavery judges had used a morally-charged account of slavery to develop the political economy of Lochnerism, the Realists used a morally-neutral account of slavery and involuntary servitude to reveal how deeply contract law’s ordering function—its power to facilitate economic activity—depended on its ability to decide what threats were permissible in “a free economy.”\footnote{Dawson, supra note 340, at 281-82.} So, Hale argued, when Holmes said that Black farmworkers’ breach was “wrong conduct,” Holmes was writing his personal morals into
contract law—the very thing he so famously accused the Lochner Court of doing to the Constitution. After all, the reason Alabama had enacted its peonage statute in the first place was to prevent judgment-proof Black farmworkers from acting like Holmes’ famous “bad man” by exercising their common-law right to choose between performance and (unpayable) damages. Black legal theorists like Charles Hamilton Houston went further. They developed a critique of what scholars would later call “racial capitalism” by building on the Realist insight about the “baseline problem” and the idea of the market as a network of mutual coercion. Basic “common law categories” were the tacit baseline that made private-sector coercion and segregation possible, they argued. “[A] Negro . . . can neither deal where he chooses nor buy where he chooses[,]” Houston wrote, “he deals where the other people please to let him.” But, other than Hale, few white Realists followed the Black theorists’ lead. Instead, much like the conservative antislavery judges had done, Realists used “slavery” and “peonage” to theorize issues they viewed as more universal and fundamental than race. By treating coercion “as a completely neutral concept” rather than a freestanding moral problem, Realists sought to reveal the conservative moral judgments beneath “baseline entitlements and duties,” without acknowledging that those moral judgments had arisen from a war over Black slavery. Thus, as Holmes’ and Dawson’s and Hale’s ideas passed into the mainstream of Critical Legal

346 Hale, Force and State, supra note 324 at 159-61 (“If the statement that breach of contract without excuse is ‘wrong conduct’ . . . rests on Holmes’s own moral judgment . . . that might well be taken to be the intent of the law if only a majority of the Supreme Court had agreed with Holmes.”).
347 See Pete Daniel, Up from Slavery and Down to Peonage: The Alonzo Bailey Case, 57 J. AM. HIST. 654, 668 (1970) (arguing that peonage statutes were created to give employers a remedy against impoverished laborers, from whom employers could not collect in a damages suit).
348 See Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 459-62 (1897) (theorizing law as a system of prophecies about “what the courts will do in fact,” rather than as a “system of reason” or “deduction from principles of ethics”).
349 See Hale, Force and State, supra note 324, at 160 (“[W]hat the pre-existing law of contracts required was not actual performance, but an election between performance and liability.”).
351 Mack, supra note 86, at 323.
352 Id. (quoting Houston); see also Fried, supra note 104, at 211 (arguing that Hale “recast” the debate about coercion as a matter of “baseline entitlements and duties”).
355 Fried, supra note 104, at 211.
scholarship and into the Second Restatement, the Realists’ engagement with race—always instrumental to what they regarded as more fundamental critiques—practically vanished.


357 See RESTATEMENT (SECOND) OF CONTRACTS § 176 cmts. a, f (AM. L. INST. 1981) (citing Dawson and Hale on when a threat is improper); id. § 73 rep’s note (citing Dawson and Dalzell on the performance of a legal duty as consideration); id. § 79, rep’s note to cmt. e (citing Dawson on the adequacy of consideration); see also E. Allan Farnsworth, Ingredients in the Redaction of the Restatement (Second) of Contracts, 81 COLUM. L. REV. 1, 5 (1981) (noting Dawson’s influence on the drafting of Restatement (Second) of Contracts). Note that Hutcheson served on the A.L.I. Council in 1938 and 1942.

358 See Dawson, supra note 340, at 278-86 (commenting that courts have quietly maintained “a standard of equivalence” in deciding cases involving “unequal exchange”). In support of this proposition, Dawson cites at least one case involving a Native American plaintiff and six cases involving Black litigants, which were identified as such in the official reports. See Kirby v. Arnold, 68 So. 17, 18 (Ala. 1915) (“[A]ppellee was an ignorant negro woman”); Stephens v. Osbourne, 64 S.W. 902, 902 (Tenn. 1901) (describing the complainant as an “ignorant old negro man”); Mann v. Russey, 49 S.W. 835, 836 (Tenn. 1898) (stating that the “vendee was an ignorant negro of very infirm mental capacity”); Thomas v. Davis, 2 So.2d 616, 621 (Tenn. 1944) (stating that a litigant testified that the opposing party had a “mental condition . . . unusually good for a negro his age”); Barner v. Handy, 183 S.W.2d 49, 51 (Ark. 1944) (describing plaintiff as an “inexperienced, illiterate, enfeebled and wholly dependent negro” who signed without “conscious volition, or understanding”); King v. Cohorn, 14 Tenn. (6 Yr.) 75, 75, 78 (1834) (granting “ignorant, old” free “negro” woman’s petition to rescind her contract to sell land to white man, on ground of fraud); Tindel v. Williams, 103 P.2d 551, 551 (Okla. 1940) (describing the plaintiff as “a mixed-blood Chickasaw Indian”). Dawson also cites two cases whose transcripts strongly suggest the plaintiffs were Black. See Transcript of Record at 44, 52, 66, 84, Smith v. Thomas, 185 Ark. 613 (1932) (No. 2525) (Arkansas Supreme Court, Little Rock); TX. DEPT. OF STATE HEALTH SERVS., No. 20999, CERTIFICATE OF DEATH OF ADA SMITH (Apr. 14, 1962) (showing matching birth and death locations and informant sharing same surname as co-tenant shown on trial transcript); see also Appellant’s Abstract of the Record at 33. McCoy v. McMahon Const. Co., No. 19785 (1918) (Missouri State Archives) (showing plaintiff was patient at a Black hospital in the same room as “a colored man by the name of William Moore”); JOHN AARON WRIGHT, DISCOVERING AFRICAN AMERICAN ST. LOUIS: A GUIDE TO HISTORIC SITES 28 (2d ed. 2002) (discussing Peoples’ Hospital as “the only place that black physicians and surgeons could treat private patients”). Yet Dawson’s only explicit nod to Black people’s presence was Evsham v. Lamar, 49 Ky. (10 B. Mon) 43 (1849), a case involving—as he put it—a “mortgage of a slave.”
B. Legal Liberalism and the Reinvention of the “Ignorant Negro”

Like the southern white lawyers who represented people like George Reno and Ben Houston in the 1890s, the mid-twentieth-century lawyers and judges who fashioned legal liberalism also trafficked in ideas about Black people, but unlike the Jim Crow lawyers, they did it to reveal structural inequality rather than to benefit a particular Black client. But from the mistake and duress cases of the 1940s to the unconscionability cases of the 1960s, legal liberals failed to mount an effective structural critique of the theoretical problems associated with voluntariness and the reasonable man. They failed because of their studied reluctance to acknowledge racial facts; because they emphasized ignorance rather than inequality; because they often moved legal problems from property law into what was imagined as the free world of voluntary contract law; and because when they did talk about race, they associated it with the category “civil rights,” which was now acquiring its modern sense of “a juridically cognizable right to be free from segregation” and exclusion on account of race, isolated from the issues that had preoccupied the Realists.

By the 1940s, judges seemed to break the notional connection between being Black and being incapable, increasingly holding that being “colored,” “ignorant,” or without a lawyer did not excuse a litigant from a bad contract anymore. In cases of mistake and duty to disclose, judges became skeptical that race made any difference. In Young v. Travelers Ins., a Black minister named Roy Young wanted the court to apply a subjective test to a clause in his policy that required him to notify Travelers “as soon as practicable” after an accident. Young said he delayed reporting “because he was a negro” in small-town Mississippi, surrounded by an angry crowd of white men threatening to “persecut[e]” him if he reported it to his insurer, and because

359 See infra Section III.C.
360 Thanks to Hendrik Hartog for this observation.
361 See Mack, supra note 86, at 263, 352 (“The legal liberal interpretation of the civil rights lawyers has made them appear isolated from the issues that engaged the realists: the interdependence of legal reform and social action, the policy judgments that inevitably lie behind the formality of legal argument and decisionmaking, coercion in the private labor market, and the rise of the New Deal-era administrative state.”).
362 See, e.g., West v. Carolina Hous. & Mortg. Corp., 89 S.E.2d 188, 188 (Ga. 1955) (holding that allegation that signers "were ignorant colored people, practically illiterate and totally incapable of reading and understanding" does not relieve the duty of due diligence); Jackson v. Brown, 70 S.E.2d 756, 757 (Ga. 1952) (refusing to cancel quitclaim deed made to a Black-owned campground business that used high-pressure tactics to keep "an ignorant, colored man" from investigating title); Williams v. Rentz Banking Co., 145 S.E.2d 256, 259 (Ga. Ct. App. 1965) (dismissing as “irrelevant and immaterial . . . the fact that the defendants were uneducated ‘colored people’”).
363 119 F.2d 877, 878 (5th Cir. 1941).
he “reasonably believed” that the other motorist wouldn’t file a claim. Judge Hutcheson flatly rejected this. “Too much water has run over the dam since that legal robot, the reasonably prudent man . . . became dominant in the law,” Hutcheson declared. The “objective standard” had no room for anyone’s “race and personal equation.”

Something similar was happening in the law of duress, where race and gender had long preserved a subjectivist niche. Rejecting Black people’s fears as a basis for assessing threat helped courts move toward an objective theory of duress. This shift was clearest in cases where white people allegedly threatened Black people. In King v. Lewis, the Georgia Supreme Court reversed a jury verdict voiding promissory notes that a white sheriff had allegedly extorted from “Merritt Lewis, a negro farmer.” Yes, the court admitted, many of “the colored citizens” feared “the ‘high sheriff,’” and Lewis might well have felt “frightened” when he heard that the sheriff was “threat[ening]” him with “criminal prosecution and . . . violence.” But fright did not prove duress. “Duress must come from without, and not from within,” Chief Justice Charles Reid held; it “can not [sic] be a creation of the [victim’s] mind,” and the threat had to be bad enough “to overcome the mind and will of a person of ordinary firmness.” All the sheriff had done was threaten to sue Lewis for slander, which was perfectly legal. Being Black no longer catalyzed the standard contract defenses the way it once did.
So Black people’s lawyers talked less and less about the “ignorant negro” and more about misrepresentation, illiteracy, or the physical look of the contract (for example, contracts larded with “fine print”). When they did insinuate race, they did it through coded language, and appellate judges slapped them down anyway. In Pierce v. Yaccarino, Isaac Pierce’s lawyer told the jury that Yaccarino’s used-car garage “does the bulk of his business with negroes. Now, I don’t have to point out to you the advantages and disadvantages that one has over the other. You . . . know the facts of life.”

The New Jersey intermediate court chastised him: this was “a sad and unfortunately too common example of how a case should not be tried.” As trial lawyers stopped using their briefs and cross-examinations to flag “colored” people for appellate judges, race in contract law became sedimented over, its now-unfashionable rhetoric safely buried in the bad old days. By 2013, a giant oil company could indignantly chide a Black plaintiff’s lawyers for bringing up “an old case, from an unfortunate era,” where an old-fashioned judge had talked about protecting “an ignorant ‘Negro’ unable to understand the . . . land deed he signed.” Things were different now. “[T]oday’s law,” the oilmen claimed glibly, finds “repugnant . . . the notion that error can be excused because of prejudicial considerations of a person’s ethnicity.” For decades, the “ignorant


374 Whitfield, 92 S.E. at 79 (“The papers had a lot of fine print.”).


376 Yaccarino, 178 A.2d at 214.


379 Id. at 9. In fact, the cited case merely said that the relator was “a Negro (about 83 years of age . . .), unable to read or write, and did not know or realize the difference between an act of sale and an act of mortgage.” See Baker v. Baker, 26 So. 2d. 132, 134 (La. 1946). Other examples abound.

negro” idea had enabled some Black people to defend themselves from white people’s predations, at least a little, and now it was gone.

But not quite. The “ignorant negro” idea had sunk deep enough into the equitable defenses of mistake and incapacity that it could communicate racial assumptions without explicitly mentioning race. Now, in the 1940s, jurists working in the Legal Realist tradition harnessed that tacit linkage to their campaign against objectivism, once again using Black people’s cases to theorize issues they viewed as more fundamental than race. For several years, Judge Jerome Frank of the Second Circuit Court of Appeals had been refining the Realists’ critique of voluntariness and objectivism in a string of accident-release cases. It was in one of these cases that he wrote what became the signature statement of the subjective theory in contract law.

In the winter of 1943, Sydney George Ricketts, a waiter on the Pennsylvania Railroad, got seriously hurt just outside Newark, New Jersey. After talking with railroad officials and a company lawyer, Ricketts signed a paper that turned out to be a release settling all his claims for $750. It then became clear that he would be crippled for the rest of his life. Ricketts got a different lawyer and sued in the Southern District of New York, claiming that when he signed the release, he was relying on the company lawyer’s representation that it was “just . . . a receipt” for his “earnings and tips” during the six months he had missed work, and that the company “will take care of you.” He asked $25,000 in damages for lost earnings, “physical and mental pain,” and medical costs. Although nothing in the trial record says so, Ricketts was Black.

Ricketts’ testimony, carefully drawn out by the railroad’s lawyer, crystallized the debate between objective and subjective theories of contract law in a way that proved irresistible to Frank. The arguments were familiar. The railroad insisted that Ricketts had settled his claim by signing and

experience”). But see WEST’S A.L.R. DIGEST FRAUD (2021) (inserting the word “negress” into the description of Thomas v. American Workmen, 14 S.E.2d 886 (S.C. 1941), even though the case did not actually use that word).

380 Transcript of Record at 12-13, Ricketts v. Pa. R.R., 153 F.2d 757 (2d Cir. 1946) (No. 19990) (National Archives at Kansas City) [hereinafter Ricketts Transcript of Record].

381 Id. at 28-30.

382 See Gets $7,500 On Claim RR Paid a $150, N.Y. AMSTERDAM NEWS, Apr. 13, 1946, at 23 (“[D]octors advised the victim not to expect complete recovery”); see also Sydney George Ricketts, Application For Annuity Under Railroad Retirement Act, No. A-306457 (Nov. 22, 1946) (Railroad Retirement Board Pension Files) (“[T]otally and permanently disabled for regular employment for hire.”).

383 Ricketts Transcript of Record, supra note 380, at 28-29, 35.

384 Id. at 4.

385 See Sydney George Ricketts, Employee’s Statement of Compensated Service (Form AA-15), No. A-306457 (Nov. 22, 1946) (Box 579, Record Group 184, Railroad Retirement Board Pension Files, National Archives and Records Administration at Atlanta) (identifying him as “Negro”).
accepting the $750. His lawyer argued “that the intention of the parties was not reflected in the form of the documents” Ricketts signed “but rather in the express understanding and conduct of the parties.”

Ricketts himself claimed he “did not even read” the release and “did not know what was going on.” And, just as Mississippi lawyers had done with people like Ben Houston and George Reno, the railroad’s lawyer made Ricketts read and explain documents in front of the jury, trying to show that he was literate, “intelligent[,]” and far from ignorant. A jury awarded Ricketts $7,500 and the railroad appealed.

When Ricketts reached the Second Circuit, two of the three judges wanted to reverse. Learned Hand thought that, under New York law, which followed Samuel Williston’s objective approach, it did not matter whether Ricketts’s lawyer had misrepresented the paper to him. Ricketts had signed, taken some money, and that was that. In a series of memoranda that winter, Frank managed to talk Hand into switching sides.

When Ricketts was finally published, Frank used a separate concurrence to lay out a full-on critique of the objective theory in contract law, a concurrence that caught the eye of the professoriate and that still appears in some casebooks and treatises today. Rather than “treat virtually all the varieties of contractual arrangements” alike and every bargainer as “the ‘reasonable man,’” Frank argued, “the modern trend” was toward “a special doctrine” granting liberal relief from personal injury releases in cases involving extreme inequalities of bargaining power. The objectivists, Frank pointed out, could only preserve their theory as an accurate description of contract law by treating these exceptions as matters of equity, much as we saw Justice Miller do in Wilkinson. Frank urged courts to treat the exception as the rule. “[T]he ordinary employee” who signed away his personal injury claim should

386 Brief for Plaintiff-Appellee at 10, Ricketts v. Pa. R.R., 153 F.2d 757 (2d Cir. 1946); see also Transcript of Record at 120, Brunswick & W. Railway Co. v. Clem, No. 8-D (Ga. 1888) (recounting railroad executive’s denial of injured Black employee’s allegation that the railroad’s written release differed from the executive’s verbal representations, and insisting that “[t]here was no difference in our understanding of the agreement).

387 Ricketts Transcript of Record, supra note 380, at 28.

388 Id. at 10 (“Will you read this over, please (handing witness)?”).

389 Id. at 39.

390 Memoranda from Judge Learned Hand, Judge Thomas Swan, and Judge Jerome Frank on Ricketts v. Pa. R.R. Co. (Nov. 19, 1945) (on file with the Yale University Library).

391 See infra note 485.


394 Id. at 762-63.
be treated the same way that sailors and other “necessitous persons” had always been treated: as people “under strong economic pressures, who, because of their helplessness, are to be protected from hard bargains.”\textsuperscript{395} They were, as Joseph Story wrote in 1823 (and as Freedmen’s Bureau officers held in 1865 and George Reno’s lawyer argued in 1916),\textsuperscript{396} “under the dominion and influence of [other] men”—so much weaker than their employers, Frank insisted, that “free bargaining” was a mirage.\textsuperscript{397} To keep companies like the Pennsylvania Railroad from using penny-ante payoffs to escape their liabilities, courts should strictly scrutinize employee releases to find “the actual intention” of the parties.\textsuperscript{398}

Maybe it didn’t matter that Sydney Ricketts was Black. After all, \textit{Ricketts} was one of a long line of cases by sailors and train workers and other employees, most of whom were white. And of course, Frank did not want to limit his argument to Black employees.

But \textit{Ricketts} became a staple of law school teaching,\textsuperscript{399} just as Frank intended, and precisely because of his choices about race. In Sydney Ricketts, Frank had tapped a racial icon to be the face of the “modern trend” toward the subjective approach and its frank recognition of unequal bargaining power: the railroad waiter. In those days, waiters and porters on the big eastern and midwestern railroads were almost invariably Black men, and their signature role was to act as personal servants to passengers, who were mostly white.\textsuperscript{400} They had two bosses, not one: the railroad and the passengers. Waiters and porters depended on tips for more than half their income, as Ricketts himself pointed out.\textsuperscript{401} And they earned those tips by flattering and “mak[ing] a fuss over” passengers,\textsuperscript{402} whisking heavy trays across the swaying

\textsuperscript{395} Id. at 767-68.

\textsuperscript{396} See discussion supra Section II.A and Section II.D, infra.

\textsuperscript{397} Ricketts, 153 F.2d at 767-68 (internal quotation marks omitted) (quoting Harden v. Gordon, 11 F. Cas. 480, 485 (C.C. D. Me. 1823) (No. 6,047)).

\textsuperscript{398} Id. at 761.

\textsuperscript{399} See discussion infra Part IV.


\textsuperscript{401} Ricketts Transcript of Record, supra note 380, at 15-16 (noting that Ricketts made roughly $8 per day in tips, against a monthly salary of $124); see also ARNESEN, supra note 400, at 18 (describing the low base salary and inconsistency of tipped wages for porters).

\textsuperscript{402} ARNESEN, supra note 400, at 18-19 (quoting white executive’s comment that “[t]he colored’s [sic] man’s smile goes a long way’ in opening passengers’ wallets or purses.”).
stage of a speeding railcar, all while smilingly obeying their white stewards, who held “absolute[... ] . . . power” to dock pay, suspend, or fire them for any reason. Justice Story’s “helpless” sailors had been far out to sea, where few people could see. By contrast, the friendly Black waiter and porter were such well-known personae that railroads featured them in advertisements. In short, Black railroad waiters were the most visible group of American workers for whom bargaining inequality was not just inherent, but on display, personified in the form of personal “service.” We have lost that context today, and even then, the unionizing of porters was weakening their association with personal servitude. But to Jerome Frank and his fellow judges and law professors riding the train between New Haven, New York, and Washington, Sydney Ricketts’ Blackness would have been so obvious as to go unspoken, just as students today, steeped in political rhetoric about Black poverty, assume that the defendant in Williams v. Walker-Thomas Furniture was Black even though, like Ricketts, the reported case does not say so.

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403 Id. at 20; see also CLAUDE MCKAY, HARLEM SHADOWS: THE POEMS OF CLAUDE MCKAY 41 (Harcourt, Brace and Co., eds., 1922) (depicting Black waiters’ harsh working conditions and vulnerability to passenger whims).


405 See R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 497 (1941) (“As is well known, porters on Pullmans are colored and conductors are white.”); see also Resnik, supra note 11, at 1039-40 (noting that the real issue in Pullman abstention doctrine was whether white women felt “safer” under the care of “a [white] conductor” than “a negro porter”); see also photographic advertisement infra at 1260.

406 See ARNESEN, supra note 400, at 59, 99-102 (discussing the effects of unionization on Black railroad workers).

407 See KALMAN, supra note 293, at 131 (describing Yale Law professors’ commute between New Haven and Washington, D.C. in the 1930s).

408 See Muriel Morisey Spence, Teaching Williams v. Walker-Thomas Furniture Co., 3 TEMP. POL. & C.R. L. REV. 89, 95 (1994) (recounting a contracts professor’s realization that her students assumed the defendant in Williams was Black). To be sure, Frank’s footnotes strongly hinted at Ricketts’ identity. See Ricketts, 153 F.2d at 767 (quoting Story’s description of sailors as under another’s “mastery,” lacking “foresight and caution,” and remarking, “[n]ote how aptly that description fits the plaintiff here”).
Advertisement in *Life* magazine, at 91 (Nov. 12, 1945).

Ricketts’ race was essential for establishing Frank’s theoretical point, yet simultaneously had to be effaced for that theory to reach beyond “race” cases. Much like the late-nineteenth-century critics of “contract freedom” and the Realist attack on the “voluntaristic fallacy,”409 Frank needed Sydney Ricketts (the man) to be “colored” but *Ricketts* (the case) to be not “colored.” *Ricketts* provided a useful fact pattern for theorizing inequality of bargaining position because being Black was integral to the railroad waiter’s job, because lost tips were the main measure of his damages, and because his ignorant helplessness

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409 See Hale, *Bargaining*, supra note 325, at 481 (criticizing a leading economist for relying on a “voluntaristic fallacy”); see also Hale, *Force and State*, supra note 324, at 150 (noting that to conflate “leaving the ship under stress of perils of the sea” with “being torn bodily away from it by tempest . . . is one of the oldest fallacies of the law . . . . [I]t is the difference between an act and no act”) (quoting The Eliza Lines, 199 U.S. 119, 130-31 (1905))).
was the key to Frank’s rule requiring strict scrutiny of workers’ personal-injury releases. At a moment when “civil rights” was becoming synonymous with a struggle for racial equality—when, as Life Magazine put it, “Civil rights . . . means Negro rights”—Frank kept Ricketts in the domain of contract law by leaving implicit the fact that Ricketts was Black. Frank used this Black man’s weak position to formulate a theory of assent that helped all contracting parties who bargained from a weak position, without claiming, as white union leaders had done in the aftermath of emancipation, that wage labor itself amounted to slavery. As we will see, Frank’s formulation appears today in leading casebooks as the paradigmatic Realist approach to contract formation.

As legal liberals—heirs to the Realist tradition—invented “the law of the poor” in the 1950s and 1960s, they reinvented the “ignorant negro” for the modern age. But now it had lost the complex associations with literacy, common sense, racism, and business custom that had made it such a flawed yet durable tool for Black southerners. Above all, it meant presuming that Black people knew nothing about law, that they were ignorant not only of the intricate terms hidden in fine-print boilerplate but of basic legal concepts and principles. In fact, as we saw in Part I, African Americans had been actively engaged in contract law since before the Civil War. My great-uncle and aunt, Thomas and Annie Holcomb, knew that the words “default,” and “due and payable” meant pretty much the same thing on a refrigerator contract in New Jersey as when you bought a farm or a mule back home in Virginia. But if

410 Ricketts, 153 F.2d at 764-65 (justifying a departure from an objective approach).
412 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 90, 110 (1873) (Field, J., dissenting).
413 See Anne Fleming, The Rise and Fall of Unconscionability as the ‘Law of the Poor’, 102 GEO. L.J. 1383, 1436-37 (2014) (showing that unconscionability doctrine after the 1960s came to “rest[ ] on insights . . . from behavioral psychology[,]” “conceptually unmoored from” the “thick” attention to “social circumstance and history” that had previously characterized “the law of the poor”).
414 Domestic Refrigeration Equipment Agreement for Thomas Holcomb (June 15, 1939) (on file with author), infra at 1262; see also HOMER KRIPKE, CONSUMER CREDIT: TEXT—CASES—MATERIALS 49 (1970) (criticizing 1960s truth-in-lending reforms as “a ‘put-on’”); Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 BUFF. L. REV. 1, 23-26, 35-37 (1990) (arguing that Black women’s experience of eviction and child-support proceedings informs their approach to legal encounters, such as welfare fraud proceedings).
“the law of the poor” was going to have a fighting chance in the courts, the poor could not just be poor. They had to be ignorant, too.

Conditional Sales Contract (commonly known as rent-to-own) for refrigerator (1939), in author’s possession.
C. The Trope of Black Ignorance Comes to the City

The reinvention of the “ignorant negro” happened most visibly in the field of installment-sale contracts, where two longstanding crises erupted in the 1960s. One was in the urban housing market, where a loose coalition of realtors, Federal Housing Administration bureaucrats, homeowners, and lawyers had conspired to funnel African Americans into “black” neighborhoods and bleed away their earnings.415 The other was in the retail consumer market, where another “two-tiered credit economy” had slowly turned judges into “collection agents for low-income retailers,” churning out thousands of judgments against poor borrowers.416 These two phenomena, many judges and law professors came to believe, threatened social disorder, and raised troubling questions about theoretical approaches that valued efficiency and uniformity over justice and about their own role as judges.417

The Realists had warned that objectivism generally favored the strong over the “servient” party, that “business usage” often resulted from practices imposed involuntarily on some parties,418 and that the “fierce control” characteristic of sharecropping and company towns would soon touch middle-class buyers of “pleasure car[s]” and mortgage loans.419 But they had not drawn out the racial dimensions of their critique.420 As loudly as they urged a “fact-based jurisprudence,” the Realists had treated racial facts as incidental. They bequeathed this willful blindness to the legal liberals who were rethinking the role of courts in a modern society.

In the early 1940s, the drafters of the new Uniform Commercial Code (UCC) began trying to write a general rule that would address what many observers believed were persistent abuses in the law of consumer credit.421


416 Fleming, supra note 413 at 1395, 1407-08.

417 See id. at 1401-02 (describing how the need to apply “elementary rules” of contract law resulted in judges employing “roundabout methods” in an effort to reach “equitable result[s]”).

418 See Austin Tappan Wright, Opposition of the Law to Business Usages, 26 COLUM. L. REV. 917, 930-31 (1926) (“Pressure exerted by the dominant party is what keeps the manner of dealing uniform.”).

419 Llewellyn, supra note 306, at 731-32.

420 See Amy H. Kastely, Out of the Whiteness: On Raced Codes and White Consciousness in Some Tort, Criminal, and Contract Law, 63 U. CIN. L. REV. 269, 302-03 (1994) (noting Realists’ failure to pursue implications of their critique of objective theory for “group-based social subordination”). An exception was Morris R. Cohen, Property and Sovereignty, 13 CORNELL L.Q. 8, 21, 24-25 (1927), which argued, pursuant to the critique of “traditional theory of [property] rights,” that abolishing slavery should result in compensation for enslaved people, not for slaveowners.

While middle-class whites eagerly took advantage of new, friendlier forms of credit, Black and working-class people were stuck with harsh credit mechanisms.\footnote{\textit{See, e.g.}, \textit{FLEMING}, supra note 421, at 177-83 (describing the potential consequences of a debtor’s failure to pay, such as job termination or wage garnishment); \textit{FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA} 114-27 (2007) (listing the various options available to creditors collecting delinquent debts).} Shut out from regular loans, the Holcombs, like most Black migrants to the cities, had to buy their chairs, refrigerators, radios—the basic consumer goods that make city life livable—the same way they had bought houses, farms and fertilizer down South: by buying on credit, from sellers who doubled as financiers.\footnote{\textit{See \textit{FLEMING}, supra note 421, at 181 ("[P]oor consumers in the 1960s . . . continued to finance new purchases through installment credit."); Beaden v. Bransford Realty Co., 232 S.W. 958 (Tenn. 1921) (involving an installment contract for a house); \textit{JAYNES, supra note 69, at 38-43, 246-49 (arguing low commodity prices, scarce credit, and "the long pay" were interrelated causes of southern poverty and violence).}}

To deal with such realities, Yale Law School’s Grant Gilmore wanted to chalk out a standard for judges to police fine-print sales contracts, a bright line that made a contract or one of its clauses unconscionable, and maybe even to separate the rules governing business-to-business transactions from the rules of consumer credit.\footnote{\textit{See \textit{FLEMING}, supra note 421, at 156 ("Gilmore toyed with the idea of separating the rules for consumer goods financing from those governing commercial machinery and equipment.").}} But the final version of the UCC did not do either of those things. Instead, section 2-302 set up a vague ban against “unconscionable” sales contracts.\footnote{\textit{See id. at 186 (describing the Code’s lack of a cogent definition for unconscionability); \textit{Arthur Allen Leff, Unconscionability and the Code—The Emperor’s New Clause, 115 U. PA. L. REV. 485, 507 (1967)} (describing the lack of distinction made between merchant-to-merchant and merchant-to-consumer transactions in \textit{UCC § 2-302}).}} Once again drawing from nineteenth-century equitable doctrines of fraud,\footnote{\textit{See, e.g.}, \textit{CHAFEE & SIMPSON, supra note 161, at 1304 n.1 (citing a fraudulent contracts case in which certain clauses were not read to an illiterate landowner).}} with their frank recognition of bargaining inequality and their “ancient classifications of ‘sheltered’ people,”\footnote{\textit{Discriminatory Housing Markets, supra note 415, at 548; \textit{Leff, supra note 425, at 502, 527-37, 556-57 (criticizing section 2-302 for treating uniquely situated parties as equally defenseless bargainers, whose vulnerability was based on stereotypes inherited from equity cases).}} the UCC drafters “creat[ed] specially vulnerable classes of people whose contracts” judges would scrutinize more closely “for unfairness.”\footnote{Discriminatory Housing Markets, \textit{supra} note 415, at 548.} In doing so, the drafters imported into the modern “law of the poor” ideas and assumptions about free will, knowledge, and understanding that had been developed in part from “colored’ cases.” But the drafters probably did not know this, because the treatises and appellate cases

(Warning appellate judges and legal academics of how harshly New York’s conditional sales law actually treated lay purchasers).

422 \textit{See, e.g.}, \textit{FLEMING, supra note 421, at 177-83 (describing the potential consequences of a debtor’s failure to pay, such as job termination or wage garnishment); \textit{FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA} 114-27 (2007) (listing the various options available to creditors collecting delinquent debts).}\n
423 \textit{See \textit{FLEMING, supra note 421, at 181 ("[P]oor consumers in the 1960s . . . continued to finance new purchases through installment credit."); Beaden v. Bransford Realty Co., 232 S.W. 958 (Tenn. 1921) (involving an installment contract for a house); \textit{JAYNES, supra note 69, at 38-43, 246-49 (arguing low commodity prices, scarce credit, and “the long pay” were interrelated causes of southern poverty and violence).}}\n
424 \textit{See \textit{FLEMING, supra note 421, at 156 ("Gilmore toyed with the idea of separating the rules for consumer goods financing from those governing commercial machinery and equipment.").}}\n
425 \textit{See id. at 186 (describing the Code’s lack of a cogent definition for unconscionability); \textit{Arthur Allen Leff, Unconscionability and the Code—The Emperor’s New Clause, 115 U. PA. L. REV. 485, 507 (1967)} (describing the lack of distinction made between merchant-to-merchant and merchant-to-consumer transactions in \textit{UCC § 2-302}).}}
on which they built their new theories did not disclose that some of the litigants in those old cases were racial minorities.\footnote{429}

It was against this uncertain legal backdrop that a new generation of activists tried to tackle the problem of “the ghetto” through the injustices of the consumer credit and housing markets. Many of the Black people who bought homes on installment contracts had migrated from the southern countryside,\footnote{430} where, as we have seen, Black people routinely negotiated contracts, owned land,\footnote{431} and ran fraternal and religious corporations (lodges and churches).\footnote{432} Now, in the late 1960s, hundreds of Black Chicagoans started a “payment strike,” depositing their payments into a new voluntary association they called the “Contract Buyers League.”\footnote{433} And through their new

\footnote{429} The “specially vulnerable classes,” according to \textit{Discriminatory Housing Markets, supra} note 415, at 548, were “minors, sailors, expectant heirs, and, sometimes, farmers and women,” citing the 1941 edition of Pomeroy’s \textit{Equity Jurisprudence, supra} note 161, §§ 944-49, 952-53. In fact, Pomeroy also listed “Persons Illiterate or Ignorant.” Id. This class included (in Pomeroy’s words) an “ignorant old colored woman.” Yarbrough v. Harris, 52 So. 916 (Ala. 1910). It also included an “ignorant, unlearned” “Creek freedman.” See Alfrey v. Colbert, 104 S.W. 638 (Ct. App. Ind. Terr. 1907). It included people with “Mental Weakness.” Bond v. Branning Manufacturing Co., 52 S.E. 929 (N.C. 1906) (Black plaintiff). It also included “Persons in Vinculis.” Stephens v. Ozbourne, 64 S.W. 902 (Tenn. 1901) (complainant described as “an ignorant old negro man”). This class of “Persons Illiterate or Ignorant” also included those deemed to possess “Inadequacy Coupled with Other Inequitable Incidents.” Kirby v. Arnold, 68 So. 17 (Ala. 1915) (where Pomeroy described the plaintiff as “a grossly ignorant colored woman”); Gaskins v. Byrd, 63 So. 17 (Fla. 1913) (whose plaintiff Pomeroy described as inexperienced and uninformed but is listed as Black at U.S. DEPT OF COM., BUREAU OF THE CENSUS, THIRTEENTH CENSUS OF THE UNITED STATES: 1910: SHILOH, CALHOUN, FLORIDA 12B). “Inadequacy Coupled with Other Inequitable Incidents” also cited cases featuring racialized descriptors. Abercrombie v. Carpenter, 43 So. 746, 747 (Ala. 1907) (describing “ignorant colored people . . . ‘well stricken in years’”); Storthz v. Williams, 111 S.W. 804, 804 (Ark. 1908) (describing “a young negro girl . . . a stranger in the town and inexperienced as to the values of real estate”). Pomeroy’s section on Duress silently cited at least one case filed by an African American plaintiff. Gilmore v. Hunt, 73 S.E. 163 (Ga. 1913). 3 \textit{JOHN NORTON POMEROY, TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA (5th ed., 1941).}\footnote{430} \textit{Stephens v. Ozbourne} was also cited in: \textit{Contracts—Consideration—Adequacy, 3 TENN. L. REV. 120, 131 (1925); Annotation, Fraud Predicated Upon Misrepresentation by Grantee or Transferee Regarding Grantor’s or Transferrer’s Title, 136 A.L.R. 1299, 1316 (1942); Annotation, Misrepresentations by One Party’s Agent, Who Was Not Authorized in that Regard, as Ground of Rescission by the Other Party, 95 A.L.R. 763, 771 (1935); Dawson, supra note 340, at 280 n.72; Woodard v. Bruce, 339 S.W. 2d 143 (Tenn. 1960) (which itself featured a “colored” complainant).\footnote{431} See James Alan McPherson, \textit{In My Father’s House There Are Many Mansions—and I’m Going to Get Me Some of Them Too}: \textit{The Story of the Contract Buyers League, ATL. MONTHLY, April 1972, at 62, 65; Jeffrey M. Fitzgerald, The Contract Buyers League and the Courts: A Case Study of Poverty Litigation, 9 LAW & SOC’Y REV. 165, 165 (1975).}\footnote{432} Jeffrey Michael Fitzgerald, \textit{The Contract Buyers’ League: A Case Study of Interaction Between a Social Movement and the Legal System (1972) (Ph.D. dissertation, Northwestern Univ.) (on file with author), at 20-21 (discussing evidence that some C.B.L. members came from landowning backgrounds in the South).}\footnote{433} See Penningroth, supra note 5, at 877-80 (discussing how southern Black churchgoers applied property and contract law).\footnote{434} Fitzgerald, supra note 430, at 170.}
association, they also filed a class-action lawsuit. Unlike those who had sued installment-sellers in the 1910s, though, the C.B.L. wanted not only to modify the vampiric contracts, but also to show the world that their suffering was the result of systemic racism, not just individual acts of discrimination.

To make this systemic argument stick, the housing activists and their lawyers turned to federal law, especially the Thirteenth Amendment and the Civil Rights Act of 1866, newly reawakened by the Supreme Court’s recent decision in *Jones v. Alfred Mayer Co.* The Chicago activists needed the Act to sweep wide, to hold slumlords responsible for “taking advantage of” racial discrimination even if the slumlords did not themselves discriminate. They had to convince judges who looked at land contracts and saw only “exploitation for profit, and not racial discrimination.” They and their lawyers came up with something they called the “exploitation theory” of discrimination. It wasn’t such a radical theory, the C.B.L.’s lawyers argued; it merely extended traditional contract-law principles, such as fraud and special circumstances. The installment land contract was “involuntary financial servitude”—slavery in disguise.

If land contracts were “involuntary financial servitude,” then what was the add-on contract that Ora Lee Williams signed with the Walker-Thomas

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435 See *Beaden v. Bransford Realty Co.*, 232 S.W. 958, 960 (Tenn. 1921) (invalidating a contract for “grossly and shockingly inadequate” consideration); Transcript of Record at 3, 6, *Higdon v. Bransford Realty Co.*, no. 29335 (Tenn. Ch. 1914) (in the course of asking court to nullify a writing purporting to be an “option of sale,” plaintiff’s lawyer paraphrased Taney’s infamous *Dred Scott* dictum regarding Black citizenship: the contract bound the complainants as if they had “no rights . . . which the defendant company was bound to respect”).
436 See *Discriminatory Housing Markets*, supra note 415, at 522, 561-63 (“Upon the specially disadvantaged position of blacks trapped by the systemic condition of discrimination, social and economic mechanisms operate, though often in a manner not traditionally discriminatory, to misallocate resources—blacks end up with less in the way of goods and services per dollar spent than do their white counterparts.”); BERYL SATTER, *FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA* 244-45 (2009).
438 392 U.S. 409, 413 (1968) (holding that Civil Rights Act of 1866 bars private discrimination in selling or renting property).
440 Clark v. Universal Builders, Inc., 501 F.2d 324, 327 (7th Cir. 1974) (quoting from opinion of District Court Judge Joseph Sam Perry).
441 *Id.* at 327, 334.
442 *Id.* at 331 (“In other contexts the law has prevented sellers from charging whatever the market will bear when special circumstances have occasioned market shortages or superior bargaining positions.”).
Furniture Store? In 1965, Judge J. Skelly Wright, a legal liberal with a keen interest in property and contract law remedies to civil rights problems, took a stab at defining what unconscionability meant, in Williams v. Walker-Thomas Furniture. “Unconscionable,” Wright wrote for the D.C. Circuit Court of Appeals, meant that one of the parties to a contract had no “meaningful choice” and that its terms were “unreasonably favorable to the other party.”

Cause lawyers picked up Wright’s unconscionability thesis and ran with it. The C.B.L.’s “financial servitude” suits made almost as much headway as Williams and her lawyers did, and even before the home-buyers’ cases went to trial, hundreds of them won concessions from sellers. Yet their core arguments faded. Few courts were willing to use the Civil Rights Act of 1866 to go after land sellers who “merely took advantage of a discriminatory situation created by others.” As much as judges were willing to believe that some sellers were racist, they were not ready to believe that the market itself was racist, much less that duly executed sale contracts had anything to do with slavery. They did not think that “the artificial shortage of housing for negroes” justified a rule that might nullify thousands of installment-sale contracts. And in retail sales, unconscionability became a last-ditch defense, frequently asserted but seldom successful, and impossible to harness on behalf of poor people or Black people in general because it was so fact-specific, “[e]ach case turn[ing] on the facts of the individual transaction.”

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444 See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 447 (D.C. Cir. 1965) (describing an installment-purchase contract stipulating that the purchaser did not own any item until the balance for every item was paid).

445 See David L. Bazelon, A Colleague’s Tribute to Chief Judge J. Skelly Wright, 7 HASTING CONST. L.Q. 864, 864 (1980) (lauding Chief Judge Wright’s doctrinal contributions to “racial equality, contracts, real property, administrative law, freedom of expression and criminal law”).

446 350 F.2d 445, 449 (1965).

447 Id.

448 See McPherson, supra note 439, at 78 (noting the novelty and complexity of urging “an essentially commercial appeal . . . within the context of a civil rights complaint charging racial discrimination”).

449 Id. at 80 (noting that almost 200 buyers renegotiated their contracts, with others taking smaller settlements).

450 Clark v. Universal Builders, Inc., 501 F.2d 324, 331 (7th Cir. 1974). On remand, Judge Nicholas Bua explicitly rejected the Seventh Circuit’s “exploitation theory of discrimination.” Clark v. Universal Builders, Inc., 706 F.2d 264, 266 (7th Cir. 1983); see also SATTER, supra note 436, at 368-69 (discussing Bua’s holding and subsequent proceedings).


453 FLEMING, supra note 421, at 191; see also Fleming, supra note 413, at 1386 (noting unconscionability today is typically used as a defense against arbitration clauses in consumer contracts).
There were unintended consequences to the cause lawyers' turn toward unconscionability and the exploitation theory of discrimination. One was an over-reliance on arguments about ignorance rather than inequality, arguments that belied the working legal knowledge that had long been part of Black life in the rural South where Ora Lee Williams had grown up. At trial, her lawyers first tried the old tactic of supercharging standard defenses (lack of mutual assent, vagueness) with the special status of the ignorant, helpless "ward of the state." Just as generations of Black southerners had done, Williams insisted in court that she didn't understand what "pro rata" meant, that it was pointless "asking me about reading things that I never had to read." And just as southern landlords and merchants had done, the furniture store's lawyer insisted that she could. Judge Wright, whose opinions often echoed the Realist critique of liberal notions of market freedom, drafted an opinion that would have shaken the entire system of low-income credit, only to backtrack, under pressure from a fellow judge, to the safer framework of uniquely greedy sellers bilking especially vulnerable and ignorant buyers. Likewise, Ebony, America's most famous Black-owned magazine, urged readers to scrutinize homebuying contracts and take charge of the contract-writing process before they signed, even "[i]f the salesman tells you that the contract is standard and cannot be changed." Public-interest lawyers on Long Island put out a cartoon booklet, The Amazing Adventures of Justiceman, hoping to teach working-class Black people to "check prices before buying, never sign a contract before reading it carefully, and comparison shop." And the U.S. Supreme Court clucked over the "poor ignorant person . . . trapped in an easy credit nightmare."


455 Fleming, supra note 413, at 1412, 1414, 1417-18 (charting Williams's lawyers' tactical shift toward emphasizing her ignorance).

456 Id. at 1410-11.

457 Id. at 1431 (arguing that Williams had a duty to "find out what 'pro rata' meant"); Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 915 (D.C. Ct. App. 1964) (stressing that Williams "did not ask anyone to read or explain the contracts to her").


459 See Fleming, supra note 413, at 1417-20 (showing the evolution of Judge Wright's Williams opinion).

460 Douglas, supra note 443, at 52.

461 FLEMING, supra note 421, at 194.

But that was the whole point. Like freedpeople in 1865, working-class Black people’s problem in 1965 was not necessarily ignorance or naïveté— they did try to comparison-shop and they understood these contracts no worse than the average white suburbanite did. It was that they had no better alternative. Middle-class white people got treated as repeat players, were more likely to be offered surprise-free credit products and to have a lawyer when they went home-shopping. And businessmen got to play what law professors were beginning to call the “battle-of-the-forms.” But no lawyer advised the installment homebuyer, who was treated as a one-shot bargainer, to be exploited without regard to future transactions. “[P]eople know they are being cheated,” said an Urban League staffer. “They halfway expect to be cheated,” but they signed because there were no better options where they lived. Like freedpeople in 1865, Black installment-buyers

elementary facts of economic life,” especially “Negro ghetto-dwellers already suspicious of the white man and his law”).

463 Homer Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 6 (1969) (“[T]here is much evidence that some consumers in the poverty areas understand very well that they are being bilked . . . ”).


465 Compare *id.* at 19-25 (describing Black homebuyers’ efforts to seek information about the terms of the purchase contracts they were about to sign) with *Transcript of Record* at 1-4, Thompson v. Murdock Acceptance Corp., 223 Ark. 483 (1954) (featuring white suburbanites who misunderstood a conditional-sale contract for the purchase of a car). Even trained lawyers had trouble figuring these contracts out. See, e.g., Fitzgerald, *supra* note 431, at 28 (describing Williams’ lawyer’s confusion about the interest provision in the contract). And recall that in 1834 the Tennessee court said that “many white persons” needed “plain language” explanations of “technical instruments” as badly as an “ignorant” “negro woman” did. See King v. Cohorn, *supra* note 243. For a synopsis of research on these issues in present-day contracting, see Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. PA. L. REV. 2109 (2015).


467 Satter, *supra* note 436, at 38, 58 (describing a lawyer’s efforts to defraud black homebuyers).


470 Fitzgerald, *supra* note 431, at 19, 22, 25 (Black homebuyers recount resorting to contract-buying only after mainstream banks refused to let them apply for regular mortgages); see also *Taylor, supra* note 467, at 167-209 (describing activists’ efforts to “expose[] the lie” of the “ignorant” Black urban homebuyer).
bargained from a position so weak that it undermined the basic premise of voluntariness. That was what Wright was trying to get at in *Williams*, when he defined an unconscionable contract as one where one party had no “meaningful choice.” Yet his published opinion shifted focus from the seller’s conduct to the buyer’s knowledge and understanding of the agreement, and the UCC’s final version of section 2-302 explicitly said it wasn’t meant to remedy problems of “superior bargaining power.” Thus, “the law of the poor” wound up emphasizing poor people’s “ignorance,” and cast Black people as exceptions to the normal rules of market bargaining. It was easier to argue about stereotypes than to confront the limits of what even “fair credit” could do “for the working poor.”

IV. RACE IN LEGAL EDUCATION

In the fall of 1972, my mother, Penelope Baskerville, became one of a handful of Black students at the University of Pennsylvania Law School. She dropped out after three semesters. Once, I asked her why. She said she just didn’t want to be a lawyer. I believed her and still do. But her grades at Penn were decent. Now that I teach in a law school myself, I wish I could ask her: what was it really like for you?

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473 See Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337, 341 (1969) (quoting from Congressional Record); Frostifresh Corp. v. Reynoso, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966) (“Defendants were handicapped by a lack of knowledge, both as to the commercial situation and the nature and terms of the contract which was . . . in a language foreign to them.”); Jones v. Star Credit Corp., 298 N.Y.S. 2d 264, 265 (1969) (citing “concern for the uneducated and often illiterate”).
474 Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1120-57 (2019) (exposing and criticizing policymakers’ choice to fight poverty by giving poor people “access to credit”). The problems associated with an approach that focuses on the buyer’s knowledge and understanding have only multiplied, and have decidedly not been solved by the wild proliferation of consumer disclosures, however plain their language may be. See, e.g., Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 665-79 (2011).
475 Especially considering she had a toddler at the time and an hour-long commute.
Cover page of the Penn Law School "Face Book" my mother was given in 1972. Biddle Law Library, University of Pennsylvania Carey Law School, Philadelphia, PA.\textsuperscript{476}

When my mother started at Penn, elite law schools, under intense pressure from students, were introducing new courses on the “Blacks and the Law,” “Civil Rights,” “poverty and minority law,” and “consumer credit.” The first-year courses were also starting to discuss various kinds of inequality, incorporating insights from law and economics and the law and society movement. But the curriculum, and the scholarly movements that were reshaping it, stumbled when it came to race. It tended to equate “civil rights” with “minorities,” implying that contract and property law were not “civil rights.” Well-meaning colleagues hardened that conceptual split when they urged newly hired minority law professors “not to get too caught up in


478 UNIVERSITY OF PENNSYLVANIA LAW SCHOOL BULLETIN 68 (1971-1973) (listing a seminar by A. Leon Higginbotham on “the use of law to perpetuate racial injustice” from slavery through 1900; Higginbotham was the first Black judge on the U.S. District Court for the Eastern District of Pennsylvania).

479 Id. at 68-69 (describing a seminar that focused on anti-discrimination law and its constitutional underpinnings).

480 Fitzgerald, supra note 439, at 182-83 (noting that such classes provide potential strategies for innovative litigation and suggesting that such course offerings validate poverty law as a legitimate specialization).

481 Wegner, supra note 477, at 734-35 (noting changes to UNC’s curriculum that added classes in response to student pressure).


483 See Bell, supra note 296, at 211-13 (critically applauding Calavita’s treatment of race as unusually sophisticated for law and society scholarship); see also OSAGIE K. OBASOGIE, RACE, LAW, AND SOCIETY 447 (Ian Haney López ed. 2007) (“Simply put, law and society as a field of scholarly inquiry has not adequately produced good social science with respect to race”).

484 See HARVARD LAW SCHOOL CATALOGUE 81-82 (1967-68) (listing third-year elective seminars titled “Civil Rights: Lowndes County, Alabama” and “Civil Rights Seminar: Problems of Minorities and the Poor”). Lowndes County was then notorious for violent attacks on a widely publicized voter registration campaign led by Stokely Carmichael and the Student Nonviolent Coordinating Committee (SNCC).
civil rights or other ‘ethnic’ subjects.”

So did white students who refused to talk about race in the “core” courses where, they supposed, race was extraneous. Many found the situation frustrating, but it seemed as though the only remedy was more clinics, more pro bono opportunities, and vague pleas for faculty to “face head-on the pain . . . and lingering injustices” of law’s treatment of women and minorities.

By treating “civil rights” as a special, minority-focused body of law, the law school curriculum overlooked race’s historic embeddedness in property and contract; it obscured what lawsuits brought by Black people had contributed to “core” areas like contract law during the field’s formative years; and the complex ways that contract jurists had used those cases to fashion their theories of voluntariness, capacity, reasonableness, assent, and other ideas.

This was understandable, because the leading casebooks of the 1960s and 1970s made it seem as though contract law had nothing to do with either minorities or civil rights. These casebooks recycled much of the structure and “leading cases” of the old ones, which had always overrepresented English cases and cases from pre-1945 New York, Illinois, and New England, an era when those states had few Black people. And, as with the casebooks of the 1940s, even when the casebooks and treatises happened to discuss a case


486 Bell, supra note 2, at 5 (recounting that Stanford Law students interpreted Derrick Bell’s race-centered approach to constitutional law as proof of his “teaching inadequacies”).


488 See E. Allan Farnsworth, Contracts Scholarship in the Age of the Anthology, 85 MICH. L. REV. 1406, 1437-44 (1987) (showing that, despite differences in approach, contract law anthologies between 1871 and the 1940s converged on certain cases as “leading cases” for teaching, and that many of those “leading cases” still appear in today’s “cases and materials” casebooks).

489 See FULLER (1st), supra note 274, at 288 (directing students, for further discussion of “contracts implied from conduct,” to consult Harold C. Havigburst, Services in the Home—A Study of Contract Concepts in Domestic Relations, 41 YALE L.J. 386, 386-406 (1932), which in turn cited at least three cases involving African Americans: Black v. Hill, 117 Ark. 228 (1915), Burroughs v. Reed, 150 Ga. 724 (1920), Carter v. Witherspoon, 126 So. 388 (Miss. 1930)). Witherspoon’s race is confirmed at Brief for Appellant at 1, Transcript of Record in Carter v. Witherspoon, No. 28447 (Hinds Cnty. Miss. Ch. Nov. 12, 1929) (Mississippi Department of Archives and History [hereinafter MDAH]). FULLER (1st), supra note 274, at 489-90 (Illustrating consideration and the seal by excerpting ALA. CODE tit. 7, § 381 (1940), which cited at least two cases involving African Americans: Lampkin v. Rose, 198 Ala. 353 (1917) (race confirmed at Record in Lampkin v. Rose at 27, case 35 (1916), Supreme Court of Alabama, ALDAH) and Nashville Railway v. Nance, 212 Ala. 22 (1924) (race confirmed at
where African Americans were parties, that fact was edited out, either by the casebook authors or by the official reports from which they took the case. The 1970 edition of Williston’s treatise, for example, called Union Mutual v. Wilkinson a “significant and oft-quoted” “early formulation of the doctrine” of equitable estoppel, a doctrine that, the authors claimed, illuminated “the whole objective theory of contracts” by showing that contract law was about a person’s “manifestations,” not her “actual state of mind.” But Williston said nothing about who Malinda Wilkinson was or why her “manifestations” became a matter of legal controversy. Jerome Frank’s opinion in Ricketts v. Pennsylvania Railroad went into the casebooks and Restatement

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footnotes:

490 Compare Gunning v. Royal, 59 Miss. 45, 46 (1881) (“[A]ppellee, who furnished an inexperienced negro boy as driver.”) with FULLER (1st, supra note 274, at 508 (“Plaintiff . . . furnished an inexperienced boy as driver.”)). Fuller’s third edition (1972) dropped Gunning, and the fourth edition (1980) (teaching the reliance measure of damages) edited Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932) so drastically that students must have wondered why the boxer Jack Dempsey breached his contract in the first place. It was because his opponent, Harry Wills, was Black. Barnett more sensibly decides that this fact is relevant to students’ understanding of uncertainty in damages. RANDY E. BARNETT & NATHAN B. OMAN, CONTRACTS: CASES AND DOCTRINE 94-99 (7th ed. 2021) (noting that “Dempsey was white and Wills was black,” and providing additional detail regarding the Dempsey-Wills fight and the role of race in Dempsey’s breach).

491 See 13 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1536 (3d ed. 1970) (tracing the doctrine of estoppel to Union Mutual v. Wilkinson and linking estoppel to the objective theory). In addition to Wilkinson, Williston’s § 1536 cited three other cases involving Black plaintiffs and one involving a Native American plaintiff. Wilkinson was quoted approvingly in Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 234 (1959) and in U.S. for Use of Humble Oil Refining v. Fidelity and Casualty of New York, 402 F.2d 893, 897 n.3 (4th Cir. 1968).


493 KESSLER & SHARP, supra note 289, at 94, 298, 360-72, 415 (discussing Ricketts); CORBIN (1952), supra note 289, at 512 (same); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS, 24, 305, 328 (2d ed. 1977) (citing Ricketts in its discussions of a subjective theory of assent, mistake, and duty to read). For Ricketts’ treatment in legal scholarship, see Notes, 23 N.Y.U. L.Q. REV. 143, 146-47 (1948) (discussing Ricketts as an example of Judge Frank’s reluctance to apply the objective approach even where there was no negligence); Malcolm Sharp, Promises, Mistake, and Reciprocity, 19 U. CHI. L. REV. 286, 294-95 (1952) (discussing Ricketts as an example of “an emerging ‘subjective theory’” to limit the scope of objective theory in the doctrine of mistake); Neil McKay, Note, Contracts—Release—Misrepresentation by Releaser’s Attorney—Avoidance by Releaser for Unilateral Mistake as to Contents, 44 MICH. L. REV. 1042, 1044-48 (1946) (discussing Judge Frank’s and Judge Hand’s Ricketts opinions as “a departure from the established rule as to the formation of contracts”); Horace Andrews Jr., The Personal Injury Release, 307 INS. L.J. 212, 213-15 (1965) (discussing Judge Frank’s opinion in Ricketts and its influence on the settlement of personal injury claims); HAROLD C. HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 41 n.44 (1966) (citing Judge Frank’s concurring opinion in Ricketts); Harold C. Havighurst, Problems Concerning Settlement Agreements, 53 NW. U. L. REV. 283, 305-08 (1958).
(Second)\(^{494}\) as a definitive statement of the two great theories of contract—objective and subjective—usually paired with Learned Hand's opinion in *Hotchkiss v. National City Bank of New York*,\(^{495}\) the case of the two ships "Peerless,"\(^{496}\) the bar-napkin joke case,\(^{497}\) or the frozen-chicken case.\(^{498}\) And once again, students had no way of knowing that Sydney Ricketts was Black, or that Black people had been discussing contractual intent and accident releases as far back as the 1870s.\(^{499}\) When white Stanford Law students

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\(^{494}\) See RESTATEMENT (SECOND) OF CONTRACTS § 152 cmt. f, § 17 cmt. c (AM. L. INST. 1981) (citing Judge Frank's *Ricketts* concurrence in official comments on mistake and assent, respectively). *Ricketts* also became the reported case for avoidance of release of claim for personal injuries on grounds of mistake or fraud respecting the nature of the claim covered. See L.S. Tellier, Annotation, *Avoidance of Release of Claim for Personal Injuries on Ground of Mistake or Fraud Respecting the Nature of the Claim Covered*, 164 A.L.R. 402 (1946) (citing at least two other cases involving Black litigants: *Davis v. Whately*, 175 So. 422 (La. Ct. App. 1937) and *Prince v. Kansas City Southern Railway Co.*, 229 S.W. 2d 568 (Miss. 1950)); see also 1 CORBIN ON CONTRACTS § 4.12.

\(^{495}\) 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties"). *Hotchkiss* is quoted in *Farnsworth* (9th), supra note 24, at 125-26.

\(^{496}\) See Raffles v. Wichelhaus (1864) 159 Eng. Rep. 375, 2 Hurl. & C. 906 (invoking a case of mutual misunderstanding regarding a material term in a contract for the delivery of a shipment of cotton, holding that there was no meeting of the minds and therefore no contract).

\(^{497}\) See Lucy v. Zehmer, 84 S.E.2d 516, 520 (Va. 1954) (invoking a case of misunderstanding about whether certain words written on a bar napkin were a joke or a contract to sell a farm, adopting the understanding of the party holding the more reasonable understanding and decreeing specific performance).

\(^{498}\) See Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (adopting the understanding more consistent with trade usage, in a case of lexical ambiguity regarding a material term in a contract for the delivery of chicken); see also KESSLER & GILMORE, supra note 177, at 707-08, 714-16 (featuring Raffles and Frigaliment between the two *Ricketts* opinions and after *Hotchkiss*).

\(^{499}\) See, e.g., CHRISTIAN RECORDER, supra note 80 ("A large share of the quarrels, disputes and law suits which afflict society, arise from . . . an imperfect understanding of a verbal agreement. All contracts and agreements should be made in writing and . . . in such form as to express the intention of the parties, and nothing more"); Typescript Notes, circa 1911, in Smith v. Yazoo & Miss.
complained in 1986 that Derrick Bell, a Black visiting professor from Harvard, was exaggerating the influence of race in their Constitutional Law course,\footnote{Bell, supra note 2, at 5.} they probably had no idea of its influence in their Contracts course. If Bessie Winston had not sold her house to a developer before defaulting on the furnace she had been buying on installments, 
\cite{Rouse v. United States} might have ended up being taught in the section on unconscionability rather than the one on third-party beneficiaries.\footnote{See Transcript of Record in Rouse v. United States at 5, 215 F.2d 872 (D.C. Cir. 1954) ("[T]he lower court was correct in granting the Government's motion for summary judgment because the pleadings and admissions on file showed that . . . the Government, as the third-party creditor beneficiary of the contract between Bessie B. Winston and [contractors], was entitled to judgment as a matter of law").} Today, the only time that most first-year Contracts students read a case knowing that one of the parties was Black is in the roughly twenty minutes spent discussing \cite{Williams v. Walker-Thomas Furniture Co.} They cannot see the other Black litigants “passing” in their casebooks or the marks those litigants left on the rules they are learning.\footnote{See Transcript of Record in Rouse v. United States at 3, 215 F.2d 872 (D.C. Cir. 1954) ("Bessie Bunt Winston, as seller . . . for the sale of Lot 139 in Square 913, also known as 608 9th Street, N.E."); U.S., SOCIAL SECURITY APPLICATIONS AND CLAIMS INDEX, 1926–2007. Rouse appears in KESSLER & GILMORE, supra note 177, at 1177–78; FARNSWORTH (9th), supra note 24, at 529–32; FULLER (10th), supra note 24, at 941–43; CALAMARI (7th), supra note 24, at 802–04; MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 248–49 (2013) (stating that Rouse confirms that a third-party’s claim is subject, generally, to the promisor’s defenses against the promisee); 9 CORBIN ON CONTRACTS § 46.8 (2021) (oddly referring to Winston as “Bessie”).}

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It is easy to think of reasons why explicit references to race faded in the 1960s and 70s. Perhaps law professors had become too squeamish to teach cases featuring language about “unlettered colored wom[e]n” and “inexperienced negro boy[s].”

Maybe they thought that teaching mutual assent through Taft v. Hyatt might now involve explaining that “the colored masonic lodge” that claimed the reward for capturing “a negro physician” charged with assault was actually protecting the physician from a lynch mob.

Maybe professors simply weren’t interested in discussing why, for

former master’s executor on a signed contract for services to the former master. See Transcript of Record at 11, Holland v. Barnes, No. 181 (Ala. Feb. 6, 1875) (ALDAH); U.S. CENSUS BUREAU, TWELFTH CENSUS OF THE UNITED STATES: 1900: ALABAMA, LEE COUNTY, PHOENIX, SHEET 14 (noting Barnes’ race as “Black”). Like Feinberg, Brickell and Holland open a window on the intersection of gender and age in contract law, but they also illuminate race and the role of contract in the provision of old-age care before Social Security and company pensions. The latter subject is brilliantly analyzed in HENDRICK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012). See also CATHERINE M.A. MCCauliff, 8 Corbin on Contracts § 40.2 (Joseph M. Perillo ed., 1999) (citing Seay v. Malone, 219 Ga. 149 (1963)); see also Albany City Directory 391 (1953) (indicating Seay was black); Bill of Exceptions, Seay v. Malone, 219 Ga. 149 (1963) (No. 22405) (showing that defendants were officers of a local lodge of a Black fraternal order); CATHERINE M.A. MCCauliff, 8 Corbin on Contracts § 33A.5 (Joseph M. Perillo ed., 2021) (citing Osborne v. Bullins, 549 So. 2d 1337 (Miss. 1989)) (discussing suit which turns out to be by Black owner of a food mart against a professor at a Black college); Joseph M. Perillo, 12 Corbin on Contracts § 63.10 (same); TOWNSEND DAVIS, WEARY FEET, RESTED SOULS: A GUIDED HISTORY OF THE CIVIL RIGHTS MOVEMENT 403 (1998) (providing suggestive evidence that Bullins was Black). Bullins was also discussed in JOHN P. DAWSON, WILLIAM BURNETT HARVEY & STANLEY D. HENDERSON, CONTRACTS: CASES AND COMMENT 796–99 (7th ed. 1998) (summarizing the case and discussing the remedy of specific performance). See also Davis v. Robert, 89 Ala. 402, 403–04 (1890) (discussing suit by a Black plaintiff against a white defendant for specific performance of a contract of “sale” whose “terms” and “form” “purport[ed] . . . to be a lease”). Davis was also cited in 12 AM. JUR. 777 (1938) (stating that the ordinary-meaning rule permits “consideration of the entire context and subject matter in the determination of the meaning and application of specific words and expressions”) and was quoted in Moss v. Cogle, 101 So. 314, 319 (1925), where both parties were white: “There may be mutuality of contract, although the promise on the part of one is in writing signed by him, and verbal on the part of the other.” Moss, in turn was cited in Armente v. Horan, 366 A.2d 162 (R.I. 1976), a white case excerpted in, among other casebooks, FULLER (10th), supra note 24, at 443–46, and CALAMARI (7th), supra note 24, at 147–44. See also KEVIN R. JOHNSON, INTEGRATING RACIAL JUSTICE INTO THE CIVIL PROCEDURE SURVEY COURSE, 54 J. LEGAL EDUC. 242, 259 (discussing a state court’s decision to mention a witness’s race and professors’ decision to edit that fact out of the new edition of their leading civil procedure casebook).

Or cases about mortgages of enslaved people. See JOHN P. DAWSON, ECONOMIC DURIES—AN ESSAY IN PERSPECTIVE, 45 Mich. L. Rev. 253, 278–79 n.68 (1947) (citing Esham v. Lamar, 49 Ky. 43 (1849) (“Mortgage of a slave for a period of eight years by settlers who had just moved to Kentucky and were destitute”)); see also FULLER (1st), supra note 274, at 508 (altering “inexperienced negro boy” to “inexperienced boy”); Kripke, supra note 414, at 21–28 (removing entirely a citation to a suit against “an unlettered colored woman”).


See Taft v. Hyatt, 180 P. 213, 214 (Kan. 1919) (stating that one of the parties claiming the reward for Dr. Robert E. Smith’s apprehension was a group of “members of the Lodge of Colored
example, in teaching the “bargained-for” aspect of consideration doctrine, a real estate salesman’s hope of attracting a crowd of “white person[s] over sixteen . . . years of age” was “sufficient consideration” for a promise to award a car.\footnote{Maughs v. Porter, 161 S.E. 242, 242 (1931); see also KNAPP (9th), supra note 24, at 108-13; STEWART MACAULAY, JEAN BRAUCHER, JOHN KIDWELL & WILLIAM WHITFORD, CONTRACTS: LAW IN ACTION 290-92 (3d ed. 2010) [hereinafter MACAULAY (3d)]; HILLMAN (3d), supra note 24, at 17-18 (“In a bargained-for exchange, the promisor requires something from the promisee in return for the promise”). Of these, only Knapp asked students to analyze race as a material fact in Maugh. As Klare pointed out in 1979, contracts casebooks reprinted this “well-known case . . . without comment[ing]” about its “racism.” Klare, supra note 477, at 897 n.90. Note that Klare, in turn, urges faculty to use Harrington as an opportunity to address “the pervasive sexism of American legal culture,” apparently unaware that Lena Harrington was a Black woman. Id. at 896-97.}

\footnote{Klare, supra note 477, at 896-97.}

Or why the Alabama court—known today as the exception to the general rule barring contract damages for emotional distress—quoted at length a Black woman’s suit against a roofing company.\footnote{See B&M Homes, Inc. v. Hogan, 376 So. 2d 667, 671-72 (1979) (“In Alabama the general rule is that mental anguish is not a recoverable element of damages arising from breach of contract. . . . The exceptions are stated in the following excerpt from F BECKER ASPHALTUM ROOFING CO. v. Murphy.”). B&B Homes is cited in HILLMAN (3d), supra note 24, at 204 as an exception to the rule that “few courts” allow contract damages for emotional distress. See also FULLER (10th), supra note 24, at 292; FARNSWORTH (9th), supra note 24, at 292. In its lengthy quotation from F BECKER ASPHALTUM ROOFING CO. v. Murphy, 141 So. 630 (Ala. 1932), the B&B Homes court omitted Becker’s description of Rosa Murphy as a “negro woman.” So do Hillman and Farnsworth. See also Am. Road Serv. Co. v. Inmon, 394 So.2d 361, 363 (Ala. 1980); Taylor v. Baptist Med. Ctr., 400 So.2d 369, 372 (Ala. 1981) (citing W. Union Ttl. Co. v. Jackson, 163 Ala. 9 (1909) (where a “Col[ored]” plaintiff sued for failure timely to deliver message of his father’s death)) (“Traditionally, damages for mental anguish alone have not been recoverable in this jurisdiction.”).}

\footnote{See Sec. Stove & Mfg. Co. v. Am. Ry. Express Co., 51 S.W.2d 572, 577 (Mo. Ct. App. 1932) (“[T]he true criterion of damages was, perhaps, the hire of the negro, the rent of the land and all the expense incurred, and actual loss sustained by the misconduct of the defendant, rather than the conjecture of the witness, as to what the crop would have been worth.” (quoting Hobbs v. Davis, 30 Ga. 423 (1860))). Most casebooks use Security Stove to teach reliance damages, but omit the Hobbs quotation. But the quotation is included, without comment, in BARNETT & OMAN, supra note 490, at 108.}

Certainly Black faculty gagged at the thought of teaching old slavery-era cases, like the one quoted in Security Stove, if they weren’t allowed to question the basic presumptions behind measuring damages to a human “chattel.”\footnote{Crenshaw, supra note 477, at 3 (“The ambiguity that the students [in a Property classroom] are asked to resolve is whether the slave should be treated as mere chattel, in which case the slave owner will recover, or whether the slave should be treated as a human agent, in which case the lessee’s responsibility will probably be mitigated.”).}

The casebook writers avoided such unpleasantness by editing out the offending words or simply dropping the cases altogether. They kept talking about “wousining,” but now they left out the part about watermelon-stealing

Masons, to which [Smith] belonged. . . . Smith expressed to them his fears of mob violence, and it was agreed that he would give himself into their custody, and they agreed to protect him,” and that “none of [them] had heard of the offer of reward at the time they called” the police.

\footnote{Maughs v. Porter, 161 S.E. 242, 242 (1931); see also KNAPP (9th), supra note 24, at 108-13; STEWART MACAULAY, JEAN BRAUCHER, JOHN KIDWELL & WILLIAM WHITFORD, CONTRACTS: LAW IN ACTION 290-92 (3d ed. 2010) [hereinafter MACAULAY (3d)]; HILLMAN (3d), supra note 24, at 17-18 (“In a bargained-for exchange, the promisor requires something from the promisee in return for the promise”). Of these, only Knapp asked students to analyze race as a material fact in Maugh. As Klare pointed out in 1979, contracts casebooks reprinted this “well-known case . . . without comment[ing]” about its “racism.” Klare, supra note 477, at 897 n.90. Note that Klare, in turn, urges faculty to use Harrington as an opportunity to address “the pervasive sexism of American legal culture,” apparently unaware that Lena Harrington was a Black woman. Id. at 896-97.}

\footnote{Klare, supra note 477, at 896-97.}

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“negro[es].”512 One leading casebook used Stephens v. City of Memphis513 to teach principles of offer and acceptance without disclosing that it concerned a reward for information leading to the arrest of Martin Luther King Jr.’s assassin.514 And even if they had wanted to include cases involving African Americans on, say, conditional-sales contracts, case reports made it very hard to spot them.515

America in the 1970s was still, in important respects, a post-slavery society. It was a country where policymakers thought that Black people were poor because slavery had “destroy[ed] the Negro family,”516 where statutes on voting, housing and job discrimination were dubbed a “Second Reconstruction,”517 where racial inequality in poverty rates and partisan voting still correlated with the percentage of enslaved people by county in 1860,518 and where legal theorists continued to use “slaves” and “slavery” as


513 565 S.W.2d 213, 219 (Tenn. Ct. App. 1977) (affirming the lower court’s judgment denying plaintiff recovery of these rewards).

514 LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 439 (4th ed. 1981). Perhaps the authors assumed students in 1981 knew who James Earl Ray was. But thirty-three years earlier, Fuller had used Shuey v. United States, 92 U.S. 73 (1875) and made clear that the case concerned a reward for information leading to the capture of one of Abraham Lincoln’s assassins. FULLER (1st), supra note 274, at 163–65.

515 Of the twenty-one Alabama cases listed today at WESTLAW 343 SALES, XIII CONDITIONAL SALES, K3049 REMEDIES OF BUYER, at least five involve African Americans, yet only two mention the plaintiffs’ races. See Am. Discount Co. v. Wyckroff, 191 So. 790, 793-794 (Ala. 1939) (stating that in weighing whether the plaintiff was “intimidated” into giving up his car to the defendant installment-seller, “the jury might consider the fact that defendant’s agents were white men; that the plaintiff was a negro; [and] that one of the white men on demanding the property advanced on him with his hands in his overcoat pockets”); Rhodes-Carroll Furniture Co. v. Webb, 160 So. 247, 248 (Ala. 1935) (describing the plaintiff as “a negro woman”). Race was not mentioned, for example, in Sroggins v. Alabama Gas Corp., 158 So.2d 90 (Ala. 1963), but Andrew Scoggins is listed as a “[c]olored” “lab[orer]” at CITY DIRECTORY, BIRMINGHAM, ALABAMA 798 (1939). Race was not mentioned in Bradley v. Wood, 93 So. 534 (Ala. 1922) either, but the plaintiff, Rosenbaum Wood, is listed as Black in U.S. CENSUS BUREAU, FOURTEENTH CENSUS OF THE UNITED STATES: 1920: ALABAMA, JEFFERSON, BESSEMER WARD 3, SHEET 9B. Race was not mentioned in Universal C.I.T. Credit Corp. v. Johnson, 127 So.2d 642 (Ala. 1960) but defendant-counterclaimant Oraton Johnson is listed as “Negro” on his draft card. D.S.S. FORM 1 (Revised Jan 1., 1942), Draft Registration Card of Oraton Johnson, No. 411-10988.


517 C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 8-10, 135 (2d ed. 1974); 117 CONG. REC. 17909 (daily ed. June 3, 1971) (statement of the Congressional Black Caucus) (“The second Reconstruction was the heady period following the historic May 17th Supreme Court decision [in Brown] and included: the Montgomery Bus Boycott of 1956; the sit-ins of the early sixties . . . the 1964 Civil Rights Act and the 1965 Voting Rights when American blacks began to believe that freedom, like the end of the war in Vietnam, was ‘just around the corner.’”).

518 Avidit Acharya, Matthew Blackwell, and Maya Sen, The Political Legacy of American Slavery, 78 J. POLIS. 621, 621 (2016) ("[T]he larger the number of slaves per capita in his or her county of
thinking devices. “Slavery” helped Harold Demsetz fashion “an economic theory of property rights.” For Guido Calabresi and Douglas Melamed, “slavery” marked the limits of alienability and the entitlements that were not or could not be protected by “property or liability rules.” Richard Posner thought “slavery” proved that “wealth maximization” provides a robust basis for a “normative theory of law,” while Ronald Dworkin thought it proved the opposite. But, much like the flesh-and-blood Sydney Ricketts, enslaved people and slavery could only be useful hypotheticals if they were not real—if they kept the veneer of “history,” yet were safely stripped of any history that might undercut the theories. Thus, the scholars’ slavery hypost has conspicuously ignored race: some went out of their way to deny that slavery was efficient. Others implied that slavery had nothing to do with race,

residence in 1860, the greater the probability that a white Southerner today will identify as a Republican, oppose affirmative action, and express attitudes indicating some level of “racial resentment.”); Heathen A. O’Connell, The Impact of Slavery on Racial Inequality in Poverty in the Contemporary U.S. South, 90 SOC. FORCES 1719, 1728 (2012) (“Within the U.S. South, blacks are at a greater disadvantage relative to whites, with respect to poverty, in places where there is a stronger historical connection to slavery compared to places with a weaker connection to slavery.”).

519 Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347, 347-49 (1967) (using slavery to illustrate how property rights shape “the internalization of externalities,” where the cost of a transaction in the rights between parties exceeds the gains from internalization).


521 See Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8 J. LEGAL STUD. 103, 127, 134 (1979) (arguing that the wealth-maximization principle distributes individual rights (e.g., life, liberty, and labor) to their natural owners, and creates free markets for owners to transfer those rights to others, as when A “sells himself into slavery” to B). But see Ronald M. Dworkin, Is Wealth a Value? 9 J. LEGAL STUD. 191, 207-10, 224-25 (1980) (“If economic analysis makes someone’s initial right to his own labor depend upon whether he would purchase the right if assigned to another, that right cannot be ‘derived’ from economic analysis unless we already know who initially has the right . . . . If [Agatha] starts her career a slave . . . [w]e cannot be confident . . . that . . . Agatha either could or would buy back the right to her labor. We therefore cannot claim that economic analysis supports giving her that right in the first place.”); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 86, 89 n.5 (1981) [hereinafter POSNER, THE ECONOMICS OF JUSTICE] (posing voluntary self-sale); Anthony T. Kronman, Wealth Maximization as a Normative Principle, 9 J. LEGAL STUD. 227, 240-42 (1980) (using a slave-auction hypothetical to criticize the wealth-maximization principle as “morally objectionable” because it “necessarily favors those who already . . . [can] pay more than others to have a new legal rule defined in the way that is favorable to them,” including entitlements to “the most basic things like bodies and labor power”). The self-sale scenario was crucial to this debate because, according to Posner, wealth-maximization is inherently hostile to slavery. In other words, in a perfect market, the slave would always outbid any would-be master for the right to his own productive capacity. See also ERIC RAKOWSKI, EQUAL JUSTICE 204-207 (1991) (critiquing Posner and arguing that in a perfect market of self-owning people, the unequal initial assignment of resources may lead toward slavery, not away).

522 See POSNER, THE ECONOMICS OF JUSTICE, supra note 521, at 146 (asserting that slavery is an incident of “primitive society”); Richard A. Posner, Wealth Maximization Revisited, 2 NOTRE DAME J. ETHICS & PUB. POL’Y 85, 93-94 (1985) (still arguing that the “main reason that slavery is no longer a common institution” is that it is economically “inefficient,” not because of “moral progress”); see also LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 630
whimsically naming their hypothetical “slaves” after famous white people, such as Roger Taney and Agatha Christie.\textsuperscript{523} But, of course, race was central to American slavery, as the real Chief Justice Taney had pointed out in \textit{Dred Scott},\textsuperscript{524} and, as we have seen, racial slavery had once been explicit in legal theorists’ thinking about the market.\textsuperscript{525} By cutting slavery adrift from both history and from race, law and economics scholars of the 1970s were not just doing bad history. They were turning away from the very link that had anchored the first law and economics movement: the critique of “baseline entitlements and duties” established in the aftermath of a war over race and slavery.\textsuperscript{526}

\textsuperscript{523} See Calabresi & Melamed, \textit{supra} note 520, at 1112 (describing a hypothetical where “Taney” is “allowed to sell himself into slavery” to “Marshall”); see also Dworkin, \textit{supra} note 521, at 209-10 (using a hypothetical involving the enslavement of detective story writer “Agatha” to criticize Posner’s premise). Of course, playful hypos about slavery were only one of several ways these authors advertised their scholarly detachment from the experiences in question. For a potent critique of legal pedagogy’s tendency to treat “rationality and feeling [as] opposites,” see Angela P. Harris and Marjorie M. Shultz, \textit{Another} \textit{Critique of Pure Reason: Toward Civic Virtue in Legal Education}, 45 \textit{Stan. L. Rev.} 1773, 1774 (1993).

\textsuperscript{524} Dred Scott v. Sandford, 60 U.S. 393, 403, 404, 407 (1857) (holding that “negroes of the African race . . . held as slaves . . . were not intended to be included, under the word ‘citizens’ in the Constitution,” but instead were “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect”).

\textsuperscript{525} See \textit{supra} Section I.A.

\textsuperscript{526} See generally FRIED, \textit{supra} note 104 (describing and analyzing “the first law and economics movement”).
The pattern went beyond the treatises and law school casebooks, to the Restatement of Contracts, which was being revised in the 1970s into what is now the Restatement (Second). The official Reporters, Robert Braucher and E. Allan Farnsworth, wanted “to get some Illustrations that people would not just laugh at as classroom hypotheticals.”527 “Out went examples using horses and cows.”528 In came “real-life illustrations”529 that the two Ivy League professors thought “busy practicing lawyers”530 were more likely to get.531 Some of the new illustrations turned out to be “too hot to handle” and the Reporters dropped them.532 For at least one other, they simply changed the facts.

Illustration 10 of Section 176 of the Restatement (Second) of Contracts, “When A Threat Is Improper,” involves a contract to sell land where “B, solely to induce A to discharge him from his contract duty on favorable terms, threatens to resell the land to a purchaser whose industrial use will have an undesirable effect on A’s remaining land.”533 The Reporter’s Note says that Illustration 10 is based on Wolf v. Marlton Corp.534 In fact, Wolf had nothing to do with industrial use. The threat was actually to sell to an “undesirable purchaser.”535 The question in Wolf was whether a buyer’s threat to resell his home to someone “specially selected because he would be undesirable” was a “wrongful [threat] . . . in a moral or equitable sense,” one that supported a duress defense.536 It was a racially-charged version of the question that legal theorists, as we have seen, had struggled with since slavery was abolished: what kinds of threats are permissible in “a free economy”?537

528 Jean Braucher, E. Allan Farnsworth and the Restatement (Second) of Contracts, 105 COLUM. L. REV. 1420, 1422 (2005).
530 Id.
531 Id. supra note 528, at 1422.
532 Thursday Afternoon Session—May 22, 1975, supra note 527, at 426.
535 Wolf, 154 A.2d at 630 (emphasis added). The “undesirable purchaser” language does appear in Dawson (11th), supra note 24, at 842. The racial dimension is discussed in MACAULAY (3d), supra note 508, at 539.
536 Wolf, 154 A.2d. at 630.
537 Hale, Bargaining, supra note 325, at 603, 605-06; see also MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, THE CRISIS OF LEGAL ORTHODOXY 196-97 (1992) (discussing Hale’s “attack [on] the prevailing vision of the market as a system of free and voluntary exchange” whose results should be reflected in law); Talley v. Robinson’s Assignee, 63 Va. (22 Gratt.) 888, 895-96 (1872) (holding that a contract entered into by “a freeman of color” threatened by third parties was not made under duress as to the plaintiff); STANLEY, supra note 96, at 123-24 (showing that federal officials forced freedpeople to make “voluntary contracts” with white southerners).
Sydelle and Milton Wolf in 1957 were a recently-separated couple who wanted to get out of the purchase contract they had signed with a developer for a spec home in the Philadelphia exurbs. When the Marlton Corporation demurred, the Wolfs issued a threat through their lawyer: if Marlton forced them to go through with their home purchase, they would resell to a buyer “who would be [so] undesirable in our tract” that “it will be the last tract that you will ever build in New Jersey.” At the trial, everyone studiously avoided asking the obvious question, the one that underpinned the company’s claim of “moral duress”: what did the Wolfs mean by “undesirable” person? Or, to put it differently, what kind of buyer would “ruin” a prominent developer’s “building career”? In central Jersey in the late 1950s, it almost certainly meant a Black person.

The New Jersey court wrote this fact pattern into the doctrine of business compulsion. “[T]he modern view,” the court held, was that “a threat may be wrongful even though the act threatened is lawful. We have come to deal, in terms of the business compulsion doctrine, with acts and threats that are wrongful, not necessarily in a legal, but in a moral or equitable sense.” And although the lawyers and judges in Wolf v. Marlton Corp. had sent up a trial transcript that “obscure[d]” the true nature of the Wolfs’ threat, the court’s discussion of legal—but-wrongful threat implied that it understood the threat was racial. In 1967, the A.L.I. glossed Wolf in its Supplement, and in 1970, the authors of Williston’s influential treatise reprinted most of it in their section on duress. Five years later, the Restatement Reporters picked up the case but they changed its facts. First, it became a threat by “a

539 Wolf Transcript of Record, supra note 538, at 41, 53-54, 154.
540 Id. at 87.
541 Id. at 103.
542 Id. at 141.
543 Id. at 142.
544 For what it is worth, both I (an African American who grew up in New Jersey during the 1970s, partly in “Mount Laurel” housing) and Shanin Specter (whose father, the late Sen. Arlen Specter, argued the case for Marlton Corporation on appeal), share the same ‘situation-sense’ on this point. Email from Shanin Specter to author (Sept. 12, 2019) (on file with author).
546 Id. at 631.
547 Id.
manufacturer” to resell to the buyer’s main “competitor.”\textsuperscript{551} Then it became the “undesirable” “industrial use” we see today.\textsuperscript{552} Race was the key fact at issue in \textit{Wolf} and the Reporters swapped it out, willfully stirring a dollop of “transcendental nonsense” into our current understanding of improper threat, and perhaps the law of duress more generally.\textsuperscript{553}

It is easy to guess why the Reporters changed the facts. One reason was probably that they thought a dispute between rival “manufacturer[s]” would seem more relevant to the growing number of students seeking to practice corporate law, which was imagined as a white world. A second reason was that the opinion in \textit{Wolf} seemed to incentivize racist behavior.\textsuperscript{554} In order to prevent the Wolfs from profiting from their racist threat, the New Jersey court in 1959 had treated potential homebuyers’ racism as a material fact to be evaluated under the subjective theory.\textsuperscript{555} By the mid-1970s, when the Restatement meetings took place, white racism was no longer seen as a just “southern” problem, as white suburbanites all over America were using zoning\textsuperscript{556} and even parking ordinances\textsuperscript{557} as facially race-neutral devices for keeping Black people out, including in Princeton, where some homeowners called the mixed-race, “low-rent project” where my parents and I lived “an instant ghetto.”\textsuperscript{558} Lawyers and judges resorted to euphemisms like “undesirable purchaser,”\textsuperscript{559} “city dwellers,” “social homogeneity,”\textsuperscript{560} and “low-


\textsuperscript{554} See Commentary, Undesirable Party, supra note 548, at 321, n.18 (inferring that the Court in \textit{Wolf} found that “the threat was of a racial or religious nature”).

\textsuperscript{555} Wolf v. Marlton Corp., 154 A.2d 625, 630-31 (N.J. Super. Ct. App. Div. 1959) (finding that the Wolfs’ threat amounted to “wrongful pressure,” that the will of Marlton’s agent was “overborne” by that “wrongful pressure,” and remanding the case for further fact-finding regarding the nature of the Wolfs’ threat).

\textsuperscript{556} See e.g., S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel, 336 A.2d 713, 716-17, 721-34 (N.J. 1975) (restricting the use of zoning to keep out “low and moderate income” people, while accepting the township’s denial that its scheme had been intended to exclude based on race).


\textsuperscript{558} Craig E. Polhemus, \textit{Princeton Is Encouraging Low-Income Housing}, N.Y. TIMES, July 22, 1973, at 65 (quoting an opponent of a “[c]ommunity housing” initiative as likely to create “an instant ghetto”); see also Picnic Offers a Glimpse of Life in Princeton’s Low-Rent Project, N.Y. TIMES, Aug. 29, 1977, at 59 (interviewing residents after the low-rent housing was built. I was six at the time and I probably did the “sack race” at that picnic).

\textsuperscript{559} Wolf, 154 A.2d at 630.

\textsuperscript{560} Mount Laurel, 336 A.2d at 736 (Pashman, J., concurring).
income housing”\(^{561}\) for the same reason the Restatement changed the facts of Wolf: because civil rights activists were making racial discrimination immoral in public discourse and civil rights statutes were making it illegal in public law. But much like the antislavery judges who rewrote the baseline entitlements and duties of contract to exclude certain kinds of pressure as “slavery,” liberal jurists of the 1970s embedded their moral revulsion against racism into the baseline entitlements and duties of modern contract law without stopping to think much about what race was or how racism actually functioned in contractual relations. The result was to reify a categorical distinction between “civil rights” and “contract law,” darkening one, whitening the other, and impoverishing both.

Consider how one current leading casebook teaches the doctrine of “business compulsion” (or “economic duress”), Wolf’s narrower counterpart, which holds that “it is not duress to . . . threaten” to do what there is “a legal right” to do.\(^{562}\) The 2018 edition of Fuller’s casebook used an excerpt from Chouinard v. Chouinard,\(^{563}\) a 1978 dispute over a (white) family-owned airport and stadium security company, to show that “economic duress” means more than hard bargaining; it requires “a wrongful act” that itself put the loser in his “untenable situation.”\(^{564}\) A closer look at Chouinard reveals that “economic duress or business compulsion” was novel to Georgia law at the time and that the Georgia court built its theory by adapting “duress principles” already being “applied . . . in various business contexts”: leasing a gas station, selling a mule, attorney fees, peanut farming, the workplace, and foreclosure.\(^{565}\) By citing old cases about mules and peanut farming alongside more recent cases about gas stations and attorney fees, the Georgia court drew a historical through-line from the business of farming to the business of guarding stadiums. The Fuller casebook edited out that through-line, along with the facts that the buyer in the mule case was a Black tenant farmer whose landlord decided to settle their contract dispute by getting him arrested for larceny,\(^{566}\) that the workplace suit involved a Black employee of a Black-owned insurance company,\(^{567}\) that a key pillar of the Chouinard rule was a suit by a Black businessman,\(^{568}\) and that some of Chouinard’s other citations themselves cited

\(^{561}\) Supra note 558.

\(^{562}\) 568 F.2d 430, 435 (5th Cir. 1978).

\(^{563}\) Id.

\(^{564}\) FULLER (10th), supra note 24, at 85-86; see also FARNSWORTH (9th), supra note 24, at 436 (discussing Chouinard as holding that "a threat of lawful action cannot be wrongful").

\(^{565}\) Chouinard, 568 F.2d at 433-34.

\(^{566}\) Id. at 434 n.3 (citing Love v. State, 78 Ga. 66 (1887)).

\(^{567}\) Id. at 434); see also Carter G. Woodson, Insurance Business Among Negroes, 14 J. NEGRO HIST. 202, 216, 220-21 (1929) (listing Atlanta Life among "Negro insurance companies").

cases involving Black plaintiffs.\textsuperscript{569} A similar pattern appears in \textit{Totem Marine v. Alyeska Pipeline Service Company}, another widely-taught case on business compulsion.\textsuperscript{570} The chapter on duress and undue influence in \textit{Williston on Contracts} (1970), which both \textit{Chouinard} and \textit{Totem Marine} relied on heavily, cited at least eighteen cases involving Black litigants, and possibly as many as twenty-four. Today, the Restatement (First) section on duress contains at least four citations to a case involving Black litigants,\textsuperscript{571} and other secondary citations\textsuperscript{572}; the Restatement (Second) contains direct and indirect citations

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\textsuperscript{570} \textit{Totem Marine} appears in \textit{KNAPP} (9th), \textit{supra} note 24, at 591-601, \textit{FULLER} (10th), \textit{supra} note 24, at 73-81; \textit{FARNSWORTH} (9th), \textit{supra} note 24, at 461; \textit{HILLMAN} (3d), \textit{supra} note 24, at 221-24; \textit{MACAULAY} (3d), \textit{supra} note 508, at 542. Noting that "economic duress or what is also called business compulsion" was new to Alaska law, the Alaska supreme court sketched the history of "duress," relying heavily on Williston's 1970 treatise, WILLISTON ON CONTRACTS, supra note 569, §§ 1601, 1602, 1616A, 1617, and on a pair of law journal articles that also cited cases involving black plaintiffs: \textit{John Dalzell, Duress by Economic Pressure}, 20 N.C. L. REV. 237 (1942) and \textit{Dawson, supra} note 505. See Dalzell, \textit{supra}, at 266, 271 (citing \textit{Shirey v. Beard}, 62 Ark. 621 (1896), whose transcript indicates Beard was Black); \textit{id.} at 274 (citing \textit{Jones v. Williams}, 96 S.E. 1036 (N.C. 1918); \textit{Pearsall v. Hyde}, 189 Ala. 86 (1942); Dawson, \textit{supra} note 505, at 280-81 (citing at least eight cases involving Black litigants, including one from 1834, and at least one involving a Native American litigant). \textit{Totem Marine}, 584 P.2d 15, 21 (Alaska 1978).

\textsuperscript{571} \textit{RESTATEMENT (FIRST) OF CONTRACTS}. §§ 492-95 (AM. L. INST. 1932) (citing \textit{Morgan v. Gilmer}, 200 A.2d 83 (D.C. 1964)).

\textsuperscript{572} \textit{RESTATEMENT (FIRST) OF CONTRACTS}. § 497 (AM. L. INST. 1932) (citing \textit{Tidwell v. Critz}, 248 Ga. 201 (1981) in which the parties were white, but the opinion cited three cases that featured Black litigants). \textit{See also} \textit{supra} note 357.
cases involving Black litigants or white litigants who used racist language, and none of them is identified as such.

These were not esoteric details. They went to the heart of the bargain principle, as Fuller’s co-author Melvin Eisenberg pointed out in 1982, raising

573 Aside from direct citations to Wolff, Ealy v. Tolbert, Ricketts, Harrington, Shuford, Talman, and Talma Builders, (discussed infra), my limited survey of the RESTATEMENT (SECOND) OF CONTRACTS (AM. L. INST. 1981) reveals the following indirect citations to “‘colored’ cases.” Taft v. Hyatt 180 P. 213 (Ky. 1919) (the case of “the colored masonic lodge”) is distinguished at § 53 cmt. c illus. 2. Leeper v. Beltrami, 347 P.2d 12 (Ca. 1959) (a white case) provides the basis for § 175 illus. 11 and § 176 illus. 6; Leeper, in turn, cites Pipes v. Webb, 111 So. 2d 641 (Miss. 1959), an inheritance dispute within a Black family (race determined from POLK’S NATCHEZ CITY DIRECTOR’S § 116 (1946)). Section 176 illus. 12 is based on Perkins Oil v. Fitzgerald, 121 S.W.2d (Ark. 1938) (a suit by a white employee injured in an oil mill), which, in turn, cites S. Lumber Co. v. Green, 121 S.W.2d 877, 878 (Ark. 1932) (describing a suit by a “colored” employee injured in a sawmill), and which also distinguishes Gus Blass Co. v. Tharp, 106 S.W.2d 608 (Ark. 1937) (a suit by a Black porter injured by a workplace elevator shaft; race strongly suggested by the fact that porters were typically Black and by U.S. DEPT. OF COM., BUREAU OF THE CENSUS, SIXTEENTH CENSUS OF THE UNITED STATES: 1940: LITTLE ROCK, PULASKI, ARKANSAS 5A). Section 173 illus. 1 is based on Owens v. Owens, 86 S.E.2d 181 (Va. 1955) (a white case), which, in turn, quotes Waddy v. Grimes, 153 S. E. 807 (Va. 1930) (a suit about a deed executed by “an ignorant old negro”), Jackson v. Seymour, 71 S.E.2d 181 (Va. 1952) (a white case where the transaction at issue was precipitated by a Black man’s purchase offer), and Bowles v. Bowles, 126 S.E. 49 (Va. 1925) (involving a formerly enslaved man’s efforts to secure old-age care). Section 172 cmt. a cites Wilkinson v. Walker, 240 S.E.2d 210 (Ga. 1977) (a white case), which, in turn, quotes Sawyer v. Birrick, 127 S.E. 806 (Ga. 1925) (plaintiff’s race indicated at U.S. DEPT. OF CO., BUREAU OF THE CENSUS, FOURTEENTH CENSUS OF THE UNITED STATES: 1920: MACON WARD 1, BIBB, GEORGIA 5B). Section 152 cmt. f cites Conklin v. Liberty Mut. Ins. Co., 239 S.E.2d 381 (Ga. 1977) (a white case), which, in turn, quotes Morrison v. Roberts, 23 S.E.2d 164 (Ga. 1942) (a case of real estate fraud where the court, in reversing the lower court’s interlocutory injunction, tendentiously omitted the seller-plaintiff’s race by describing her as “an educated teacher,” even though in the transcript she identified herself as “a teacher in the colored schools” who “ran a restaurant” on the side, probably because teachers in Georgia’s “colored schools” were grossly underpaid); see Record in Morrison v. Roberts at 699, 697, case 143,99, Supreme Court Case Files, GA, and Leander L. Boykin, The Status and Trends of Differentials Between White and Negro Teachers’ Salaries in the Southern States, 1900-1946, 18 J. NEGRO EDUC. 40, 44 (1949)). In addition, Dawson’s 1947 articles (which cited at least eight cases involving Black litigants and one involving a mortgaged slave) were cited at § 73 cmt. a; § 79 cmt. e; § 173 Reporter’s Note; § 176 cmts. a and d. Dalzell’s 1942 article (which cited at least four cases involving parties who were Black) was cited at § 73 cmt. a; § 173 Reporter’s Note; and § 175 cmt. b. Robert Hale’s 1943 article (which extensively discussed slavery and involuntary servitude) was cited at § 176 cmt. f. Chouinard v. Chouinard, 568 F.2d 430 (5th Cir. 1978) (which relied on several cases involving parties who were Black) was cited at § 176 cmt. f.

574 See, e.g., RESTATEMENT (SECOND) OF CONTRACTS, cmt. a, cmt. b, § 177 (AM. L. INST. 1981) (citing Dobkins v. Hupp, 562 S.W.2d 736 (Miss. Ct. App. 1978)). Dobkins was a dispute over a joint will setting up a whites-only charitable trust, and the challengers had witnesses testify about the two testators’ racial attitudes; the court extensively quoted testimony using the n-word; it also quoted approvingly from another then-recent case that denigrated the merging of contract law with the law of wills as “miscegenation.” To take another example, Owens v. Owens, 86 S.E.2d 181 (Va. 1955) (a white case) is cited at RESTATEMENT (SECOND) OF CONTRACTS, § 173, illus. 1 (AM. L. INST. 1981). Owens, in turn, quotes from Waddy v. Grimes, 153 S. E. 807 (Va. 1930) (a lawsuit within a Black family in which the opinion muses about “the mental processes and idioms of the Southern negro”). Owens is also cited in Melvin Aron Eisenberg, The Bargain Principle and Its Limits, 95 HARV. L. REV. 741, 748 (1982), which, in turn, is excerpted in FULLER (10th), supra note 24, at 88-90.
tough questions about whether there was any such thing as “objective value” and whether judges should try to protect it by second-guessing “bargains that are not made in a perfectly competitive market,” or even by developing “a systematic theory of inequality of bargaining power.” Indeed, as Farnsworth admitted at the 1975 A.L.I. meeting, the defense of mistake—whether in the context of a release, as in Ricketts, or in real estate, as in Talman v. Dixon, or in a commercial context, as in Nutmeg State Machine Corp. v. Shuford—was “troubling” because it revealed “a tension” between the general principle “sanctity of contract” and the need for “particularized judgment on all of the facts.” And on duress, the Restatement acknowledged that it was “difficult” to draw the line between “[h]ard bargaining” and “improper threats,” citing Hale’s 1943 article, but it wiped away what Hale had thought epitomized that difficulty—cases of involuntary servitude—and his trenchant Holmesian 

575 See generally Eisenberg, Bargain Principle, 741.
576 See Sharp, supra note 493, at 294-95 (discussing Judge Frank’s opinion in Ricketts).
579 30 A.2d 911, 911 (Conn. 1943). Shuford was cited by the RESTATEMENT (SECOND) OF CONTRACTS, § 153, cmt. g, illus. 12 (AM. L. INST. 1981). Shuford was also cited by 1 CORBIN ON CONTRACTS § 56 n.5 (1950) and at 3 CORBIN ON CONTRACTS §§ 601 n.50, 52 (1960). John Shuford, the defendant and seller of the machinery in Shuford, was a prominent Black businessman, one who had been involved in civil suits before. See Rich Welder Faces $25,000 Suit in Conn., N.Y. AMSTERDAM NEWS, Sept. 15, 1954 at A2 (describing the facts of an earlier legal action against Shuford); see also Johnson v. Shuford, 98 A. 333, 333 (Conn. 1916) (affirming the lower court’s decision in that earlier case, finding in favor of the plaintiff). Shuford’s 1916 case is also cited at 5A CORBIN ON CONTRACTS § 1246 n.17 (1964). RESTATEMENT (SECOND) OF CONTRACTS, § 153, illus. 2, 7 (AM. L. INST. 1981) were supported by Calman Co. v. Talsma Builders, Inc., 367 N.E.2d 695 (Ill. 1977), a case in which Talsma was hired by “the largest black-owned, privately financed convalescent home in the country.” See $5 million facility for Robbins, CHI. DEFENDER, Dec. 23, 1974 at 4 (describing the historic nature of the Robbins construction project).
580 Thursday Afternoon Session—May 22, 1975, 52 A.L.I. Proc. 382, 392 (1976). In addition to the cases cited above, RESTATEMENT (SECOND) OF CONTRACTS, § 155, illus. 1 and cmt. f, illus. 9 (AM. L. INST. 1981) were supported by Searcy v. Tomlinson Interests, Inc., 358 So.2d 373 (Miss. 1978), where the opposing parties, both white, were successors in interest to the family of a Black man named Vester Thompson, Jr. See U.S., SCHOOL YEARBOOKS, 1900-1999, BASSFIELD HIGH SCHOOL (1974).
observation that it was difficult precisely because “[t]he difference” was one of “degree,” not of kind—582—that “[e]ven a slave makes a choice.”—583

Thus, in their editing and case selection, the professors inadvertently muffled the role that Black litigants, racial ideas, and the legacy of emancipation had played in the development of contract law. And that encouraged white students to think of race as something tangential to “real” contract law. It treated Black students as guests to a white limestone cathedral built by white men.—584 In the fall of 1972, when my mother opened her Contracts casebook,—585 the only reference to African Americans she would have found was criticism, in the section on unconscionability, of “low-income market[ing]” as an “urban sharecropper system.”—586 Penn’s new course on Consumer Credit—which used Homer Kripke’s recently-published casebook—587—taught her how to decipher the installment-sale contracts and nickel-a-week insurance policies that she had seen her great-aunt Annie and uncle Thomas Holcomb wrestle with,—588 but it veiled what people like the

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582 Hale, Bargaining, supra note 325, at 612.
583 Id. at 606; see also E. Allan Farnsworth, Coercion in Contract Law, 5 U. ARK. LITTLE ROCK L. REV. 329, 338 (1982) (asserting that the modern “doctrine of economic duress” had dropped the old “common law” “objective requirement” that the threat had to be enough to “overcome the [mind and] will of a person of[... ordinary firmness]” (quoting King v. Lewis, 4 S.E.2d 464, 467 (Ga. 1939)). For Professor Havighurst, Service Fire Insurance Company of New York v. Reed, 72 So. 2d 197 (Miss. 1954) illustrated “the modern trend” toward applying “a subjective standard” of duress in cases involving threats of criminal prosecution. Harold C. Havighurst, Problems Concerning Settlement Agreements, 53 NW. L. REV. 283, 296 (1958). The record in Reed shows the insurer disputing a Black policyholder’s claim by advancing specious claims about “Negroes,” “the FBI,” and “civil rights.” Reply Brief for Appellant at 8, Service Fire Ins. v. Reed, 72 So. 2d 197 (Miss. 1954) (No. 39097) (MDAH). At least one other civil-rights-era Mississippi case involved malicious prosecution to avoid paying an insurance claim to a Black policyholder. See Washington v. Serv. Fire Ins. Co. of N.Y., 172 So. 2d 765, 766 (Miss. 1965). The policyholder’s race is confirmed at Transcript of Record at 45, Washington v. Serv. Fire Ins. Co. of New York, 2 So. 2d 765 (Miss. 1965) (No. 2777) (MDAH).
584 See Calabresi & Melamed, supra note 520, at 1090 n.2 (explaining the cathedral metaphor as an allusion to Claude Monet’s famous series of oil paintings of Rouen Cathedral, which explored the effects of light in shaping the viewer’s perception of a subject).
585 Her assigned casebook was FULLER (3d), supra note 466. Thanks to Professor Curtis Reitz for recalling the Contracts casebook he used that year and for generously sharing his memories of teaching at Penn Law during the early 1970s.
586 Id. at 596-605. Earlier editions of the Fuller casebook had featured Taff v. Hyatt, the case of the “colored masonic lodge” member. LON L. FULLER & ROBERT BRAUCHER, BASIC CONTRACT LAW 326 (2d ed. 1964). And the racial facts appeared plainly in CORBIN (3d), supra note 506, at 51-55. But Fuller’s third (1972) edition spoke merely of “a member of a masonic lodge.” FULLER (3d), supra note 466, at 414-15. The 1972 edition also did not disclose that the plaintiffs in Ricketts v. Pa. R.R. and Harrington v. Taylor were Black, nor that racism was the predicate for Chicago Coliseum v. Dempsey. Id.
587 Kripke, supra note 414.
Holcombs had done to help make the law of consumer credit. This veil was woven from lawyers’ and judges’ tactical decisions in pursuit of the broadest winning rule, combined with the assumption—ironically strengthened by the 1960s civil rights movement—that Black people encountered law meaningfully only in criminal justice, voting, the workplace, schools, and public accommodations—that is, in cases “about” race.

V. PRESCRIPTIONS

What should judges, lawyers, and law schools do about all this? One sensible place to start might be from the law student’s perspective—say, the perspective of a law student like Penelope Baskerville. At the most basic level, legal professionals should acknowledge that contract law has never been white and that they are already, unavoidably, making choices about race in their case selection and analysis. Here, it may be useful to distinguish two ways of thinking about the materiality of race. Whether race was material to the outcome of a given case is, typically, impossible to determine with certainty. I have made limited inferences at some points in this Article, applying my knowledge of the relevant historical context. But race can also be material to the doctrinal meaning that has accrued around a case and to our choices about what a case should stand for in the future. Race is still a doctrinal catalyst of opportunity, and legal professionals should try to make better and clearer choices about its materiality—their decisions to bind or unbind it from the rules and categories they deploy in their work. They should consider “recognizing race” whenever it is connected to a legally cognizable harm or benefit resulting from interactions or will enable readers to grasp the rule, concept, or approach being presented.

This selective recognition of race can proceed along two tracks: intellectual history and case selection. Most casebooks and some modes of legal interpretation are already silently organized around a history of legal thought, and they often explicitly use history as context for cases and concepts. They should build on that scaffolding by making clear that the

589 One of Kripke’s note cases, Sloan v. Sears, Roebuck and Co., discussed two cases brought by Black plaintiffs: Cunningham v. Chamblin Sales Co., 299 S.W.2d 89 (Ark. 1957), and Smith v. Kaufman, 224 S.W. 978 (Ark. 1920). Kripke omitted Cunningham’s opening words: “Appellant is an illiterate Negro farm laborer.” Cunningham, 299 S.W.2d at 90. He entirely omitted Sloan’s citation to Smith, a suit against “an unlettered colored woman.” Smith, 224 S.W. at 987. Another of Sloan’s citations, Thompson v. Murdock Acceptance Corp., 267 S.W.2d 11 (Ark. 1954), featured a dissent that quoted from Perry v. Shelby, 118 S.W.2d 849, 849 (1938), a case that involved a Black woman seeking to foreclose a loan to a Black lawyer-undertaker. KRIPE, supra note 414, at 21-28.

590 Driver, supra note 14, at 408, 445-46, 450.

591 See Brooks, supra note 243, at 206 (urging law to recognize race “to the extent that it is connected to legally cognizable harm . . . without appealing to . . . essentialist notions of race”).
history of contract law in America is profoundly connected to the struggle to end slavery and the ensuing struggle to conceptualize what it means to be a free, self-willed individual in a multiracial market economy. Understanding the roles of racial thinking, cases involving Black people, and the long shadow of emancipation will help students understand the modes of analysis associated with canonical scholars such as Williston, Corbin, Fuller, and Dawson, and why they are canonical.

To an extent, the canon itself should change. Casebook authors should also look for opportunities to replace cases involving only white people with cases involving Black people that illustrate the same rule, approach, or concept. For example, duress by threat of suit is presented as squarely in the case of the Georgia “high sheriff”\(^{592}\) as in a dispute between telecommunications contractors.\(^{593}\) A bereaved Black woman’s promise to pay her dead brother’s $48 doctor bill is arguably a more realistic example of simple donative promises than a rich white woman’s $3,000 promise to her nephew.\(^{594}\) Students may find it easier to learn the problem of indefiniteness from a Black woman’s agreement to provide old-age care\(^{595}\) than from a Vermont toy-store’s lease renewal\(^{596}\) or an agreement to publish a famous white novelist’s short story collection.\(^{597}\) And for introducing the doctrine of estoppel, a Black family’s effort to use insurance to rebuild their lives after a

\(^{592}\) King v. Lewis, 4 S.E.2d 464, 466 (Ga. 1939).


\(^{594}\) Compare Dougherty v. Salt, 125 N.E. 94 (N.Y. 1919) (involving an eight-year-old boy whose aunt gave him a promissory note for $3000), with Wright v. Threatt, 92 S.E. 140 (Ga. 1917) (discussing the legal claims of a Black woman who, after her brother’s death, signed writings to a Black doctor and a Black undertaker, promising to pay her brother’s medical and funeral bills out of the proceeds of his life insurance policy). Both cases are cited in 3 CORBIN ON CONTRACTS § 9.23 (2021). $3,000 is equivalent to about $172,000 today. See Seven Ways to Compute the Relative Value of a U.S. Dollar Amount—1790 to Present, MEASURINGWORTH.COM (2022), https://www.measuringworth.com/calculators/uscompare [https://perma.cc/ES54-QY5L] (using unskilled “relative labor earnings” value). In addition, the writing at issue in Threatt, which was witnessed by a local justice of the peace, included the words “love and affection” and “moral obligation,” hinting that nonlawyers were aware of and engaged in the debate over these concepts. For Sarah Threatt’s race and other facts of her case, see Transcript of Record at 9, 14-17, Wright v. Threatt, No. 6 (Ga. Oct. 1916) (Supreme Court Case Files, GA).

\(^{595}\) Tucker v. Warfield, 119 F.2d 12, 13 (D.C. Cir. 1941). Such agreements were common among whites, too, before the advent of Social Security and public and private pension systems. See HARTOG, SOMEDAY ALL THIS WILL BE YOURS 169-70. Tucker also raises the issue of specific performance of contracts for personal services and gives a real-life glimpse of when and why laypeople decide to hire lawyers. 119 F.2d at 14.

\(^{596}\) Toys, Inc. v. F. M. Burlington Co., 582 A.2d 123 (Vt. 1990), repr. in FARNSWORTH (9th), supra note 24, at 324-26.

lifetime of slavery might usefully complement the machinations of a slaveholder and his sister-in-law to acquire public land, and a white bookkeeper’s desire to quit working. Likewise, if scholars want to discuss the limits of alienability through the problem of self-sale, they should present one of the rare examples of real people who sold themselves into slavery and should include enough context to clarify why someone would do such a thing and what was actually being alienated. Of course, faculty and casebook authors should take care that they do not inadvertently propagate stereotypes, especially if it is a famous judge who is doing the stereotyping. Where stereotyping is doctrinally germane, they should frame the case in a way that does not force minority faculty or students to become the object of a classroom hypothetical. They should avoid saying racial epithets aloud. As this Article has shown, cases featuring Black people rarely used racial epithets, if they mentioned race at all. And few law students need to be taught that racial epithets exist in the real world.

As we have seen, race has historically functioned in private law as an exception, a limiting principle. Legal professionals should reject this “race exceptionalism,” and think more carefully about the doctrinal “passing” that makes it possible. Instead, they should recognize race where ignoring it would artificially cabin the salience of race within a particular area of law, or where it would distort or confuse the meaning of a rule or concept. Unlike


599 See Morris, supra note 90, at 31-36 (summarizing nineteenth-century theories and statutes regarding voluntary self-enslavement and providing examples).

600 See Frug, supra note 177, at 1099-1100 (arguing that a casebook’s choice and ordering of cases subtly uses sexist stereotypes to convey the authors’ view that reliance damages are exceptional).

601 See Kastely, supra note 420, at 282-86 (criticizing Judge Richard Posner’s subtly racist language in Wassell v. Adams, 865 F.2d 849 (7th Cir. 1989)).

602 See Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J. 385, 368 (1991) (describing and critically assessing the author’s resentment at having to become a hypothetical in her own law school classroom to teach an important employment discrimination case involving braided hair).

603 But see Randall Kennedy & Eugene Volokh, The New Taboo: Quoting Epithets in the Classroom and Beyond, 49 CAP. U. L. REV. 1, 9-10, 40-45 (2021) (arguing that “enunciating slurs” has pedagogic value and relying on the intent-based “use-mention distinction”).

604 See Forde-Mazrui, supra note 2, at 4 (defining race exceptionalism as the “tendency . . . to minimize the relevance of race to the merits of a law or doctrine, viewing the law’s relationship to race as exceptional or aberrational . . . .”); see also MACAULAY (3d), supra note 508, at 11 (contending that absence of people of color from contracts casebooks signals contract’s concern with power).

605 See Driver, supra note 14, at 445-50 (arguing for a historically informed approach to analyzing racial undertones in case law). Driver’s heavy focus on public law limits his key historical assertion that “racially specific statutes” kept judges generally from choosing to recognize race. Id. at
“slave cases,” “‘colored’ cases” should not be weeded out or set apart in a distinct category. On the contrary, casebook authors should acknowledge which of their existing cases already feature African Americans, and how deeply key concepts are soaked in debates about slavery and race. This would increase, not decrease, the pedagogical power of the canonical cases.

One might reasonably object, as Farnsworth did in 1974, that casebooks need fewer cases involving “horses and cows” and more involving large business corporations, since many law students, including Black students, are headed for corporate practice, not cause lawyering. And that objection might reduce opportunities to incorporate race, because Black people are underrepresented in large business corporations. Indeed, some casebooks seem to recognize this problem and have tried to adapt by adding “real-life illustrations” involving famous Black businesspeople, such as In re WorldCom, Inc. But it sends a troubling message if the only cases featuring African Americans involve a basketball player, a boxer, a famously corrupt boxing promoter, and a welfare recipient. Business disputes involving African

416. Nevertheless, Driver offers a valuable analytical frame and normative ideas for private law scholars.

606 See Simard, supra note 8, at 120-24 (proposing that legal scholars and other professionals clearly mark citations of cases involving slavery).

607 See Braucher, supra note 528, at 1422 (recounting Farnsworth’s efforts at the 1970s ALI meetings “to modernize the illustrations” in the Restatement (Second) of Contracts); David B. Wilkins, Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, 45 STAN. L. REV. 1981, 1983-84 (1993) (assessing the motivations and implications of Black law students’ decisions to go into corporate law).

608 361 B.R. 675 (Bankr. S.D.N.Y. 2007) (featured in MACAULAY (3d), supra note 508, at 77-89; CALAMARI (7th), supra note 24, at 698-707; and DAWSON (11th), supra note 24, at 86.

609 One current casebook includes, in addition to Williams v. Walker-Thomas, the following cases: In re WorldCom, Inc., 361 Bankr. 675 (2007), which involved famous Black basketball player Michael Jordan; Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (Ill. App. Ct. 1932), where white boxing champion, Jack Dempsey, breached his contract for a championship match against Black boxer Harry Wills; World of Boxing LLC v. King, 107 F. Supp. 3d 265 (S.D.N.Y. 2015), which involved famous Black boxing promoter Don King; DK Arena, Inc. v. EB Acquisitions I, LLC, 112 So. 3d 85 (Fla. 2013), another case involving famous Black boxing promoter Don King; and World of Boxing LLC v. King, 56 F. Supp. 3d 507 (2014), yet another case involving famous Black boxing promoter Don King. DAWSON (11th), supra note 24, at 47-53, 58-62, 86-93, 329-33, 670-72. The Dawson authors include a photograph of Wills but leave students to speculate about why Dempsey refused to fight him. This fact is easily discovered. See Jack Dempsey, New Heavweight Champion, Announces He Will Draw the Color Line, N.Y. TIMES, July 6, 1919, at 17 (stating that Dempsey would only defend his title against white challengers). Another casebook, in teaching the implied duty of good faith, awkwardly places Hilton Hotels Corp. v. Butch Lewis Productions, 808 P.2d 919 ( Nev. 1991), which involves famous Black boxing promoters Don King and Butch Lewis, right after Dalton v. Educational Testing Services of Princeton, 663 N.E.2d 289, 290-91 (N.Y. 1995), which describes a white high school student who sues Educational Testing Service to release SAT scores withheld on suspicion of cheating. FARNsworth (9th), supra note 24, at 672-76. The awkwardness is heightened by the fact that the lower court in Dalton had explicitly discussed the plaintiff’s race in finding that ETS had failed to evaluate probative evidence: “One student . . . specifically stated that Brian had stood out in the classroom that day because he was fair-complexioned and blue-eyed and exhibited
Americans who are not famous would make far better, and more realistic illustrations: the industrial-equipment seller in *Nutmeg State Machinery Corporation v. Shuford*, for example, or the Black shop-owner in *Osborne v. Bullins*, or the Black taxicab company in *City of Memphis v. W.M.S. Company*. At the level of theory, any discussion of “Black corporations” should forthrightly discuss the knotty theoretical questions that that concept raises. Ninety years ago the Realists mocked the courts for hiding their value judgments behind “metaphysical” questions like “Where is a corporation?” and for reducing “practical legal problems” to “legal magic and word-jugglery.” But the question “Where is a ‘Black corporation’?” may be anything but metaphysical. As Richard Brooks has pointed out, it is well worth asking, in both practical and theoretical terms, when and why law should ascribe racial identities—which are commonly associated with natural persons—to corporate persons. Finally, if Braucher and Farnsworth were right that the Restatements and legal scholarship should appeal to “busy practicing lawyers” by choosing “real-life illustrations,” then authors should consider that a small but significant fraction of today’s practicing lawyers, as well as the future lawyers in their classrooms, are Black, and that Black lawyers and judges may have a different idea of what “real-life” is than they do. The purpose of teaching “colored cases” is not necessarily to...

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611 30 A.2d 911 (Conn. 1943).
612 549 So.2d 1337 (Miss. 1989). *Bullins* was discussed in DAWSON, supra note 504, at 796 but it does not appear in the current edition.
613 326 S.W.2d 828 (Tenn. Ct. App. 1959) (describing a lawsuit to recover street tax on taxicab operations).
614 Cohen, supra note 553, at 810-13, 821 (“Nobody has ever seen a corporation. What right have we to believe in corporations if we don’t believe in angels?”).
615 As Richard Brooks points out, until the 2000s, courts assumed that “in law, there can be no such thing as a colored corporation.” That is, courts refused to impute to corporate persons the race of their shareholders, managers, or other stakeholders. See Brooks, supra note 245, at 2023-26, 2045.
617 See Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 FORDHAM L. REV. 2483, 2483 (2015) (noting that the only professions less diverse than law are the natural sciences and dentistry); NAT’L ASS’N FOR LAW PLACEMENT, 2021 REPORT ON DIVERSITY IN U.S. LAW FIRMS 19 (2022) (noting that 2.22% of partners at law firms in 2021 were African American). See also Rhode & Ricca, supra, at 2483-87 (showing top law firms consider diversity “critical to [their] economic success”); David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1546, 1554-60 (2004) (charting and critiquing the “business case for diversity”). For that matter, the dominance of commercial transactions in contract casebooks and theory is a choice made by authors, not a reflection of real-world contracting. See HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 7-13 (2017) ("[C]ontract law teaching has followed Williston’s commercial
“acknowledge” and “atone” for historic wrongs, or even solely to make Black law students feel included. It is to convey to all students a more accurate understanding of the rules, principles, and concepts of contract law.

Beyond these pedagogical questions, this Article also suggests certain changes in scholarship. In arguing that African Americans’ legal activity formed part of the mainstream of common-law doctrine, the Article builds on insights from Critical Race Theory but departs from it in certain ways. Finding out what people like Lena Harrington actually said and did about rights, and what role they played in the making of contract law, is an inquiry that complements but is distinct from CRT’s inquiry into law’s role in constructing, naturalizing, and justifying racial inequality. Although it is important to highlight the racial aspects or consequences of a given problem or doctrine, as some scholars have urged and some casebooks have done, it is equally important to flip the causal arrow—to explain how Black people’s cases helped forge a given doctrine. This is important both because it positions Black people as legal agents rather than primarily as objects of law, and because it clarifies and illuminates the doctrine.

Citing and teaching “colored” cases will demand extra work and some training in historical methods. Although some cases relating to race and slavery are well-known and it is relatively easy to find others through WestLaw keyword searches and other standard techniques, most contract law push... [T]he same few dozen primary teaching cases... drive home a Willistonian agenda supported by a thin utilitarian scaffolding.

618 But see Simard, supra note 8, at 122 (“Exposing the practice of the citation of slave cases will allow judges and court systems to acknowledge and begin to atone for their past acts.”).

619 Randall Kennedy, Race Relations Law in the Canon of Legal Academia, 68 FORDHAM L. REV. 1985, 1990-91 (2000). See also Crenshaw, supra note 477, at 9-10 (noting that classroom discussions of race may make some minority students uncomfortable, too, and suggesting that faculty choose cases with facts that will appeal to students from many different backgrounds and worldviews); Brophy, Integrating Spaces, supra note 9, at 321 (proposing ways to incorporate discussions of race into doctrinal property courses); Simard, supra note 8, at 81-82, 84, 106 (revealing and criticizing courts for routinely citing “slave cases” as support for modern rules without acknowledging what they are doing, considering how “a case’s slave context” should affect its value as an authority, or weighing the dignitary harms of embedding “cases involving human property” into the common law).

620 BARNETT & OMAN, supra note 490, at 94-99 (discussing “the role of race” as “relational and historical background” for Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932)); id. at 175-78 (discussing an 1821 freedom suit as an example of the limits on specific performance of contracts for personal services); id. at 201-07 (excerpting Bailey v. Alabama as presenting a “statutory scheme that raises similar moral and constitutional issues” regarding specific performance of contracts for personal services); JOHN P. DAWSON, WILLIAM BURNETT HARVEY, STANLEY D. HENDERSON & DOUGLAS G. BAIRD, CONTRACTS: CASES AND COMMENT 38-45 (10th ed. 2013); FARNSWORTH (9th), supra note 24, at 227-28 (discussing the significance of contract formation for antidiscrimination law); KNAPP (9th), supra note 24, at 522-23, 590-91 (discussing gender and race discrimination as a breach of the duty of good faith; gender- and race-based restrictions on capacity).

621 Scholars have used such cases to reveal and critique the ways that race and law construct one another. Examples include Simard, supra note 8, at 97 (finding more than 300 citations to slave
cases involving Black litigants cannot be found that way because they are “passing” and their case reports do not contain those keywords. First-year instructors should therefore be given a modest budget for research assistance to go through the casebook and lesson plan and think creatively about when and how the course could be sharpened by discussing explicitly what is usually left implicit or hidden: the role of Black litigants and ideas about race and slavery. I identified many of the parties in this Article simply by looking up their names on Ancestry.com, a widely available commercial database that offers full-text searching of the manuscript United States Census, city directories, and other useful archival materials. And ambiguities can usually be resolved by consulting transcripts of record, which can readily be ordered from state archives. In weighing how best to make use of this information, instructors should also consult colleagues in campus departments from time to time, especially History and African American Studies, many of whom are quite familiar with legal concepts and institutions.

CONCLUSION

The formative era of modern contract law and legal education in the United States was also the era of slave emancipation and Jim Crow. Black people’s exercise of contract rights in a world defined by white supremacy required whites to think of them as both ordinary and set apart, as people who were inferior yet “capable [of] transacting business.”622 Those competing visions of Black people’s legal personhood emerged most explicitly in court cases, but they also permeated daily life. Then, from the 1940s to the 1960s, judges and activists reinvented that tradition under the banner of federal law, without realizing how old it really was or the role African Americans had played in making it. The same thing that made Black people’s cases such useful vehicles for doctrinal development in private law—the space they afforded for manipulating the materiality of race—tended to make them

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622 Bond Transcript of Record, supra note 239, at 37 (“capable”). All plausible Census matches for Thomas are white. Bond was Black.
invisible. “Doctrinal passing” was, and is, a dynamic, complex, mostly unplanned phenomenon, fashioned by many hands at all levels of the legal system, and any response to it must be equally nuanced and dynamic.

If, as has often been said, “we . . . are all legal realists now,” then Law and Political Economy scholars seeking a “fourth wave” of legal realism should think carefully about the intellectual genealogy of the original Realists, especially their approach to Black people, race, and slavery. If the “root flaw” of the Roberts Court is that it has revived the Lochner Court’s Classical “presumption of a prepolitical, neutral baseline of market equality,” then critics should recognize that the key issue of that time—what the Realists and Classicists were fighting about—was the meaning of freedom in a country that had, for much of its history, defined freedom as the antonym of “African slavery.” Scholars should recognize that the Lochner Court’s presumption that voluntary transactions “are, by definition, fair and equal” marked the triumph of the abolitionists’ neutral baseline vision of market equality in a post-slavery society, and that the first testing ground of the “market freedom” idea in America was the contracts of Black people who had been born into slavery. The original Realists sought to expose and critique the unspoken moral judgments embedded in freedom of contract, to show that its “voluntaristic fallacy” was naturalizing contractual relations so unequal that they amounted to “industrial slavery.”

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623 Singer, supra note 142, at 503.


625 See Angela Harris, Where Is Race in Law and Political Economy?, LPE PROJECT (Nov. 30, 2017), https://lpeproject.org/blog/where-is-race-in-law-and-political-economy [https://perma.cc/7XB6-BGUB] (urging law and political economy scholars to start from the “proposition . . . that race is foundational to ‘law,’ to ‘the political,’ and to ‘the economy’”).

626 Rahman, supra note 624, at 1336.

627 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 58 (1873); see also supra Section II.A (arguing that the Lochner Era “freedom of contract” principle was built on the premise that slavery and freedom were categorical opposites and that the right to make contracts was the bright line between them).

628 Rahman, supra note 624, at 1334.

629 Forbath, supra note 108, at 770.

630 See, e.g., STANLEY, supra note 96, at ix (arguing that Americans repeatedly “drew on contract to describe” and interpret the transformations wrought by emancipation and industrialization); ROSE, supra note 101 (analyzing the “free labor” experiment during the Civil War tying citizenship privileges to African Americans’ willingness to work for wages in export agriculture).

631 Hale, Coercion, supra note 324, at 481.

Realists used African Americans, race, and slavery as convenient thinking tools without seriously confronting what those words actually meant, especially to African Americans themselves. Their intellectual heirs today must grapple with that flawed inheritance.633

In sketching this partial genealogy of contract law, the Article also makes a bigger argument about the relationship between law and history. Legal professionals often think of history as “context”: “descriptive” material to be “ransacked” to help “resolv[e] modern legal controversies.”634 And yet, like any other legal field, the doctrinal and conceptual unity of contract law rests, in part, on abstracting cases from their contexts, stripping “away what mattered.”635 The “facts’ as stated in a case” are partly “artifacts of the legal system” itself.636 Indeed, the “reported facts” of the great teaching cases are sometimes so truncated, and even inaccurate, that they are more like legends than “the historical truth.”637 And in law school, as in John Ford’s Old West, when the legend becomes fact, we print the legend.638

American law schools implicitly teach two important legends. The first is that contract law has little to do with civil rights, African Americans, or race. The second is that the history of civil rights, African Americans, and race is a story of legal liberalism and its failures—“how African American communities, and the lawyers and organizations that supported them,

633 See supra Part IV (describing how doctrinal passing and the selective incorporation of race, slavery, and Black people from contract law helped create “contracts” and “civil rights” as discrete legal fields, hardened curricular distinctions, impoverished students’ learning, and influenced key post-Realist theoretical debates.); see also FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 12-21 (1960) (defining “liberty” as the antonym of “slavery” and summarizing the history of slavery without mentioning African Americans or race).


636 Robert W. Gordon, Historicism in Legal Scholarship, 90 YALE L.J. 1017, 1035 (1981); see also KALMAN, supra note 293, at 211 (showing that the case method’s reductionist approach to the facts of a case tended to mislead students).

637 Watson, supra note 291, at 1806; see also Casto & Ricks, supra note 598, at 323-24, 375 (arguing that Kirksey v. Kirksey is a casebook classic precisely because it is obscure, ambiguous, and terse).

638 THE MAN WHO SHOT LIBERTY VALANCE (Paramount Pictures 1962) (“This is the West, sir. When the legend becomes fact, print the legend.”).
struggled to overturn *Plessy v. Ferguson,*" won a landmark victory over state-mandated white supremacy in *Brown v. Board of Education,* and fought to realize its promise.639 These two legends reinforce one another. The legal liberal interpretation and its critical heirs triumphed by throwing away alternative traditions of civil rights,640 including ones rooted in contract law.641 Modern contract law, in turn, was created in part by exiling “race” to the doctrinal niche of unconscionability and to other branches of law, especially criminal law and constitutional law, and by taking the massive legal–theoretical struggle over the meaning and limits of market freedom in a post-slavery society and turning it into abstract hypotheticals about “the negro” and “the slave.”642 Many of the cases reprinted or cited today in first-year contracts casebooks were chosen during the decades between the end of slavery and the end of Jim Crow. Those cases were chosen not because they were representative or frequently cited, but because men like Samuel Williston and Allan Farnsworth thought that they illustrated certain legal principles.643 Jurists established contract law as a conceptually unified field partly by burying their complicated choices about race. In a broader sense, race may have shaped the social domains in which contract was a key organizing institution, helping to demarcate contract from regulation in ways that made certain contracts impermissible,644 while steering politics away from forms of state intervention that would have limited the domain of contract.645

Now, there is nothing necessarily wrong with legends, especially if they serve a useful purpose. Legal scholars, like judges and lawyers, must be choosy


640 See generally, e.g., GOLUBOFF, *supra* note 19, at 15, 238-70 (arguing that “*Brown* short-circuited” alternative visions of civil rights rooted in labor rights and economic inequality); BROWN-NAGIN, *supra* note 88 (showing multiple visions of civil rights at work in twentieth-century Atlanta).

641 Penningroth, *supra* note 5, at 896-98 (arguing that lawyers and racial justice activists obscured African Americans’ longstanding use of property, contract, and corporate law).

642 See infra Parts II–III.

643 See Farnsworth, *supra* note 488, at 1409, 1439-40 (characterizing the original American casebook, Langdell’s A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871), as "a curious work," dominated by pre-1700 English cases); GILMORE, *supra* note 35, at 61-62 (“The apparent unity of doctrine was achieved through . . . an extremely selective handling of the case material . . . facilitated by . . . an extraordinary” reliance "on English cases"); see also Watson, *supra* note 291, at 1788 (noting that Mills *v.* Wyman owes its fame to "repeated citation not in case law but in commentaries and, especially, casebooks"); Richard Danzig, Hadley v. Baxendale: A Study in the Industrialization of the Law, 4 J. LEGAL STUD. 249, 275 (1975) (characterizing the canonical status of famous cases as a product of casebook editors’ "marketing").

644 Paradigmatic examples include *Plessy v. Ferguson,* 163 U.S. 537, 548-51 (upholding a statute that made it impermissible for a common carrier to contract with a "colored" person for carriage in a car other than the one assigned to his race) and *State v. Gibson,* 36 Ind. 389, 394, 402-403 (1871) (upholding a statute criminalizing interracial marriage on the ground that marriage "is more than a mere civil contract").

645 Thanks to John Witt for this idea.
in their ransacking of history. But when the needs of the legal profession change, it may be worth asking whether the particular legends being taught are still useful or not.\textsuperscript{646} For fifty years now, law schools have struggled to attract and keep talented minority students and faculty, and to convince them that “the law” being taught is relevant to them and worth devoting their careers to. Yet the leading casebooks make it seem as though contract law has almost nothing to do with race or racial minorities or the struggle to define freedom in a world without slavery. And this doctrinal passing has cost law schools dearly. By making \textit{Williams v. Walker-Thomas Furniture} the only “colored’ case first-year law students read, contracts teachers have inadvertently reinforced racial stereotypes\textsuperscript{647} and relegated racial minorities to the marginal, seldom-used doctrine of unconscionability. The point is general. There is no principled reason why only some parts of the law school curriculum—chiefly courses in constitutional and criminal law—should be responsible for teaching about the role of race and racial minorities in law, or why students interested in corporate law or contracts should be taught that those areas of law have nothing worthwhile to say about race. Many law students already realize this and are expressing their frustrations outside of class.\textsuperscript{648} The right to contract is a civil right. Understanding how long and how deeply Black people have engaged with the law of contract can help ease the damaging perception that racial minorities contribute only to cases that are “about” race.\textsuperscript{649} The curriculum needs to be desegregated.\textsuperscript{650}

But this might be easier than it appears. To paraphrase Toni Morrison once more, “[i]t only seems that the canon of American” contract law “is ‘naturally’ or ‘inevitably’ ‘white.’ In fact, it is studiously so.”\textsuperscript{651} And the canon becomes more fascinating and more powerful when we begin to notice the unspoken presence of race and how studiously legal professionals have dealt

\textsuperscript{646} See Gordon, supra note 636, at 1055 (positing historicist critique of lawyers’ history as “bad mythmaking”).

\textsuperscript{647} See Spence, supra note 408, at 103 (worrying that teaching \textit{Williams} may “overlook[] or ignor[e] the potential for reinforcing [harmful] stereotypes”).

\textsuperscript{648} See Forde-Mazrui, supra note 2, at 21 (observing that students notice when “racial issues lurking in the materials” are left unaddressed); Park, \textit{This Land Is Not Our Land}, supra note 9, at 1983 (predicting increased pressure from law students to “confront these questions”); Crenshaw, supra note 477, at 9-10 (contending that “[m]inority student alienation” stems largely from resistance to discussing “[t]he racial dimensions of traditional law school subject areas”).


\textsuperscript{650} See Crenshaw, supra note 17, at 1353 (recounting law students’ “demands to desegregate the faculty and curriculum”).

\textsuperscript{651} Morrison, supra note 39, at 14.
with it. “‘Colored’ cases” offer a useful window on judicial decisionmaking, lawyers’ tactics, and case reporting, precisely because they obscure race. They belong at the core of our shared legal intellectual life. Indeed, more than we know, they are already there.