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Integrating a Racial Capitalism Framework Into First-Year Contracts: A Pathway to Anti-Capitalist Lawyering

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INTEGRATING A RACIAL CAPITALISM FRAMEWORK INTO FIRST-YEAR CONTRACTS: A PATHWAY TO ANTI-CAPITALIST LAWYERING[1]

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"I came to theory because I was hurting— the pain within me was so intense that I could not go on living. I came to theory desperate, wanting to comprehend— to grasp what was happening around and within me. Most importantly, I wanted to make the hurt go away. I saw in theory then a location for healing."[2]

"[T]he practice of theory is informed by struggle."[3]

[1] Any effort in advancing a critical pedagogy in the law classroom is only possible due to the intellectual curiosity and generosity of students. For this article, I am thankful to my Law and Market Economy students Class of 2023 and Class of 2024 for their openness and encouragement including those who expressed reservations and skepticism around this methodology. I especially thank Carolyn Weldy, Erin Quinn, Hugh Schlesinger, Elizabeth Pudel, Marcela Jiminez, Monica Sobrin, Sean Fabi, and Sneha Jayaraj who participated in a focus group on this piece. Thanks to Ann Cammett for sharing this publishing opportunity. Additional thanks to Andrea McArdle, Alan White, Charles Calleros, Eduardo Capulong, Etienne C. Toussaint, Gregory Louis, and Ruthann Robson for reading abstracts and drafts of this paper. Of course, any shortcomings in this article are my own. I am grateful for the legal research assistance of Erin Quinn and Rex Santus.

[2] BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM 59 (1994).

[3] CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 307 (University of North Carolina Press 2000) (1983).

INTRODUCTION

Nationwide protests against police brutality in the summer of 2020,[4] coupled with the high rates of COVID-19 deaths among Black, Indigenous, and People of Color (BIPOC),[5] has brought to the foreground the role of the legal system in upholding structural racism and economic inequality. This renewed focus spotlighted our legal education:[6] what are law schools doing as *the* institutions[7] that educate future lawyers to be anti-racist, so they can, in turn, create a legal profession that is anti-racist?[8] Being anti-racist is making conscious choices to fight racism in all its forms: individual, interpersonal, institutional, and structural.[9] Being anti-

4 *See* Dionne Searcey & David Zucchino, *Protests Swell Across America as George Floyd is Mourned Near His Birthplace*, N.Y. TIMES, https://www.nytimes.com/2020/06/06/us/george-floyd-memorial-protests.html (last updated Sept. 7, 2021); *see also* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html (reporting that 15 to 26 million people participated in demonstrations over the death of George Floyd, making it the largest movement in United States history).

5 *See* Whitney N. Laster Pirtle, *Racial Capitalism: A Fundamental Cause of Novel Coronavirus (COVID-19) Pandemic Inequities in the United States*, 47 HEALTH EDUC. & BEHAV. 504, 504 (2020) (detailing how racism and capitalism mutually create harmful social conditions that shape health outcomes).

6 Legal educators are not the only professions examining their racism and racial capitalism in their curriculum. *See, e.g.*, Lundy Braun, *Theorizing Race and Racism: Preliminary Reflections on the Medical Curriculum*, 43 AM. J. L. & MED. 239, 250 (2017) (linking racial capitalism and critical race theories to scientific research, health, and clinical practice).

7 *See* Anthony R. Chase, *Race, Culture and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 54 (1995) (commenting on the powerful role law plays in our society creating distinct discursive practices, which must reflect "multicultural democracy").

8 A convening of New York area law schools last year asked its participants: what would an anti-racist law school look like? *See* Chrissy Holman, *Where Will 250 Deans & Professors from NYC Area Law Schools be on Thursday and Friday?*, CUNY SCH. L. (July 10, 2020), https://www.law.cuny.edu/newsroom_post/creating-an-anti-racist-climate/ ("Over 300 legal scholars, deans, faculty, administrators, and select students from NYC area law schools are convening to build a network committed to working together across roles and institutions to create an anti-racist climate in legal education."); Jill Backer, *New York City-Area Law Schools Form Law School Anti-Racism Consortium*, N.Y.L.J. (Jan. 29, 2021, 10:45 AM), https://www.law.com/newyorklawjournal/2021/01/29/new-york-city-area-law-schools-form-law-school-anti-racism-consortium/. Other law schools around the country engaged in similar discussions. *See, e.g.*, Miriam Fauzia, *BU School of Law Holds Symposium on Racial Inequality in Legal Education,* DAILY FREE PRESS (Mar. 1, 2020, 11:03 PM), https://dailyfreepress.com/2020/03/01/bu-school-of-law-holds-symposium-on-racial-inequality-in-legal-education/; Hannah Hayes, *Law Schools Vow to Address Structural Racism,* A.B.A. (Sept. 25, 2020), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2021/september/law-schools-vow-address-structural-racism/.

9 *See* IBRAM X. KENDI, HOW TO BE AN ANTI-RACIST 19, 23 (2019). *See also Being Anti-racist*, NAT'L MUSEUM AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/learn/talking-

racist also means addressing economic inequality, and as this article advances, being anti-racist is being anti-capitalist. It is not simply acknowledging racism but taking action to dismantle it. Increased scrutiny of the legal curriculum[10] and whether law schools are explicitly addressing racism seems critical at this political moment, especially where we have witnessed Critical Race Theory coming under attack by the previous Trump administration[11] and in the present political climate.[12] In this article, I take this question to the classroom: what could an anti-racist/anti-capitalist contracts class look like? Contracts, or Law and the Market Economy,[13] as it is aptly titled at CUNY School of Law, is one of the foundational first-year required courses.[14] If we as legal educators believe that we must equip our students with the ability to address structural racism in our profession, then we must address it early on in our students' legal education in the 1L year.[15]

about-race/topics/being-antiracist (last visited Oct. 2, 2021); *Law Deans Antiracist Clearinghouse Project*, ASS'N AM. L. SCHS., https://www.aals.org/antiracist-clearinghouse/ (last visited Oct. 2, 2021).

10 *See* Paul Caron, *150 Deans Ask ABA to Require Law Schools to Provide Anti-Bias Training to Students*, TAXPROF BLOG (Aug. 2, 2020), https://taxprof.typepad.com/taxprof_blog/2020/08/150-deans-ask-aba-to-require-law-schools-to-provide-anti-bias-training-to-students.html ("ABA should require, or at least consider requiring, that every law school provide training and education around bias, cultural competence, and anti-racism.").

11 *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (Sept. 4, 2020). *See also* Laura E. Gómez, *Trump's White House Says Critical Race Theory is Anti-American. Here's the Truth.*, NBC NEWS, https://www.nbcnews.com/think/opinion/trump-s-white-house-says-critical-race-theory-anti-american-ncna1239825 (last updated Sept. 11, 2020, 1:35 PM).

12 *See* Michelle Goldberg, *The Campaign to Cancel Wokeness: How the Right is Trying to Censor Critical Race Theory*, N.Y. TIMES (Feb. 26, 2021), https://www.nytimes.com/2021/02/26/opinion/speech-racism-academia.html (discussing how conservative groups want to eliminate focus on critical race theory in public institutions, which could include my own). States are passing laws to ban teaching racial equity in schools. *See* Char Adams et al., *Map: See Which States Have Passed Critical Theory Bills*, NBC NEWS (June 17, 2021, 2:54 PM), https://www.nbcnews.com/news/nbcblk/map-see-which-states-have-passed-critical-race-theory-bills-n1271215.

13 *See* Dinesh Khosla & Patricia Williams, *Economies of Mind: A Collaborative Reflection*, 10.2. NOVA L. REV. 619, 619 (1986) (describing Law and a Market Economy course at CUNY Law as incorporating elements of contracts, theory, and engaging in a comparative analysis of how social goals are reflected in economic structures).

14 *See id.* Contracts is a year-long course at CUNY, which provides some flexibility to innovate the course. *See id.* However, based on student reactions discussed in the article, the mere introduction of critical frameworks is often sufficient to encourage them to pursue these ideas in greater depths in upper-level courses. *See infra* Part V. The ideas offered here can easily be incorporated into a one-semester course. *See id.*

15 *See* Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1515 (1991) (discussing the inclusion of race in the first-year legal curriculum); Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLIAMETTE L. REV. 541, 544 (1996) (discussing the benefits of including more social issues in law school education); Alexi Nunn

How can I facilitate students' understanding of how race functions in law and empower them to make conscious choices as legal professionals to dismantle racism? Criminal Law or Constitutional Law professors may discuss race and racism under the premise that those courses lend themselves to an exploration of this topic. However, as a group of law professors who teach contracts and business law courses recently stated, "[f]rom slavery and redlining to lack of opportunity in the workplace and limited access to capital, race, and racism have always been part of business and business law."[16] Entrenched neo-classical values of objectivity and rational choice embedded in contract doctrine, as well as the presentation of the doctrine as a mechanical application of rules, require professors to be more intentional about discussing race.[17] For example, reinforcing the idea of objectivity in contracts leaves the impression that the doctrine is free from bias, and that there is a uniform set of lived experiences shared by all parties to a contract.

Freeman and Lindsey Webb, *Positive Disruption: Addressing Race in a Time of Social Change Through a Team-Taught, Reflection-Based, Outward-Looking Law School Seminar*, 21 U. PA. J. L. & SOC. CHANGE 121, 123 (2018) (discussing a race-focused course as an example of including race into the law school curriculum); *see also* Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM L. REV. 1631, 1636 (arguing for a different curriculum and noting that the present race-neutral model of teaching criminal law trains students to trust and embrace criminal law and helps to facilitate a carceral state by supplying it with willing agents).

16 Benjamin P. Edwards, *Business Law Profs' Statement on Race/Racism in Business Law*, L. PROFESSOR BLOGS (Aug. 29, 2020), https://lawprofessors.typepad.com/business_law/2020/08/business-law-profs-statement-on-raceracism-in-business-law.html; *see* Paulina Davis, *Racism, Capitalism, and Predatory Lending: How the U.S Government's Failure to Regulate Disproportionate Negative Effects of Payday Lending in Black Communities Violates the International Convention on the Elimination of All Forms of Racial Discrimination*, 4 HUM. RTS. & GLOBALIZATION L. REV. 61, 70 (2011) (discussing racial animus in commercial transactions).

17 *Charles Calleros,* Guest Post, *Talking About Race in the Contracts Course: Interface with Civil Rights Laws, Part I - Mutual Assent*, L. PROFESSOR BLOGS (June 15, 2020), https://lawprofessors.typepad.com/contractsprof_blog/2020/06/guest-post-by-charles-calleros-talking-about-race-in-the-contracts-course-interface-with-civil-right.html ("[T]he role played by an ostensibly neutral set of contract rules in producing racially disparate outcomes can escape the attention of students unless we intentionally bring that theme to the surface."); Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 293 (1994) (discussing how race functions in the objective theory of contracts); *see also* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379 (1988) (arguing that racial hierarchy is not addressed by moving to facially neutral law and where white norms become "submerged in popular consciousness").

More so in contract law, which entails the legal ordering of the market economy, it is important to examine the relationship of race, law, and capitalism.[18]

For this reason, this past year and with the plan to continue to do so in the future, I introduced my first-year contracts students to the conceptual framework of racial capitalism.[19] Briefly, racial capitalism can be described as the mutual interdependence of racism and capitalism, a form of capitalism that relies on and is maintained by the exploitation and reproduction of racial differences.[20] Scholar Ruth Wilson Gilmore's oft-cited quote sums it up well: "[c]apitalism requires inequality, and racism enshrines it."[21] This framework is not offered at the exclusion of other critical theoretical frameworks, but as a way to demonstrate engagement with contracts doctrine through one theoretical lens.[22] To meet broader learning objectives, I intend this approach to model for students *praxis*: integrating theory into the class to facilitate a dynamic and

18 *See* Neil Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 186 (1994) (discussing that if we are interested in social justice, one way "capitalist society allocates resources is by contract."); Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 199 (1987) (discussing that a technical oriented rationality of rights reflects discourse of power that reinforces market ideologies); *see also* Angela Harris and James J. Varellas III, *Law and Political Economy in a Time of Accelerating Crises*, 1 J.L. & POL. ECON. 1, 6 (2020) (noting how legal scholarship of the last half-century has "withdrawn from the questions of economic distribution and structural coercion" and how racial capitalism illustrates how the allocation of resources is racialized).

19 *See* Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, BOS. REV. (2017) (discussing Cedric Robinson's famous work, *Black Marxism*, where he introduced the idea of "racial capitalism[,]" which my first-year students from Fall 2020 were asked to read). For Fall 2021, students were asked to read portions of Charisse Burden-Stelly's piece, *Modern U.S. Racial Capitalism*.

20 *See id.* ("Capitalism was 'racial' not because of some conspiracy to divide workers or justify slavery and dispossession, but because racialism had already permeated Western feudal society.").

21 antipodeonline, *Geographies of Racial Capitalism with Ruth Wilson Gilmore – An Antipode Foundation Film,* YOUTUBE, at 01:36 (June 1, 2020), https://www.youtube.com/watch?v=2CS627aKrJI&feature=youtu.be; *see* JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 95 (2012) (explaining that race and class are foundational and mutually constitutive in the United States).

22 *See* Charisse Burden-Stelly, *Modern U.S. Racial Capitalism*, MONTHLY REV. FOUND. (July 1, 2020), https://monthlyreview.org/2020/07/01/modern-u-s-racial-capitalism/?utm_source=rss&utm_medium=rss&utm_campaign=modern-u-s-racial-capitalism (discussing that the definition of racial capitalism is broad to include feminist and other critical frameworks); *see also* Harris & Varellas III, *supra* note 18, at 10, 12 (discussing an overview of some other critical frameworks combining law and economy).

interactive practice of action and reflection which empowers *them* to question the foundation of law and develop critical thinking skills.[23] Further, it empowers them to explore creative lawyering approaches aimed to realize the justice demands of their clients and communities they seek to serve.[24] Praxis allows students to draw connections between how they are learning law and how to mobilize that learning in support of social movements.[25] It allows "advocates [to] dream into being new forms of governance . . . ."[26]

I invite my students to engage in a dialogical[27] and collaborative inquiry: what does racial capitalism add to *their* understanding of the law that is different from the dominant theories of classical and neo-classical economics in contracts?[28] I also ask them to think about how this framework helps them to understand legal solutions and lawyering strategies. They are invited to share their

23 *See* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 125–126 (2005) (discussing that praxis is defined by Brazilian philosopher Paulo Freire as reflection and action directed at the structures to be transformed and noting that praxis is not divided into some prior stage of action and reflection but that it occurs simultaneously).

24 *See* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 829 (1997) (discussing applications of praxis to lawyering and racial justice using Freire's notion of praxis, and developing the idea of a critical race praxis, which combines "critical, pragmatic, socio-legal analysis with political lawyering and community organizing to practice justice by and for racialized communities[]"); *see also* Raneta J. Lawson, *Critical Race Theory as Praxis: A View From Outside the Outside*, 38 HOW. L.J. 353, 369 (1995) (arguing that "[t]he future of critical race theory is dependent upon its ability to expand its audience base into new spheres of influence, including courts, politicians, the bar, and the general public[]" by transforming theory into practice).

25 *See* Curry Malott, *How Amílcar Shaped Paulo Freire's Pedagogy*, NEW FRAME (Aug. 26, 2021)(connecting Cabral's ideas of decolonial forms of education that emerged from anti-colonial movements, which influenced Freire's pedagogy more popularly known and illustrates that the theory emerges from practice to enable people and communities to make sense of their worlds). Similarly, a revolutionary educator does not replace content to be passively consumed but rather gives learners opportunities to reflect on new ideas become active subjects. *See id.* For legal education, this means not simply changing the course content, but connecting what is taught to practice.

26 ANGELA P. HARRIS, *Foreword*: *Racial Capitalism and Law* to HISTORIES OF RACIAL CAPITALISM xiv (Destin Jenkins & Justin Leroy eds., 2021).

27 Dialogic learning takes place through social dialogue. Here, I am referencing Freire's concept of education which calls on the educator to create the conditions for dialogue and curiosity. *See* FREIRE, *supra* note 23, at 88–89 ("[D]ialogue is the encounter in which the united reflection and action of the dialoguers are addressed to the world which is to be transformed and humanized . . . .").

28 *See* Williams, *supra* note 18, at 194, for an overview of classical contract and neoclassical contract theories.

thoughts with me directly or on our online course management site.[29] In addition, I hosted a focus group discussion with a smaller group of students. This article will also share their comments.

My article centers on three main points using examples related to the praxis-oriented study of contracts.[30] The concept of racial capitalism (1) provides a critical analytic lens to the study of contracts; (2) illuminates how the interplay of law and capitalist market structures maintain racial discrimination; and finally, (3) reveals equitable contract theories' limits in addressing racism, helping students to identify anti-racist/anti-capitalist legal solutions to combat structural racism and economic inequalities. The examples in this article are for explicatory purposes rather than attempts to provide in-depth coverage of each point. First, I apply racial capitalism to *Kirksey v. Kirksey*,[31] a case that many contracts students read for the principle that gratuitous promises are not legally enforceable, making visible the political and socio-economic contexts at the core of contract doctrine. Further, in providing students with background reading on the parties,[32] I use the case to illustrate how seemingly neutral rules reinforce racial subordination. Second, I use a reported instance of discrimination in the appraisal of a home to show how Black homeowners, whether as buyers or sellers with access to capital, get a lower value on their property by virtue of their race.[33] This disrupts the deeply

29 Our online course management site allows me to post supplementary material related to cases for students who would like to discuss them in further depth either during office hours or through comments online. Students are also invited to share their own articles based on their interests. Moving away from the "classroom" as the sole locus of learning shifts the often hierarchical nature of law teaching, which promotes a banking concept of education where the students are "containers" or "depositories" of knowledge that students "receive, memorize, and repeat." FREIRE, *supra* note 23, at 71–72.

30 Lawson's categorization of Critical Race scholarship is informative. Lawson catalogs critical scholarship as being foundational, transformative, instructive, and as praxis. Foundational identifies a persistent problem in law and uses critical theory as a "method of inquiry"; transformative uses narrative form to contextualize law and challenge the mindset of legal discourses; instructive seeks to incorporate legal theories into the law school curriculum; and finally, praxis, where scholarship offers guidance to practitioners and community outside of law school. *See generally* Lawson, *supra* note 24, at 354. This article utilizes these methodologies in teaching and shares Lawson's goal of building a critical praxis.

31 *See* Kirksey v. Kirksey, 8 Ala. 131, 133 (1845).

32 *See* William R. Casto & Val D. Ricks, *"Dear Sister Antillico…": The Story of Kirksey v. Kirksey*, 94 GEO. L.J. 321, 324 (2006). I require students to read an excerpt of this article along with a short reading on racial capitalism.

33 *See* Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES, https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html (last updated Aug. 27, 2020).

held notion within contracts that ultimately, the market is fair.[34] Third, racial capitalism helps to explain why reparations[35] remain an elusive goal despite the existence of unjust enrichment as a restitution principle long recognized as an equitable legal theory.[36] The call for reparations discloses the integral role that United States capitalism has and continues to play in the subjugation of Black labor and the extraction of wealth from communities.[37] It is perhaps why even legislation to establish a commission to study its feasibility continually fails. Finally, I conclude with some thoughts on how introducing this theory allows students to explore anti-capitalist and anti-racist lawyering approaches. Before I discuss these examples, I provide some context of how I am using the phrase racial capitalism in its broadest sense while remaining fully aware of its contested meanings.

I. RACIAL CAPITALISM: CONCEPTUAL ELABORATIONS, ALIGNMENT WITH CRITICAL RACE THEORY AND INTERVENTIONS IN LAW

Scholar Cedric Robinson popularized the theory of racial capitalism,[38] though as scholar Charisse Burden-Stelly discusses in her piece *Modern U.S. Racial Capitalism*, many Black anti-capitalist thinkers, including Claudia Jones, have articulated views

34 *See id*.

35 *See* Margalynne Armstrong, *Reparations Litigation: What About Unjust Enrichment?*, 81 OR. L. REV. 771, 772 (2002).

36 In response to the scholar strike, I converted my office hours to a conversation on reparations and restitution, and elaborate those points here in this article. *See generally* Anthea Butler & Kevin Gannon, *Why We Started the #ScholarStrike,* CNN, https://www.cnn.com/2020/09/08/opinions/starting-a-scholar-strike-butler-gannon/index.html (last updated Sept. 8, 2020, 2:20 PM).

37 *See* MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY, AND SOCIETY 2 (Haymarket Books 2015) (1983) (arguing that American democracy and market is "structured deliberately and specifically to maximize Black oppression[]" and that capitalism did not advance "in spite of the exclusion of Blacks, but because of the brutal exploitation of Blacks as workers and consumers[]").

38 *See* Angela Davis, Interview by Gaye Theresa Johnson and Alex Lubin, *An Interview on the Futures of Black Radicalism*, in FUTURES OF BLACK RADICALISM ch. 15 (Gaye Theresa Johnson & Alex Lubin eds., 2017) (stating that the concept associated with Robinson's book Black Marxism that is most transformative is the idea of racial capitalism); *see also* Ruth Wilson Gilmore, *Abolition Geography and the Problem of Innocence*, *in* FUTURES OF BLACK RADICALISM ch. 14 (Gaye Theresa Johnson & Alex Lubin eds., 2017) (referencing Cedric Robinson by stating "[c]apitalism: never not racial").

akin to racial capitalism.[39] In invoking racial capitalism as a critical framework, I intend it to encompass past and recent elaborations of the concept by Black feminists.[40] Carole Boyce Davies, while noting the limitations of Robinson's work on gender, nonetheless comments that his work makes space such that "other intellectual projects could evolve[]" and that those projects were advanced by a generation of Black feminists.[41] Claudia Jones, often ignored, offers an intersectional conception of capitalism that considers the economy, race, and gender.[42] The 1977 Combahee River Collective Statement also makes clear that any liberation project requires "the destruction of the political-economic systems of capitalism and imperialism . . . ."[43] But such a project must be feminist and anti-racist. In this section, I also include Critical Race Theory (CRT) in this iterative elaboration of racial capitalism as being an aligned framework emerging from the context of law and legal studies.[44] Finally, as this article seeks to illustrate, integrating racial capitalism as a framework in law, especially in fields

39 *See* Burden-Stelly, supra note 22; *see also* Charisse Burden-Stelly et al., *Racial Capitalism, Black Liberation, and South Africa*, BLACK AGENDA REP. (Dec. 16, 2020), https://www.blackagendareport.com/racial-capitalism-black-liberation-and-south-africa (positing that the phrase "racial capitalism" emerged in the context of anti-apartheid and southern African liberation struggles in the 1970s); Arun Kundani, *What is Racial Capitalism?*, ARUN KUNDNANI ON RACE, CULTURE, & EMPIRE (Oct. 23, 2020), https://www.kundnani.org/what-is-racial-capitalism/ (discussing different formulations of the concept of racial capitalism from South African scholars, UK scholars, and Robinson to demonstrate that it is still in the process of being clarified).

40 *See* Carole Boyce Davies, *A Black Left Feminist View on Cedric Robinson's Black Marxism,* BLACK PERSPECTIVES (Nov. 10, 2016), https://www.aaihs.org/a-black-left-feminist-view-on-cedric-robinsons-black-marxism/.

41 *Id.* (noting that Robinson's Black Marxism serves as a point of departure for other activist scholars). *See* H.L.T. Quan, *Geniuses of Resistance: Feminist Consciousness and the Black Radical Tradition,* 47 RACE & CLASS 39, 39 (2005).

42 *See* CLAUDIA JONES, AN END TO THE NEGLECT OF THE PROBLEMS OF THE NEGRO WOMAN! 19 (1949), *reprinted from* POLITICAL AFFAIRS ("To win the Negro woman for full participation in the anti-fascist, anti-imperialist coalition, to bring her militancy and participation to even greater heights in the current and future struggles against Wall Street imperialism, progressives must acquire political consciousness as regards her special oppressed status.").

43 Combahee River Collective, *The Combahee River Collective Statement*, BLACKPAST (Nov. 16, 2012), https://www.blackpast.org/african-american-history/combahee-river-collective-statement-1977/.

44 *See* HARRIS, *supra* note 26, at vii (noting law as a key cite to develop new scholarship in racial capitalism that brings together scholars in diverse fields to "disrupt some of the discourses that sustain neoliberal governance[]").

like corporations and contracts that closely involve capitalism, opens up new potential to critique capitalist democracy.[45] Those critiques can, in turn, reveal alternate sites and strategies for lawyering.

For Robinson, the theory of racial capitalism asserts that the development of capitalism in the United States was far from "neutral" or modern but produced a racialized form of capitalism.[46] He writes: "[t]he development, organization, and expansion of capitalist society pursued essentially racial directions . . . ."[47] Racism is not a byproduct of capitalism; rather, capitalism is racialized in its very origin and functions by assigning measurable benefits based on race. Modern racism evolved with capitalism.[48] Referencing Robinson's theory, activist-scholar Angela Davis notes that "[w]hile it is important to acknowledge the pivotal part slavery played in the historical consolidation of capitalism, more recent developments linked to global capitalism cannot be adequately comprehended if the racial dimension of capitalism is ignored."[49] Racial capitalism provides an important through-line for students to understand how racial inequalities are reproduced in the present and the law's role in this reproduction. As essentially a political-economic theory, it is particularly useful to draw connections between legal doctrine and the market economy. It stands in contra-distinction to the dominant classical and neoclassical economic theory embedded in contract doctrine.

Burden-Stelly incorporates the intellectual contributions of Black anti-capitalist scholars to define racial capitalism broadly as: "a racially hierarchical political economy constituting war and militarism, imperialist accumulation, expropriation by domination, and labor superexploitation."[50] This robust definition allows for an expansive examination of legal doctrine. Relevant to this article's discussion of anti-capitalist lawyering is her observation

45 *See id*. at x.

46 Robin D. G. Kelley, *Foreword* to CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (University of North Carolina Press 2000) (1983).

47 ROBINSON, *supra* note 3, at 2.

48 *See id*. at 3 (discussing how racism was present in Europe, and also how racism impacted social structures in capitalism).

49 Interview by Gaye Theresa Johnson & Alex Lubin with Angela Y. Davis, *Angela Davis: An Interview on the Futures of Black Radicalism*, VERSO (June 23, 2020), https://www.versobooks.com/blogs/3421-angela-davis-an-interview-on-the-futures-of-black-radicalism.

50 Burden-Stelly, *supra* note 22.

that a racialized capitalism is also linked to anti-radicalism, defined as "discursive repression and condemnation of anticapitalist and/or left-leaning ideas, politics, practices, and modes of organizing that are construed as subversive, seditious, and otherwise threatening to capitalist society."[51] This theoretical link to modes of organizing is critical because such a framework reveals not only how law functions to reinforce racial and economic subordination but also legal practices and strategies that get to the root of structural racism and economic inequality. Racial capitalism provides the praxis necessary for law students committed to a particular form of anti-racist and anti-capitalist lawyering.

CRT as a legal paradigm, though not explicitly focused on political economy or capitalism, shares with the concept of racial capitalism a concern for the link between race and power.[52] Arising in response to Critical Legal Studies (CLS), which also critiqued the formalist origins of legal theory in the United States and the indeterminacy of law, CRT reveals the centrality and complicity of law in maintaining racial subordination.[53] CRT questions "the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law."[54] Since CRT theorizing focused mainly on the state and political rights, which United States jurisprudence deems separate from economic rights, scholars did not theorize on

51 *Id.*

52 *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxv (Kimberlé Crenshaw et al. eds., 1995) (discussing how law constructed race and produced racial power "through [a] myriad [of] legal rules" that created structures of racial domination even within a legal liberal discourse); *see also* Derrick Bell, *Who's Afraid of Critical Race Theory?*, U. ILL. L. REV. 893, 898 (1995) (describing CRT as "a body of legal scholarship . . . committed to the struggle against racism"); Chase, *supra* note 7, at 41–42; Crenshaw, *supra* note 17, at 1336 (discussing racism as a central foundation to American society); Anthony Paul Farley, *When the Stars Begin to Fall: Introduction to Critical Race Theory & Marxism*, 1 COLUM. J. RACE & L. 226, 226 (2012) (commenting on CRT's missing element that is a critique of political economy).

53 *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 52, at xi-xii.

54 RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3 (3d ed. 2017) (noting that "[t]he [] CRT movement is a collection of activists and scholars engaged in studying and transforming the relationship among race, racism and power[]"); *see also* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 52, at xix (describing CRT as an attempt by progressive scholars of color to make "a left intervention into race discourse and a race intervention into left discourse[]"); Lawson, *supra* note 24, at 355–56 (citing Delgado and Stefancic, who list the CRT themes as including a critique of liberalism storytelling as a way to name one's reality, understanding of race of racism, and the intersection with race and sex).

a law on capitalism.[55] Bringing racial capitalism within CRT allows for this theory to develop; CRT theorists are scholars from whose work a critique of capitalism can develop. CRT scholar Cheryl Harris in *Whiteness as Property* details how race and property are deeply intertwined concepts such that whiteness has its own social identity and value.[56] Whiteness as a commodity is premised and maintained by Black subordination[57]; as such, people who identify as white benefit in tangible ways from the perpetuation of racism. While Harris does not use the phrase racial capitalism, her conceptualization of race is based on an understanding of how both race and economy intertwine to perpetuate inequality and racial subordination.[58] Where Harris and Robinson perhaps differ is on *when* race and economy fused: for Harris it was during slavery in the United States.[59] For Robinson, it occurred earlier in Europe.[60] Nevertheless, Harris's groundbreaking scholarly contribution as to how whiteness functions as property can be considered a legal analog to racial capitalism.[61] She notes that whiteness continues to be "materially significant"[62] and remains a concept based on social power.

Law legitimates and normalizes whiteness in our legal structure as the neutral state, which in turn obscures inequalities.[63] Through affirmative action jurisprudence, Harris demonstrates how whiteness as property is maintained in the present.[64] Harris's methodology, combined with the broader literature on racial capitalism, helps to sharpen this article's focus on contracts. Further, it is important to note that while CRT originated in the legal academy and is an intellectual movement, it aligns itself with traditions of resistance and liberation.[65] It seeks to understand not only

55 *See* Harris, *supra* note 26, at xi.

56 *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1710, 1757–58 (1993).

57 *See id.* at 1720–21; *see also id.* at 1726 ("White identity conferred tangible and economically valuable benefits and was jealously guarded as a valued possession, allowed only to those who met a strict standard of proof.").

58 *See id.* at 1745, 1753.

59 *See* Kelley, *supra* note 46, at xiii; ROBINSON, *supra* note 3, at 9.

60 *See* Harris, *supra* note 56, at 1718 n.31, 1724 n.56 ("Through slavery, race and economic domination were fused.").

61 *See id.* at 1731.

62 *Id.* at 1758.

63 *See id.* at 1769, 1777–78.

64 *See id.* at 1781–782.

65 Cornel West describes CRT as "a gasp of emancipatory hope that law can serve liberation rather than domination." Cornel West, *Foreword* to CRITICAL RACE THEORY: THE

how racial subordination is created but how to change it.[66] Integrating racial capitalism, with its focus on political economy in law, could also contribute to greater connections and analytical frameworks among diverse social movements around the globe, such as environmental justice, with a critique of capitalism.[67] Introducing critical frameworks enables students to imagine legal strategies that resist inequality.

In this article, I also draw from writers in other disciplines such as Keeanga Yamahtta Taylor's book Race for Profit,[68] Ta-Nehisi Coates' article on reparations,[69] and Nikole Hannah Jones' 1619 Project.[70] While these pieces present, to varying degrees, critiques of a racialized political economy, they do not explicitly mention racial capitalism especially as it relates to law and legislation. For that reason, integrating this critical framework with contracts in its broadest formulation allows students to access other viewpoints and observe how tensions can exist within a theory. Racial capitalism; its elaborations across varied disciplines, including law; and its continued significance; underscore the importance of employing this framework in the contracts class curriculum.

KEY WRITINGS THAT FORMED THE MOVEMENT xii (Kimberlé Crenshaw et al. eds., 1995); *see* Bell, *supra* note 52, at 900 (explaining that CRT is committed to scholarly resistance).

66 *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 52, at xiii.

67 *See id*. at xiv (referencing the sixties as an example of a period when ideas about racial power and social transformation were imbued with the mass mobilization of social energy and civil rights movements).

68 *See generally* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019).

69 *See generally* Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

70 *See generally* Nikole Hannah-Jones, *The 1619 Project: Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html.

II. *KIRKSEY* DECONSTRUCTED:[71] ACCUMULATION OF WHITE WEALTH; BLACK SUBORDINATION[72]

By applying racial capitalism to a commonly read contracts case, this section seeks to illustrate how the framework reveals inadequacies and incompleteness within traditional legal analysis and can provide students with a deeper insight into contract law. Racial capitalism challenges the assumptions embedded in contract law and engages with the lived experiences of racialized and oppressed communities.[73] It introduces pluralist perspectives, which challenge the idea that contract law is about neutrality and fairness.[74] Ultimately, rather than assimilating law students into *one way* of thinking, this approach democratizes the curriculum and better serves the educational objectives of a law school and democratic society.[75] Such an approach also moves law schools towards their goals of inclusion and anti-racism.

Kirksey v. Kirksey is a case read by most first-year law students and is, as scholars William R. Casto and Val D. Ricks write, "a great teaching case."[76] They argue that "*Kirksey*'s primary significance today lies in its use as a tool for introducing students to some of the more rudimentary aspects of the law of contracts."[77] It seems important, then, to apply a racial capitalism analysis to this foundational case. I agree that it is a great teaching tool, but it also

71 Deconstruction, a practice of interpreting texts to demonstrate the ideological biases of the legal doctrines, is suggested as a useful technique to introduce race into discussions of contracts. *See* Chase, *supra* note 7, at 61.

72 *See* Harris, *supra* note 56, at 1761 (noting that whiteness is "a social construct predicated on white dominance and Black subordination[]").

73 *See* Chase, *supra* note 7, at 41.

74 *See id.*

75 *See* Bennett Capers, *The Law School as a White Space,* 106 MINN. L REV. 1, 37 n.184 (2021) (describing how educational institutions assimilate their students into ways of thinking); *id.* at 11 (applying sociologist Elijah Anderson's work on white space, where "black people are . . . absent, not expected, or marginalized when present[]" in law school, and arguing that law schools remain white spaces unless what and how courses are taught are examined).

76 Casto & Ricks, *supra* note 32, at 324.

77 *Id*. at 326.

provides a way to demonstrate how neutral discussions of core contracts principles, such as the unenforceability of gratuitous promises, consideration, and reliance, obscure how law maintains racial and economic subordination.[78]

In *Kirksey v. Kirksey*, the plaintiff Antillico Kirksey was the wife of defendant Isaac Kirksey's brother but had for some time been a widow and had several children.[79] Isaac invited his widowed sister-in-law and children to his residence, put her in a comfortable house, and gave her land to cultivate for two years.[80] At the end of that time, he moved her into an uninhabitable house and eventually evicted her.[81] Antillico sued to enforce his promise to stay and have a place to raise her family.[82] The court held that Isaac's promise was not enforceable because it was not bargained for and was a mere gratuity.[83] One of the judges, however, would have found there was sufficient consideration to enforce the promise because Antillico moved and uprooted her family.[84] The case allows professors to explore a wide range of pedagogical objectives including the distinction between bargained for exchange and promissory estoppel, the relationship between the parties, and the relationship of facts to the law.[85] Therefore, it is also a natural entry point to introduce a critical framework like racial capitalism.

Through the meticulous research of scholars Casto and Ricks, we learn that Isaac made his wealth buying and selling land[86] he obtained through federal land grants[87] and that he was a

78 "American law students should not leave [] law schools . . . [without] a thorough and explicit grounding in the role that race has played in the creation and transformation of central legal institutions." Ansley, *supra* note 15, at 1520.

79 *See* Kirksey v. Kirksey, 8 Ala. 131, 132 (1845).

80 *See* Casto & Ricks, *supra* note 32, at 340.

81 *See id*.

82 *See id*. at 353.

83 *See Kirksey,* 8 Ala. at 133.

84 *See id*.

85 *See* Casto & Ricks, *supra* note 32, at 375–76, 380 (discussing varied ways professors use the case).

86 *See id*. at 337 (explaining that Isaac did not buy land to cultivate, but to sell at a profit).

87 Acts passed were designed to legalize the possession of land by white settlers by purchasing the land at a severely discounted price. *See id*. at 341. These laws gave way to the Homestead Act of 1862. *See* Tom Philpott, *Black Farmers Have Been Robbed of Land. A New Bill Would Give Them a "Quantum Leap" Toward Justice*, MOTHER JONES FOUND. FOR NAT'L PROGRESS (Nov. 19, 2020), https://www.motherjones.com/food/2020/11/black-farmers-have-been-robbed-of-land-a-new-bill-would-give-them-a-quantum-leap-toward-justice/. "[T]he westward expansion of the United States was largely driven by land grabs followed by handouts." *Id.* The biggest of them all was the Homestead Act, signed into law by

slaveowner.[88] He invited Antillico to his residence to put her on public land so that he could buy it from the government at a discount.[89] Land laws at the time made him ineligible because he already owned over 320 acres of land.[90] He needed her to serve as a placeholder for the land so that he could eventually place his son there.[91] Antillico also sought a claim to the land, but she did not provide evidence of her arrangement with Isaac apart from the inconvenience of having moved her family.[92] Evidence of their arrangement may have provided the consideration necessary to support her contract claim. However, under land laws, her role as a placeholder for Isaac may have defeated her own claim to the land.[93] There is also evidence that Antillico brought the lawsuit in hopes of obtaining money to purchase the land.[94]

What emerges from this in-depth historical review, which includes a review of litigation documents, are two parties who presented their contract claims to gain an advantage through land laws that deprived indigenous people of their land[95] and historically excluded Blacks.[96] The presentation of the case, which raises issues of gratuitous promises, bargained for exchange, and promissory estoppel as being between two individuals, conceals legal

Abraham Lincoln in 1862, which ultimately delivered about 270 million acres—about [ten] percent of the [U.S.] land base—to smallholders." *Id.*

88 *See* Casto & Ricks, *supra* note 32, at 332.

89 *See id.* at 325; *see also id.* at 340 ("Isaac in fact invited [Antillico] down as part of a scheme to grab rights to more land, and he invited her off of the property in furtherance of that scheme.").

90 *See id.* at 338, 342.

91 *See id.* at 325.

92 *See id.*at 385.

93 *See id.* at 352.

94 *See id.* at 325.

95 *See id*. at 332, 336 (detailing that Isaac was one of the first white men to own land in his county, just months after the Creek Indian cession).

96 *See* Thomas W. Mitchell, *From Reconstruction to Deconstruction*: *Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 523–24, 526 (2001), for a discussion on the exclusion of Black persons from the benefits of federal land laws. Prior to Emancipation, enslaved persons were denied the right to own land; while the period 1865-1910 showed promise of land redistribution, ultimately federal efforts failed miserably. *See id.* at 523, 525–26. One study showed that seventy-seven percent of applications for land under the Southern Homestead Act intended for freed men went to white settlers while Black Americans experienced discrimination in efforts to apply for land. *See id.* at 526. Any land gained, which was later "wiped out" after 1916, was after overcoming discriminatory credit practice and violence. *Id*. *See also Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE, https://lynchinginamerica.eji.org/report/ (last visited Sept. 27, 2021) (noting that "'[t]error lynchings peaked between 1880 and 1940 . . . ").

ploys of power and racial subordination.[97] Without this context, students are unable to discern how contract law reinscribes and sustains racial power.[98] Some students feel sympathetic for Antillico, who moved her large family to live close to Isaac only to be evicted by him. Others side with Isaac on some notion that he should not be legally burdened for wanting to help his sister-in-law. We know that Isaac's motives were not at all benevolent. From a gendered perspective,[99] students find some sympathy for Antillico, as her relationship to her brother-in-law Isaac is disadvantageous due to the structure of patriarchy. However, her whiteness[100] also gave her a potential claim to land rights over Blacks, who were systematically and violently excluded from making such claims.[101] The outcome of the case and the perceived injustice to Antillico were used to bolster arguments in support of the doctrine of promissory estoppel, which allows parties to enforce promises not supported by consideration if they rely on it to their detriment.[102] Even if the court ruled for Antillico on a theory of promissory estoppel, her "detriment" obscures the then realities of Blacks and Native Americans. This result would also obscure a choice that whites at that time could have made to disrupt racism and refuse to participate in land schemes that dispossess Native Americans and Blacks.[103] A narrow legal analytic approach to the case fails to give students a robust understanding of the doctrine

97 *See* Forward v. Armstead, 12 Ala. 124, 127 (1847). Kirksey is cited in another Alabama case, which reveals the context at the time. *See id*. A father promises his son if he moves to Alabama from North Carolina that he would give him the plantation and slaves. *See id.* at 124–25. The court discussed the idea of whether this promise was a gift and held that the facts were not as strong as those in Kirksey; the land was a gift. *See id.* at 127.

98 *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 52, at xxv (defining racial power, not as a by-product of biased decision-making, but how "law shapes and is shaped by 'race relations'" and reproduces structures of racial domination).

99 *See* Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1252–53 (1999) (discussing how women were largely excluded from market transactions and thus contract law's domain).

100 *See* Casto & Ricks, *supra* note 32, at 326 n.14 (mentioning that Antillico was not an entirely innocent party, had benefitted from slavery, was at times a slaveholder, and had the capacity to bring suit unlike persons enslaved and subjugated).

101 *See* Todd Lewan et al., *Landownership Made Blacks Targets of Violence and Murder*, AUTHENTIC VOICE (Dec. 3, 2001), https://theauthenticvoice.org/mainstories/torn-fromtheland/torn_part2/ (citing the Tuskegee Institute and the National Association for the Advancement of Colored People, which documented over 3,000 lynchings between 1865 and 1965 and found most of those lynched owned property).

102 *See* RESTATEMENT (SECOND) OF CONTRACTS § 336 cmt. g (1981).

103 The construction of whiteness was a deliberate strategy to keep poor whites and Blacks from uniting around class interests. *See* POWELL, *supra* note 21, at 151.

and fails to reveal how the doctrine is formed on the exclusion of others whose stakes to the claim for land were denied. Thus, contract law is not about what promises to enforce but rather reflects which socio-economic and power relationships are validated when courts enforce certain promises. From a praxis standpoint, a narrow legal analytic approach presents doctrine as fixed and inevitable and disempowers students from making choices to be anti-racist.

Racial capitalism analysis allows students to observe the economic dimension to this racial subordination. That the parties manipulated the law and courts by seeking to obtain an economic advantage through a land acquisition scheme demonstrates how contract law enables the accumulation of wealth afforded to the Kirkseys by virtue of their whiteness.[104]

Slavery, seizure of Native American land, and the Kirkseys' roles as slaveowners are not unimportant or peripheral historical facts but are constitutive of Isaac's "promise" of (or *right to promise)* land to cultivate to Antillico. This right to make a promise is afforded to him because of his whiteness.[105] The court's ruling in favor of Isaac and refusal to enforce his promise to Antillico legitimate the bases upon which he made the promise, thereby providing an imprimatur to his land schemes, which he used to increase his wealth.[106] The concept of racial capitalism exposes for students this legal maneuvering and the law's complicity.[107]

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104 *See* Harris, *supra* note 56, at 1724 (discussing how "[t]he legacy of slavery and of the seizure of land from Native American peoples . . . established and protected an actual property interest in whiteness . . . .").

105 *See id.* at 1729–31 (explaining that whiteness as property implies that there is an advantage in its possession and expectation of its continuance).

106 *See* Kirksey v. Kirksey, 8 Ala. 131, 132 (1845) (verdict found for Isaac); *see also* posting from Katherine Packer, Student, CUNY L. Sch., to Contracts (LME I) Private Forum, Re: Gender in Kirksey v Kirksey (Aug. 31, 2021) (on file with author). Katherine noted that this holding validates the notion that "Isaac, as a white man, is the proper steward of the land and potentially of his brother's widow because it is his land and she is his to move as he sees fit, so if he has made that determination, then the judges stand by his choice." *Id.* I add that this contrasts with Native Americans as the stewards of land, thereby reinforcing settler colonialism, which is beyond the scope of this paper. The gender and racial components of this case are illuminated by a Black feminist understanding of racial capitalism.

107 *See* Keri Leigh Merritt, *Land and the Roots of African-American Poverty*, AEON MEDIA GRP. (Mar. 11, 2016), https://aeon.co/ideas/land-and-the-roots-of-african-american-poverty (discussing how whites benefited from federal land grant laws such as the Homestead Act of 1962); *see also* Capers, *supra* note 75, at 30 (listing manifest destiny, the law of empire, and the rules of criminal procedure as topics that can be used to highlight the complicity of the law in racial capitalism).

Further, introducing the concept of racial capitalism does more than the oft suggested advice to discuss race in first-year courses, as an additive or supplement. Instead, it invites students to challenge the very foundations of contract law that normalize neoclassical economic theory. This critical framework does not simply lift the curtain on the racial and economic power the doctrine conceals but seeks to change the stage altogether.[108] Here, Black feminist epistemology is instructive.[109] Epistemology inquires *why* we believe what we believe to be true:

Epistemological choices about whom to trust, what to believe, and why something is true are not benign academic issues. Instead, these concerns tap the fundamental question of which versions of truth will prevail, and shape thought and action.[110]

Since United States institutions, especially law schools, embody and validate Western and Eurocentric knowledge systems,[111] when students are invited to question those views as being universal truths or introduce their own belief systems, "then all prior knowledge claims validated under the dominant model becomes suspect[]"[112] and open to scrutiny. The invitation is to question the content of what is communicated as truth.[113] This is precisely the critical thinking in which we should want our students to engage. It equips them with the instinct to challenge those norms in their actions generally and specifically as a lawyer. Such a pedagogical approach democratizes legal education because it makes room for alternative views, and it does not reify the interests of students whose values align with dominant ideas.[114]

108 *See* Capers, *supra* note 75, at 30 (describing that law schools teach students "to rearrange the apples in the apple cart[]" and not "to upset the apple cart altogether[]").

109 *See* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 252 (2000).

110 *Id.*

111 *See* Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 MINN. J.L. & INEQ. 323, 338–39 (1997) (noting that the law promotes European values and interests at the expense of all others).

112 COLLINS, *supra* note 109, at 271.

113 *See id*; *see also* Capers, *supra* note 75, at 40–41.

114 *See* Chase, *supra* note 7, at 58 (discussing how law students are taught to examine doctrine, but not the very body of thought that underpins those doctrines, and so the impact of this approach "is that the cultural perspective of most white law students is validated, while the perspectives of rights, fairness, justice, and equality of many African-American students and professors are seen as less worthy of serious consideration[]"); *see also id.* at 32 (noting that the law currently taught is deeply "inflected with white interests[,]" and must be democratized in order to teach incoming students how to help the country become a more fair and responsive place).

In sum, introducing the concept of racial capitalism to a common contracts case like *Kirksey* empowers students with an analytic tool and methodology to approach the doctrine, which they can bring to other cases[115] and later to the profession. It provides them with a robust understanding of the doctrine. It invites them to question ideas presented as universal and fixed truths and enables them to imagine new possibilities for law that are anti-racist and equitable.

III. INTERPLAY OF LAW, RACE, AND THE CAPITALIST MARKET: THE EXAMPLE OF BLACK HOME OWNERSHIP[116]

The interplay of race and contracts is often discussed as to how contracts law furthers stereotypes that Blacks are in need of paternalist legal protection[117] or burdened by discrimination in *accessing* the market.[118] It obscures the relationship between law

115 *See, e.g.* State Bank of Standish v. Curry, 500 N.W.2d 104 (Mich. 1993) (a case brought under promissory estoppel, and an important contracts case in understanding the political-economic factors that underpin contracts). *See* Deborah Post, *Of Milk, Markets, Populism and Promissory Estoppel: State Bank of Standish v. Curry*, 45 FLA. STATE. U. L. REV. 945, 945 (2018) (detailing how "[p]olitical and economic struggles . . . are implicated in contract disputes between farmers and banks[]"); Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333, 337, 341 (2001) (stating that the United States Department of Agriculture's loan structure, including devolution of decision to local farmers, most of whom are white, resulted in a sustained lack of access to funds to Black farmers and eventually their land loss).

116 *See* Angela Hanks et al., *Systemic Inequality: How America's Structural Racism Helped Create theBlack-White Wealth Gap,* CTR. FOR AM. PROGRESS (Feb. 21, 2018, 9:03 AM), https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/ (finding that African American families hold less wealth than white families and that even after considering positive factors such as increased education levels, African Americans have less wealth than whites, evidencing structural racism).

117 For example, Chase argues that the inclusion of the *Williams v. Walker-Thomas Furniture Co.* case, which involves African American consumers, as an example of unconscionability implies a weakness and need for protection by the white power structure. *See* Chase, *supra* note 7, at 38–39, 57; *see also* Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 96 (1993–1994) (finding that the Court's assumption that Williams' lack of education accounts for her failure to understand the legal significance of the clause is paternalistic).

118 Other ways contract professors have discussed race and contracting is by assigning 42 U.S.C. Section 1981 cases which provide that "[a]ll persons . . . shall have the right to make and enforce contracts . . . as is enjoyed by White citizens." *See* Calleros, *supra* note 17; for an overview of the history of 1981, how contract law limits its radical scope intended to address discrimination in contracting, and recent retail cases, *see also* Charlotte H. Sanders, *Come Down and Make Bargains in Good Faith: The Application of 42 U.S.C. § 1981 to*

and capitalism.[119] The legal solutions then focus on doctrines such as unconscionability or federal anti-discrimination laws to remove discriminatory barriers to the market.[120] While those solutions are no doubt helpful, they do not incorporate a political economy perspective such as racial capitalism which implicates law in maintaining those racially exploitative capitalist market structures. Instead, the traditional approach leaves the impression that the capitalist market economy does not inherently discriminate, and when discrimination occurs, it can be corrected by modest legal interventions.[121] The traditional approach leaves unexamined contract doctrines like adequacy of consideration[122] where courts do not inquire about social identities of the parties to an agreement or whether the terms are fair and how such a race-neutral doctrine can serve to reinforce racial discrimination.[123] So, more critical legal approaches are needed to challenge the racism inherent to capitalism.

Race and National Origin Discrimination in Retail Stores, 4 HASTINGS RACE & POVERTY L.J. 281, 281–83 (2007).

119 *See* Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy,* 21 THE SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 255, 270-71 (2019) (discussing how the first-year legal curriculum has remained unchanged, how the case method was designed to "meet the legal needs of Industrial America" and how 1L curriculum of Property and Contracts reflect legal tools to "maintain the imperialist, capitalist, White supremacist patriarchy[]").

120 *See Discriminatory Housing Markets, Racial Unconscionability, and Section 1988: The Contract Buyers League Case*, 80 YALE L.J. 516, 518 (1971) (describing how a seller's liability arises from an unequal bargaining position where Black buyers are disadvantaged); *see also* McMurtry-Chubb, *supra* note 119, at 531–32 (describing how a seller's egregious conduct bearing little resemblance to what is normally considered discriminatory gives rise to the doctrine of unconscionability); Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation,* 52 DEMOGRAPHY 1025 (2015), https://read.dukeupress.edu/demography/article/52/3/1025/169528/A-Research-Note-on-Trends-in-Black (demonstrating through a study that the number of racially hyper-segregated communities has slowly declined since the passage of the 1968 Fair Housing Act, the 1974 Equal Credit Opportunity Act, and the 1977 Community Reinvestment Act).

121 *See* Richard Delgado, *Rodrigo's Equation: Race, Capitalism, and the Search for Reform,* 49 WAKE FOREST L. REV. 87, 93, 103 (2014) (explaining that the law is not a useful tool for reform for capitalism because law and capitalism are the same; in the context of civil rights there may be momentary advances when white self-interest requires those advances).

122 The general rule in contracts is that law will not inquire into the adequacy of the consideration of a bargain if the consideration is valid, meaning it will not look at the relative value or worth of the exchange. *See* Samuel Williston, Adequacy of Consideration §7:21, Westlaw (4th ed. updated May 2021).

123 *See* Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. OF RACE & L. 30–31 (2013) (discussing that the foundation of the doctrine of consideration assumes a neutral playing field when in reality, pricing in the United States tends to vary according to the race, class, and gender of the consumer).

Black homeownership,[124] especially in the context of home appraisals, illustrates[125] how racial capitalism challenges the assumed fairness of the market in contract doctrine and the inability of capitalism to achieve equity. Further, such an approach to contract teaching empowers students to explore anti-capitalist lawyering strategies.[126] In class, I focus on the case of Florida bi-racial couple Abena and Alex Horton, who were able to obtain a higher appraisal on their home after removing evidence of their "blackness"[127] This case is not uncommon; cases like this exist throughout the United States.[128] It provides an excellent example to

[124] It is beyond the scope of this article to discuss Black homeownership and the possible strategies to address racial discrimination. I focus on Black homeownership not to suggest it as a preferable strategy for achieving equity, but more to underscore the point that even where BIPOC, as owners of private property or capital, are thought to be in a favorable market position, we still observe that their ownership is valued less by virtue of their race.

[125] The appraisal example is suggested as one way to illuminate to students the role of law in reinforcing inequality. Along with State Bank of Standish v. Curry, 500 N.W.2d 104 (Mich. 1993) (discussed in note 115), the denial of land and loans to Black farmers also evidences the interplay of law, market, and race. For instance, in 1920, there were 949, 889 farmers, and now out of "3.4 million total farmers, only 1.3%, or [fifty-four], 508 are [B]lack." *See* Summer Sewell, *There Were Nearly a Million Black Farmers in 1920. Why Have They Disappeared?* THE GUARDIAN (Apr. 29, 2019), https://www.theguardian.com/environment/2019/apr/29/why-have-americas-black-farmers-disappeared (discussing discrimination in USDA loans, the landmark *Pigford v. Glickman* litigation alleging rampant discrimination by the USDA, and legislative advocacy for farmers unaware of the lawsuit); *see also* Zoe Willingham, *Progressive Governance Can Turn the Tide for Black Farmers*, CTR. FOR AM. PROGRESS (Apr. 3, 2019), https://www.americanprogress.org/issues/economy/reports/2019/04/03/467892/progressive-governance-can-turn-tide-black-farmers/ (providing a historical overview of sanctioned discrimination by the USDA, and recommending policy changes such as advocating for land trust, federal protection for farmers, and stringent oversight of USDA to remedy past discrimination); *see also* Philpott, *supra* note 87 (discussing the Justice for Black Farmers Act, which would, among other actions, buy farmland in the open market, grant land, and provide technical assistance to Black farmers).

[126] *See infra* Part V, which demonstrates student responses to how an anti-capitalist framework empowers students to explore anti-capitalist themes in their lawyering strategies.

[127] Anne Schindler, *Florida Couple Sees Home Appraisal Jump 40% After They Remove all Traces of "Blackness"*, ABC 10 (Aug. 25, 2020), https://www.abc10.com/article/news/local/jacksonville-couple-sees-home-appraisal-jump-40-percent-after-they-remove-all-traces-of-blackness/77-c3087e8c-0c65-4fb9-8319-da82f5c0ea20. *See* Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Aug. 25, 2020), https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html; Aris Folley, *Florida Couple Says Home was Appraised 40 Percent Higher After Removing Black Relatives' Photos*, THE HILL (Aug. 26, 2020), https://thehill.com/policy/finance/housing/513770-florida-couple-says-home-was-appraised-for-40-percent-higher-after.

[128] In Denver, *see* Troy McMullen, *When Race Plays a Role in Home Appraisals*, THE INQUIRER (Jan. 27, 2021), https://www.inquirer.com/real-estate/housing/racial-bias-real-estate-appraisal-20210127.html (reporting that a house was appraised $145,000 higher when the wife, who is white, greeted the appraiser); in Indianapolis, *see* Antonio Planas, *After She Concealed her Race, Black Indianapolis Owner's Home Value Doubled,* NBC NEWS (May 17, 2021) https://www.nbcnews.com/news/us-news/after-concealing-her-race-black-indianapolis-owner-s-home-value-n1267710; in San Francisco, *see* Julian Glover, *Black California Couple Lowballed by $500k in Home Appraisal, Believe Race was a Factor,*

introduce racial capitalism: the racially discriminatory appraisal for the exact same home shatters the neoclassical view that the market is neutral, efficient, and fair for all parties. It also evidences that whiteness is, in fact, a commodity and has its own value in the market, as Harris discusses.[129] Further, Taylor's work shows how law works in tandem with racialized market structures to perpetuate extractive and exploitative business practices. Finally, race-neutral doctrines like adequacy of consideration prevent courts from examining the racial bias of these appraisals and agreements.

In *Race for Profit*, Keeanga-Yamahtta Taylor discusses how inclusion or market access legislative and policy strategies fail, and in fact, reinscribe the racial discrimination they seek to combat.[130] Taylor examines the turn from ending redlining, a long-standing housing discrimination policy, to encouraging homeownership among African Americans.[131] These home-ownership programs[132] under the United States Department of Housing and Urban Development (HUD) used federal subsidies, mortgage insurance guarantees, and the participation of the real estate industry to make homeownership affordable to poor and working-class families.[133] These policies incentivized real estate speculators[134] and the banking industry to view these programs as a "new frontier for economic investment and extraction" and used race to make a profit in an already racially bifurcated housing market.[135] Key is

ABC NEWS (Feb. 12, 2021), https://abc7news.com/black-homeowner-problems-sf-bay-area-housing-discrimination-minority-homeownership-anti-black-policy/10331076/; *see also* Andre Perry et al., *The Devaluation of Assets in Black Neighborhoods,* BROOKINGS INSTITUTE 3 (Nov. 27, 2018) (reporting that homes in Black neighborhoods were undervalued on average by $48,000, equaling $156 billion in losses).

129 *See* Harris, *supra* note 56, at 1721, 1725–26, 1758–59 (arguing that cultural practices that formulated whiteness could be described as a type of property to the exclusion of Blacks and Native Americans.)

130 *See* TAYLOR, *supra* note 68, at 5.

131 *See id.* at 3.

132 While beyond the scope of this article, Taylor points out that a central premise to homeownership policies was the idea that ownership was better than renting. *See id.* at 258. This policy reveals a commitment to private property. *See id.*

133 *See id.* at 3.

134 *See id.* at 145. A real estate speculator is "someone who buys cheap property with the intention of reselling them very quickly for as much money as possible." *Id.*

135 *Id.* at 4.

Taylor's concept of predatory inclusion: by tying housing policies to the market, Black homeowners were placed in greater precarity, at risk of losing housing, while the real estate industry profited.[136] Taylor writes:

> Real estate agents and speculators familiar with the landscape of the Black housing market were newly partnered with appraisers, mortgage bankers, and, of course, the FHA itself, which was quite inexperienced when it came to Black buyers and the urban housing market. These were the conditions that constituted predatory inclusion, where African Americans were no longer excluded but welcomed into the housing market on terms most favorable to the industry.[137]

This policy was premised on the neoliberal views that "law and [free-market] capitalism could finally produce fairness and equality for its Black citizens"[138] and that "inclusion [w]as the antidote to the crises created by exclusion."[139] This same view underpins much of contract doctrine. The result was the extraction of wealth from Black communities.[140]

Taylor specifically discusses appraisers and real estate speculators. Appraisers were particularly prone to bias because the industry lacked uniform standards, and the entire valuation process relies on racialized information.[141] Home values were based on the neighborhood and proximity to whiteness.[142] It is therefore not

136 *See id.* at 4–5 (discussing how African American home buyers were granted access to conventional real estate practices and mortgage financing, but on more expensive and comparatively unequal terms).

137 *Id.* at 147.

138 *Id.* at 8.

139 *Id.* at 17.

140 *See id.* at 52.

141 *See id.* at 148 (quoting a representative of the Society of Real Estate Appraisers who said "[the] job of the appraiser was to mirror the market."). Early training manuals of real estate appraisals were filled with racist stereotypes and values were assessed based on proximity to nonwhite ethnic groups. *See id.*

142 *See id.* at 254. The homogeneity of the population, read all white, and proximity to African Americans contributed to the value of real estate such that homes in Black neighborhoods are valued at fifty percent less than homes where there are no Black people. *See id.* at 149, 254, & 262; *see also* Brentin Mock, *A Neighborhood's Race Affects Home Values*

surprising that the Hortons and other Black homeowners would find dramatically different appraisals when the property was known to be owned by a Black person. Race to Profit helps explain how real estate speculators purchase property in low-income communities of color for a lower value, only to sell those homes at substantial profits, resulting in gentrified neighborhoods, where Black families are no longer able to afford to purchase homes.[143] As Harris' piece discusses, whiteness serves as a commodity that depresses the value of property when the seller is Black and drives up the value of the property when the seller is white.[144] Racial capitalism helps to explain the limitations Black homeowners face when contracting both as sellers and buyers.

Legal statutory changes alone will not change deeply ingrained racist values that shape our society, as Taylor argues through a close examination of FHA/HUD policies.[145] While she does not use the phrase racial capitalism, she writes: "racialized political economy challenged the idea that inclusion in the financial and public services that for so long had excluded African Americans was enough to overcome the physical and economic devastation of Black urban communities."[146] By not challenging this racialized economy, these policies support a real estate market where Black buyers are blamed and viewed as "risky" borrowers.

More Now Than in 1980, BLOOMBERG (Sept. 21, 2020, 2:29 PM), https://www.bloomberg.com/news/articles/2020-09-21/race-gap-in-home-appraisals-has-doubled-since-1980 (reporting that racial composition of a neighborhood is a stronger determinant of value in 2015 than in 1980 and showing increasing disadvantage to Black homeowners, which can't be explained by past racially discriminatory practices).

143 *See* Leo Goldberg & John Baker, *House Flipping in NYC: How Real Estate Speculators Are Targeting NYC's Most Affordable Neighborhoods*, CTR. FOR N.Y.C. NEIGHBORHOODS 3 (June 2018), https://s28299.pcdn.co/wp-content/uploads/2018/06/CNY002-Flip-Report_June2018-1-1.pdf (reporting that house flipping diminishes supply of homes for working-class families and legislative policies); *see also* Lylla Younes, *NYC House Flipping Is on the Rise, Exacerbating Gentrification*, GOTHAMIST (May 30, 2018, 8:59 PM), https://gothamist.com/news/nyc-house-flipping-is-on-the-rise-exacerbating-gentrification (stating that house flipping results in a wealth transfer from communities of color to wealthy investors); Jacob Adelman & Craig R. McCoy, *In Gentrifying Philly, Speculators Pay Heirs Peanuts – Then Flip Their Properties for Massive Gains*, PHILA. INQUIRER (Sept. 27, 2019), https://www.inquirer.com/real-estate/housing/philadelphia-real-estate-flippers-gentrification-heirs-inheritance-20190927.html (Providing an example of an instance where property bought at $14,000 sold at $144,000).

144 *See* Harris, *supra* note 56, at 1709.

145 *See* TAYLOR, *supra* note 68, at 257 (citing Equal Credit Opportunity Act, Home Mortgage Disclosure Act, and Community Reinvestment Act).

146 *Id*. at 254.

For contract-teaching purposes and connections to anti-capitalist lawyering, introducing these examples, as well as excerpts from Taylor's discussion on predatory inclusion to provide sociological context, allows law students to see the ways that race interferes with one's ability to contract, that the market is far from fair and neutral, and that legislative solutions have limits.[147] They observe how law and racialized capitalist markets reinforce and reproduce racial hierarchy, resulting in the loss of wealth for Black homeowners and families. Further, students may understand how contract doctrines such as the adequacy of consideration, where courts do not examine the terms of the contract or bargaining power of parties, serve to maintain racial inequalities. If a Black buyer sells their property at a lower appraised price, absent coercion or duress, the doctrine of adequacy of consideration would not invalidate that agreement simply because they obtained a worse deal. Realization of these limits encourages students to explore additional approaches that get to the foundation of the racialized political economy such as the regulation of appraisers, diversification of the appraisal industry, which is mostly white,[148] the standardization of methods for calculating value,[149] and the regulations against house flippers and greater protection for Black homeowners, to name a few.[150]

147 *See id.* Such an approach is particularly important as the potential of 42 U.S.C. § 1981, which prohibits racial discrimination on making and enforcing contracts, has been severely limited in its ability to cover a range of contracts in the market that have a racial impact, but are not explicitly racially discriminatory. *See* Sanders, *supra* note 118, at 281, 284 (providing an overview of the history of 42 U.S.C. § 1981).

148 *See* Safia Samee Ali, *Black Appraisers Call Out Industry's Racial Bias and Need for Systemic Change,* NBC NEWS (June 7, 2021, 3:15 PM), https://www.nbcnews.com/news/us-news/black-appraisers-call-out-industry-s-racial-bias-need-systemic-n1269452 (stating that less than two percent of appraisers identify as Black).

149 *See* Junia Howell & Elizabeth Korver-Glenn, *The Increasing Effect of Neighborhood Racial Composition on Housing Values, 1980-2015,* SOC'Y FOR THE STUDY OF SOC. PROBS. 1, 8 (Sept. 2020). Race-neutral calculation of appraisals, such as comparable sales, reinforces the racist home pricing, and a report suggests decoupling pricing from neighborhood demographics. *See id* at 18–19.

150 *Briefing Room*, *FACT SHEET: Biden-Harris Administration Announces New Actions to Build Black Wealth and Narrow the Racial Wealth Gap*, THE WHITE HOUSE (June 1, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/01/fact-sheet-biden-harris-administration-announces-new-actions-to-build-black-wealth-and-narrow-the-racial-wealth-gap/. Given the pervasiveness of racial bias in appraisals and housing discrimination, the White House formed an interagency taskforce to address inequity in home appraisals. *See id.*

IV. LIMITS OF EQUITABLE CONTRACTS THEORIES:[151] ELUSIVENESS OF REPARATIONS

With this last example, this article seeks to illustrate how racial capitalism reveals the limits of equitable contract theories such as unjust enrichment[152] when applied to the case for reparations.[153] Unjust enrichment provides a remedy for individuals who conferred a benefit to others for which a contract does not exist but to whom a remedy is owed.[154] Reparations is a classic formulation of this contract theory.[155] Pairing reparations with the study of restitution/unjust enrichment evidences the limited role equitable theories under contract law can play in challenging the dominance of market capitalism and perpetuation of racial inequality.

The concept of reparations is a good example to explore in the context of contracts because of its "challenges to conventional legal structures and institutions and as a lens into the Black struggle for liberation from slavery and its vestiges."[156] It both challenges contracts doctrine and connects students to social movements. It has been well documented that specific individuals, organizations, and society in general, have benefitted from the uncompensated

151 *See* Williams, *supra* note 18, at 197 (discussing a willingness in contract doctrine to counter precedents from classical contract theory that are at odds with present norms). Contracts doctrine has evolved from its classical contract theoretical roots evidencing a reluctance to intervene in agreements between private parties for some social good to include alternative equitable theories such as promissory estoppel and promissory restitution to address new social contexts including racial discrimination. *See id.* at 195-97; *but see* Gordon, *supra* note 18, at 203 (noting how even when courts adopt an exception to the general rules of contracts or seem to be intervening in a transaction on grounds of equality, it reinforces market transactions and the will of the parties as the norm and protects the dominant regime of contracting).

152 *See* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2083 (2001) (noting that the law of restitution was invented in 1937 with the publication of the Restatement of Restitution; the notion that a person who has been enriched at the expense of another is required to make restitution dates back to Roman law). Unjust enrichment is also referenced in numerous ways including contract implied in law, quantum meruit, quasi contract, and restitution. *See id* at 2086–87, 2113 n.12.

153 Armstrong, *supra* note 35, at 771 (noting the availability of applying unjust enrichment/restitution to reparations).

154 *See* RESTATEMENT (FIRST) OF RESTITUTION § 1 (AM. LAW INST. 1937); *see also* Sherwin, *supra* note 152, at 2095 (discussing how unjust enrichment can be viewed as a theory authorizing courts to depart from formal legal rules when the legal outcomes would be unjust).

155 *See* Armstrong, *supra* note 35, at 775–76.

156 Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'cobra) and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687, 692 (2010).

and brutal de jure subjugation of the labor of Black persons.[157] Yet, for decades, the late Representative John Conyers would introduce H.R. 40 to establish a commission to study and develop reparation proposals.[158] It is important to bear in mind that H.R. 40 is a bill only to *stud*y proposals.[159] The goal in this article is not to argue the "legal or political viability" of reparations, which has been done by scholars and activists that have long devoted their work to the struggle for reparations.[160] If we accept the premise that unjust enrichment is an established equitable contract legal theory that rectifies economic advantages gained by one party, then it is difficult to fathom why the labor of formerly enslaved persons remains uncompensated, let alone unacknowledged and even unstudied. From a pedagogical and social movement perspective, which this article is concerned with illuminating as a critical race praxis, the reparations struggle spotlights the "historical vision and imagination that has animated the movement since the days of slavery."[161] This imagination is critical for law students to explore movement-oriented approaches because the reparations movement reveals class distinctions around racial justice and "competing visions of Black political subjectivity" and an "alternative site for black struggle.[162] Racial capitalism then provides students with an important critical framework through which to examine contract doctrine, connect the doctrine to social movements, and elevate specific movement demands for racial justice such as reparations.

For different purposes, but important to note, scholar Margalynne Armstrong discusses the utility of unjust enrichment as a contract theory to apply to reparations litigation.[163] Recognizing

157 *See* WILLIAM A. DARITY & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 5–6, 28 (U.N.C. Press 2020) (detailing and documenting through meticulous research three tiers of injustice that would support Black reparations: slavery, Jim Crow period and ongoing racial equality).

158 *See* Rep. Sheila Jackson Lee, *H.R. 40 Is Not a Symbolic Act. It's a Path to Restorative Justice*, ACLU (May 22, 2020), https://www.aclu.org/news/racial-justice/h-r-40-is-not-a-symbolic-act-its-a-path-to-restorative-justice/ (discussing the three-decade-long effort made by Representative Conyers in having H.R. 40 passed).

159 Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 117th Cong. §§ 1–3 (1st Sess. 2017) (discussing the purposes and duties of the commission expressed in H.R. 40).

160 Aiyetoro & Davis, *supra* note 156, at 687–88.

161 *Id*. at 688 (quoting Robin Kelley).

162 *Id*. at 727, 763.

163 *See Id.* at 703 (discussing the case *Johnson v. McAdoo*, 45 App. D.C. 440, 441 (1916) (dismissing suit on grounds of sovereign immunity) where in 1915, the Ex-Slave Pension Associations filed "what may have been" the first lawsuit seeking reparations for the

narrow legal barriers to these lawsuits, restitution can "illuminate the fallacy that most persons of African descent in the United States have equal access to equal opportunity."[164] The advantage of restitution theory is that a defendant may be liable even if they did not intentionally create the harm; the theory thus overcomes the common objection that implementing reparations now would penalize individuals for actions not directly committed by them.[165] Further, given that restitution focuses on redistributing gains unjustly obtained, it can serve the goals of reparations.[166] However, despite its evident connections, racial capitalism helps to explain why it has been difficult to actualize.

Most recently, reparations have gained renewed focus in light of Black Lives Matter protests as well as Ta-Nehisi Coates's article, *The Case for Reparations*.[167] While Coates reasons that reparations threaten American identity as a country and forces a reckoning of our past, he places less emphasis on capitalism as the

enslavement of Black people claiming rights to funds collected through a cotton tax collected during the Civil War that were alleged to still be in the U.S. Treasury); *see also id.* at 733-34 (discussing where in the 1980s, a group of Black Activists formed the National Coalition of Blacks for Reparations in America ("N'COBRA") became aware of individual lawsuits being filed seeking reparations for slavery most of which were dismissed); *see id.* at 734 (citing *Cato v. United States*, 70 F.3d 1103, 1108 (9th Cir. 1995) where in 1995, the Ninth Circuit ruled in Cato that the claim for reparations was a political question and not a legal claim). The last significant piece of federal reparations litigation occurred in 2006. The litigants this time changed their strategy to overcome sovereign immunity by targeting corporations. Descendants of slaves brought nine actions against private companies in various federal districts, which were consolidated, seeking reparations; the Court rejected the claim because the plaintiffs lacked standing, and the Supreme Court later denied certiorari twice for two of the individual cases that were part of the lawsuit); *see, e.g., In re African-American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1071-72 (N.D. Ill. 2004) (deciding that plaintiff lacked specificity in when the injury occurred and determining that the Court will not extend "statute of limitations indefinitely"); *In re African-American Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006) (affirming the lower court ruling and stating, "In all likelihood it would still be impossible for them to prove injury, requiring as that would connecting the particular slavery transactions in which the defendants were involved to harm to particular slaves. But in any event, suits complaining about injuries that occurred more than a century and a half ago have been barred for a long time by the applicable state statutes of limitations."); *Farmer-Paellman v. Brown & Williamson Tobacco Corp.*, 128 S. Ct. 92 (2007) (denying a writ of certiorari); *see also Hurdle v. R.J. Reynolds Tobacco Corp.*, 128 S. Ct. 92 (2007) (denying a writ of certiorari).

164 Armstrong, *supra* note 35, at 773.

165 *See id.* at 779–780; *see also* Mari Matsuda, *Looking to the Bottom: Critical Legal Students and Reparations*, 22 HARV. C.R.C.L L. REV. 323, 379 (1987).

166 *See* Armstrong, *supra* note 35, at 780–82 (discussing how the redistribution of unjust gains satisfies the restitutionary law and theory.)

167 *See* Coates, *supra* note 69; *see also* DARITY & MULLEN, *supra* note 157, at 24–26 (discussing how recent rhetoric towards the "Black Lives Matter" movement and Coates' June 2014 article brought the topic of reparations back into national headlines).

obstacle to reparations.[168] In *What is Owed*, Nikole Hannah-Jones similarly discusses the obstacles to reparations as one primarily of political will:

> The real obstacle, the obstacle that we have never overcome, is garnering the political will — convincing enough Americans that the centuries-long forced economic disadvantage of black Americans should be remedied, that restitution is owed to people who have never had an equal chance to take advantage of the bounty they played such a significant part in creating.[169]

The mainstreaming of the reparations movement away from its original class-based and redistributive focus solely to a political question[170] ignores that the prolonged extraction of wealth from and denial of equality to Black people are functions of racial capitalism.[171] As is discussed below, W.E.B. Du Bois's work presents racial justice as a political question as much as an economic one.[172] Similarly, reparations—the quintessential demand for racial justice—is not only a matter of political viability; it necessitates an economic analysis. Further, reparations is not solely a legislative battle but must be connected to its origins as a mass-based movement. Using racial capitalism as a critical framework thus illuminates an important political-economic critique to legislative efforts for reparations that sound in restitution principles.

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168 *See* Aaron White, *Reparations Would Shake up American Capitalism – and That's a Good Thing*, OPENDEMOCRACY (May 25, 2021, 12:00 AM), https://www.opendemocracy.net/en/oureconomy/reparations-would-shake-up-american-capitalism-and-thats-a-good-thing/ (discussing that although many fear the threat reparations have to America's heritage and history, the drastic consequences reparations have is a good thing for America).

169 Nikole Hannah-Jones, *What is Owed*, N.Y. TIMES MAG. (June 30, 2020), https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html.

170 *See* DARITY & MULLEN, *supra* note 157, at 27 (noting that political will is needed for Black reparations to become a reality).

171 Some of the early activists in the reparations movement were active in left formations such as Queen Mother Audley Moore. Early elite-dominated civil rights organizations distanced themselves from the movement for these reasons. *See* Aiyetoro & Davis, *supra* note 156, at 706, 719–20 (describing Mother Moore as coming from a family "that struggled for daily survival.").

172 *See* W. E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION 346–47 (Harbor Scholars' Classics ed. S.A. Russell Co. 1956) (1935) (referring to Reconstruction as "an economic revolution . . . .").

For capitalism to function, racism is needed as the engine. W.E.B. Du Bois in *Black Reconstruction* understood precisely and presciently the role of capitalism and its relation to racial justice in achieving political equality.[173] For Du Bois, the political question of achieving racial justice cannot be separated from the economy.[174] He discussed that the failure of Reconstruction rests not solely on the South, but on the reorganization of capital at that time, including the rise of Northern industrial capitalism.[175] That Du Bois features in Robinson's book *Black Marxism* is precisely to draw our attention back to theories and theoreticians whose ideas emerged from a critique of capitalism and engagement with mass movements.[176] Building on Du Bois's discussion of the Black worker as essential to Southern slavery but also to Northern commerce, Robinson connects slavery to modern capitalism.[177] For Du Bois and Robinson, "political institutions and structures identified with American democracy" had an economic character connected to slavery and capitalism.[178] I add that law also has an economic character. Further, a critique of capitalism through a racial justice lens is necessary to understand the shortcomings of the left-oriented movements of their time.[179] It is also not surprising that reparations have been referred to as the Third Reconstruction.[180]

Returning to the contract doctrine of unjust enrichment and the movement for reparations, failing to view the economic character of these demands exposes the obduracy in passing legislation just

173 *See id.* at 347 ("Reconstruction was a desperate effort . . . to restore an anachronism in economic organization by force . . . and in bitter strife with a new capitalism and a new political framework.").

174 *See id.* at 346–47 (explaining the relationship between economic justice and racial justice).

175 *See id.* at 583–84, 626–27 (detailing how Northern capital compromised on radical racial justice demands, and how "Southern capital accepted race hate and Black disfranchisement as a permanent program of exploitation[]").

176 *See* ROBINSON, *supra* note 3, at 195–96 (describing Black Reconstruction as providing a theory of history that connected mass praxis, class consciousness, and ideology).

177 *See id.* at 200 (arguing that slavery was not a "historical aberration" or in the past, but rather is constitutive of the emerging American liberal democracy, and that "its imprints continue[] to be . . . *systemic*[]").

178 *Id.* at 203.

179 *See id.* at 238–39 ("In *Black Reconstruction*, Du Bois had striven to enrich the critique of capitalism and bourgeois society that had merged into dominant strains of Western radicalism.").

180 Wilfred Codrington III, *The United States Needs a Third Reconstruction,* THE ATLANTIC (July 20, 2020), https://www.theatlantic.com/ideas/archive/2020/07/united-states-needs-third-reconstruction/614293/ (noting that the Second Reconstruction/Civil Rights era was successful because it was "coupled with an economic agenda[]").

to study reparations. The obstacle for reparations may well be that it directly confronts the present legal and economic system that continues to be unjustly enriched by the extraction of Black labor and wealth, as seen in the discussion above on appraisals of homes. Acknowledging the theory accepts the harm which could tumble the house of cards of capitalism. Racial capitalism also informs us that reparations must involve substantial economic distribution of power to Black people as well as a total restructuring of the economy. It is *not* solely a question of national identity or a political question. Restitution, to make one whole, cannot happen without a substantial and radical shift in our political economy. Without a direct and frontal critique of capitalism, racial exploitation and subordination will continue. Perhaps, without a political will or movement for that type of consciousness, reparations remain elusive. Robinson was concerned about what would animate mass-based movements for change; introducing to our students, who are equally committed to social change, such a rich theoretical framework could help them identify the legal strategies that would lead to redistributive justice and understand how their legal work can support social movements.

V. PATH FORWARD: ANTI-CAPITALIST LAWYERING[181]

As the bell hooks and Cedric Robinson quotations at the beginning of this article suggest, for racial capitalism as a theoretical framework to have any resonance and traction in the context of the legal profession, it must be grounded not only in the study of doctrine but also in practical applications to lawyering and in service of social movements.[182] These approaches must be anti-racist

[181] The National Lawyers Guild identifies itself as an anti-capitalist legal organization. In their preamble, they describe this as uniting law students, lawyers, and jailhouse lawyers as changing the basic political and economic structure. *See Our Work*, NAT'L LAWS. GUILD, https://www.nlg.org/our-work/ (last visited Jan. 17, 2021); *see also* Athena D. Mutua, *Introducing Classcrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859, 913 n.83 (2008) (defining anti-capitalism, at least in relation to Marxism, as the idea that a private capitalist market economy "blocks the possibility of achieving a radically egalitarian distribution of the material conditions of life[]").

[182] *See* BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM 59 (1994) ("I came to theory because I was hurting— the pain within me was so intense that I could not go on living. I came to theory desperate, wanting to comprehend—

and anti-capitalist because the capitalist market economy blocks the distribution of resources and contract law reifies these inequalities.[183] Robinson was more concerned about redirecting attention to the Black radical tradition to provide clarity for mass-based social change than with the theoretical framework of racial capitalism.[184] His own involvement in liberation movements in the United States and around the world[185] models for students a critical race praxis and theoretical clarity to movement lawyering. It provides a pathway to the student who envisions themself as an anti-capitalist, anti-racist lawyer. The first step on that path is for us as legal institutions to integrate critical scholarship like racial capitalism into our 1L curriculum.[186] The purpose is not to convince students of the viability of this particular framework but to expand the theoretical bases from which they can analyze the law.[187] It could animate a curiosity to explore other critical frameworks.[188] Whether they agree with this framework or not,

to grasp what was happening around and within me. Most importantly, I wanted to make the hurt go away. I saw in theory then a location for healing."); ROBINSON, *supra* note 3, at 307 ("[T]he practice of theory is informed by struggle.").

183 *See* Mutua, *supra* note 181, at 896 (noting that "[c]apitalism blocks the possibility of achieving

a radically egalitarian distribution of the material conditions of life[]").

184 *See* Robin D.G. Kelley, *Why Black Marxism, Why Now?*, BOS. REV. (Feb.1, 2021), https://bostonreview.net/race-philosophy-religion/robin-d-g-kelley-why-black-marxism-why-now ("Contrary to popular belief, *Black Marxism* was primarily about Black revolt, not racial capitalism."). The author also notes that the inspiration of bringing out a new edition of Robinson's work was from the summer of 2020 protests. *See id.*

185 *See* Kelley, *supra* note 19 (noting that Robinson and his wife pursued a life of social activism and intellectual work and critiqued Karl Marx "for failing to comprehend radical movements outside of Europe[]"). Robinson noted that Marx "failed to account the racial character of capitalism." *Id.*

186 *See* Taifha Baker, *How Top Law Schools Can Resuscitate an Inclusive Climate for Minority and Low-Income Students,* 9 GEO J. L. & MOD. CRITICAL RACE PERSPECTIVES 123, 147–48 (2017) (providing a student perspective on the legal curriculum arguing that law school curricula are poorly designed and do not adequately incorporate Critical Race Theory perspectives and suggesting that faculty supplement assigned reading with cases and law review articles that directly discuss race and class).

187 Critical frameworks help to disrupt the reproduction of hierarchy in legal education. *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 607 (1982) (noting how legal education reproduces hierarchy); *see also* Ansley, *supra* note 15, at 1579 (noting how "conscious inclusion of multiple perspectives" brings students "closer to perceiving a 'relatively truer truth' than one wedded to an unacknowledged viewpoint[]").

188 Introducing racial capitalism opened up spaces for students to introduce to the classroom critical frameworks they are familiar with such as feminism, disability justice, and class. *See* Ansley, *supra* note 15, at 1579 (noting that by incorporating multiple perspectives in law school curriculums students and teachers "will be deeply challenged and forced into unanticipated self-examinations and will be enabled to see [their] own previous knowledge and convictions from new and unsettling angles[]").

students welcome a critical approach to legal doctrine. At CUNY Law, given our unique social justice mission,[189] our students have come to expect such a critical approach to doctrine. My anecdotal experience is that this interest in theoretical perspectives is not unique to CUNY Law students but is shared by social justice-oriented law students across the country.[190] Students aiming to be anti-capitalist and anti-racist movement lawyers must be able to access critical and conceptual tools to make meaning of their public interest law experience.[191]

Students in my class were presented with two broad questions: "*how has this framework helped your understanding of contract doctrine, if you can give specific examples that is ideal, and second, could this framework inform your lawyering strategies."*[192] Erin Quinn shared, "the history of contract law *is* the history of racial capitalism.[193] Quinn commented that contracts are "often the beating heart of discrimination, allowing white, wealthy, [upper-class] people to deprive and divest minority groups of the rights that they themselves are afforded, all under the banner of mutual assent and exchange."[194] Sean Fabi added: "I think a lawyering perspective that centers racial capitalism . . . can therefore focus on the massively disproportionate effects certain unfettered market dynamics have on BIPOC communities."[195] Marcela Jimenez

189 The mission of the law school is to prepare law students to use law in service of human needs, and as such, its academic philosophy is that "theory cannot be separated from practice, abstract knowledge of doctrine from practical skill, and understanding the professional role from professional experience." *Philosophy and Mission*, CUNY SCH. OF L., https://www.law.cuny.edu/about/philosophy/ (last visited Jan. 21, 2021).

190 Nisha Agarwal & Jocelyn Simonson, *Thinking Like a Public Interest Lawyer: Theory, Practice, and Pedagogy*, 34 N.Y.U. REV. L & SOC. CHANGE 455, 455 (2010) (discussing a summer theory program where public interest students discuss theory while participating in public interest internships to disrupt the divide between theory and practice).

191 *See id.* at 462 ("[L]aw students must learn to engage with difficult normative questions on a theoretical level while simultaneously grappling with them on a practical level. It is at this intersection between theory and practice that a law student learns to think like- and be-a public interest lawyer.").

192 Video Recording: Racial Capitalism Focus Group, Discussion among Professor Chaumtoli Huq and her students, at 0:50, (CUNY L. Sch. 2020) (on file with author); *see also* Chaumtoli Huq, Posting to *Forum Racial Capitalism,* THOMSON REUTERS: TWEN (Aug 26, 2020, 1:02 PM), https://lawschool.westlaw.com/twen/.

193 E-mail from Erin Quinn, Student, to Chaumtoli Huq, Professor of L., CUNY L. Sch. (Sept. 27, 2020, 14:47 EST) (on file with author).

194 *See id.*

195 E-mail from Sean Fabi, Student, to Chaumtoli Huq, Professor of L., CUNY L. Sch. (Sept. 29, 2020, 10:55 EST) (on file with author).

noted: "I believe having this framework lifts the veil of our justice system in a way that provides a real sense of the obstacles you will have to grapple with as a lawyer to represent your client."[196]

Deepening our discussion in a focus group, students shared the following reflections At the outset, students acknowledged the challenge of integrating critical frameworks into a first-year course, mainly that there is not enough time to explore complex theories in depth.[197] They understand the tensions we face as professors to cover topics that appear on the bar examination.[198] However, Carolyn Weldy noted that professors can still point students to certain directions which they can explore further on their own.[199] One student, Liz Pudel, discussed it as the most "useful priming mechanism" to approach the course, especially for white law students who actively do not want to perpetuate racial subordination.[200] Liz provided a potential scenario to avoid: legal strategies that are structurally futile or communicating race-blind legal strategies.[201] Ultimately, they say, it is up to individual students to deepen their knowledge of critical race theory or racial capitalism.[202] Such in-depth exploration cannot happen in the class and should occur by the student themselves or among peer students.[203] The student would have to tailor critical frameworks to a specific

196 *See* Racial Capitalism Focus Group, *supra* note 192 (explaining how the framework of racial capitalism prepares students for obstacles they will face as attorneys).

197 *Id.* (reflecting in the group discussion on the challenges of integrating this framework into first-year courses).

198 *See* Meera E. Deo, *Paint by Number? How Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 30–31 (2010) (explaining how some law students find that race-related discussions detract from learning from subjects on the bar examination, though as a whole, most students do prefer race and gender discussions); *id.* at 34, 37 (noting how faculty who engage in diversity related discussion are "punished" in terms of teaching evaluations)*; see also* Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31.1 COLUM. J. GENDER & L. 7, 26 (2015) (discussing experiences of faculty of color that challenge their authority: faculty of color, especially those who are untenured, who employ such critical frameworks can receive negative evaluations questioning their knowledge of the doctrine.). *See generally* GABRIELLA GUTIÉRREZ Y MUHS ET AL., PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (2012).

199 *See* Video Recording: Racial Capitalism Focus Group, *supra* note 192.

200 *Id.* at 00:26:40.

201 *Id.* at 00:27:16.

202 *See id.* at 00:13 (discussing how the burden falls on students to gain a better understanding of critical race theory).

203 *See* FREIRE, *supra* note 23, at 84 (describing a sentiment that reflects a pedagogy that views knowledge as dynamic, and that the role of the professor is not to dump knowledge to students).

type of law they would practice. They suggested student-led discussion to deepen their inquiry.[204] I encourage these alternate sites of learning to move away from the hierarchical structures of learning in law school. Autonomous, self-directed learning were key parts of many social movements.[205]

Insightful revelations and reflections were unlocked by integrating a critical framework such as racial capitalism even in an abridged form. Erin did not expect that contracts would be a class that would expose her to the links between systems of oppression and the law.[206] Marcela found it helpful to question facts and context that are left out of our study of cases, mentioning *Kirksey* as an example as well as the reasonable person standard.[207] Carolyn pondered contracts cases that were brought to court like *Hamer v. Sidway*[208] where an uncle paid a nephew not to drink and smoke, as exemplars of white privilege in the contracts.[209] She continued that the subjects of contracts of the cases we study do reinforce elite dominance in law.[210] Sean shared how the concept of gifts presupposes there are things *to give* and/or bargain and connects those concepts to private property and settler colonialism.[211] He further commented how the contracts cases reify these underlying principles and perpetuate inequality.[212] For Sneha as an undergraduate economics/psychology major, racial capitalism exposed the flaws of neo-classical economics that underpin contract doctrine.[213] She shared studies showing that learning economics makes one selfish because of its focus on neo-classical economics, which promotes views of utility and rationality.[214] Might learning

204 Erin Duncan et al., *Radicalizing Curriculum*, NLG RADICAL L. STUDENT MANUAL (2016), https://www.nlg.org/wp-content/uploads/2016/03/Radicalizing-Curriculum.pdf (providing advice to students on integrating critical legal studies to the law school).

205 *See* DONNA JEAN MURCH, LIVING FOR THE CITY: MIGRATION, EDUCATION, AND THE RISE OF THE BLACK PANTHER PARTY IN OAKLAND, CALIFORNIA 95 (2010) (discussing how the Black Panther Party started as a study group and demonstrating the role Black students and youth contributed to new political formations).

206 *See* Video Recording: Racial Capitalism Focus Group, *supra* note 192, at 00:22:06.

207 *See id.* at 00:06:05, 00:07:40.

208 Hamer v. Sidway, 27 N.E. 256, 257 (1891).

209 *See* Video Recording: Racial Capitalism Focus Group, *supra* note 192, at 00:55:48.

210 *See id.* at 00:56:28.

211 *See id.* at 00:06:50.

212 *See id.* at 01:07:31.

213 *See id.* at 00:16:01.

214 *See id.* at 00:17:15. *See generally* Adam Grant, *More Evidence That Learning Economics Makes You Selfish*, EVONOMICS (Feb. 3, 2016), https://evonomics.com/more-evidence-that-learning-economics-makes-you-selfish/.

legal doctrines that buttress these theories impact our own behavior making us individualistic in our thinking? Do neoclassical views embedded in contracts make students less interested in public interest lawyering? Critical frameworks help them to connect legal doctrine to contemporary events or concrete legal practice examples.

Critical frameworks also helped students to closely scrutinize equitable legal theories and whether they are effective in achieving justice. It helped them to articulate and dispel the myths of law bringing about just results for clients. Liz wondered if promissory estoppel and unjust enrichment, which are intended to prevent injustice, could actually do so given racial capitalism.[215] Hugh noted with frustration that contracts communicated the message that the most "radical takeaway" to address injustice was to fit legal issues into an alternative theory, referring to promissory estoppel and restitution.[216] He noted that the implication of this approach is that to achieve justice, more aspects of social life should be brought under the contracts doctrine; however, the outcomes there feel like a dead end.[217] For example, just because home health aides or those engaged in care work can bring contract claims for their labor does not change the fact it is one of the exploited professions.[218] Here, students are expressing frustration that engagement with law, even the more liberal and equitable theories, do not get to the root of economic and racial inequality. This awareness, I hope, pushes them to think creatively about legal or other non-legal strategies.

In terms of lawyering, Liz noted that, because contracts pervade everyday life, racial capitalism would help them as future public interest lawyers to understand the daily struggles that their clients may face.[219] While students had just begun their first year, they noted generally that critical frameworks allowed them to imagine strategies outside of the courtroom. Sometimes the solutions that our clients want cannot be found in the formal legal system. The critical approach reinforced Sneha's interest in a career in mediation or alternatives to litigation with a culturally

215 *See* Video Recording: Racial Capitalism Focus Group, *supra* note 192, at 00:29:05.
216 *See id.* at 00:37:28.
217 *See id.* at 00:38:36.
218 *See id.* at 00:38:08.
219 *See id.* at 00:28:11.

competent mediator.[220] Understanding the limits of legal avenues helped Marcela, a former labor organizer, to see the value her organizing experience will bring to her career as a lawyer.[221] For Hugh, the framework helped crystalize that legal action is a tactic.[222] The lawyering paradigm that emerged for him was to think about pathways that can be used to "shift the locus" of their struggle out of the courtroom and legal system.[223] What legal strategies can they employ, even if they are not successful, that would create leverage and power for the community the lawyer is working with?

What emerged from these thoughtful student reflections underscored the importance of integrating critical frameworks into their study of law. Their insights reflected a sophisticated understanding of the law that they can better utilize in service of social movements. As I began this article, my goal was not to convince students of this approach, and I am sure many would disagree. It does catalyze students' ideas and provides them with a methodology that they can take into other classes and eventually into their lawyering. This pedagogy reflects a view of knowledge as generative, expansive, dynamic, dare I hope liberatory, in contrast to reifying one that is banked, contained, constrained, and perpetuates inequality. Given the enormous social, political, and economic challenges of our times[224] and our collective pledge to build an anti-racist law school, integrating critical frameworks like racial capitalism into the first-year legal curriculum is an important first step. This perspective models praxis orienting students to legal solutions and lawyering approaches that seek to directly upend racial and economic injustices.

220 *See id.* at 00:43:40.
221 *See id.* at 00:49:40.
222 *See id.* at 00:51:30.
223 *See id.* at 00:52:00.
224 *See* Harris & Varellas III, *supra* note 18, at 2–5 (listing various challenges of the current moment).