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RELOADING THE CANON: THOUGHTS ON CRITICAL LEGAL PEDAGOGY

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On the first day of the first-year contracts class that I teach, I preview for the students both the general contours of the “blackletter law”¹ that we will be learning throughout the course, and some of the perspectives that I will incorporate in developing our critical thinking and analysis of the law. My aim is to impress upon the students that their understanding of the blackletter law—the technical training that many law students think of as constituting the bulk of their educational mission—varies positively with their understanding of and capacity for critical analysis. I go about this in part by teaching the case of *St. Landry Loan Co. v. Avie*² as offering a critical perspective on one of the cornerstones of the law in this area—the “objective theory” of contracts. This Essay reflects on the *St. Landry* case as a departure point for considering practical and theoretical aspects of critical legal pedagogy, and concludes with a call for “reloading the canon” in legal education.

In *St. Landry*, the plaintiff loan company sued the defendant Arthur Skinner for the balance of an unpaid loan, after Skinner signed the loan as a guarantor for his son-in-law Jeffrey Avie. After a trial on the merits, the district judge sustained Skinner’s defense against liability on the grounds that Skinner was “illiterate and that, although he authorized his X mark to be placed on the note, in doing so he did not intend to obligate himself as a guarantor.”³ The Louisiana Court of Appeal reversed, however, holding that because Skinner performed an

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1. *Blackletter Law*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[L]egal principles that are old, fundamental, and well settled.”); *Blackletter Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/blackletter_law (last visited Jan. 26, 2021) [<https://perma.cc/P2EN-R4TE>] (“[L]aw [that] is free from doubt and generally well-known . . . well-established case law and . . . the basic key components of a subject in the law.”).

2. 147 So. 2d 725 (La. App. 3d Cir. 1962).

3. *Id.*

action that would be objectively interpreted by an observer to constitute valid consent to the contract—that is to say, signing it—he must be held to its obligations. The *St. Landry* court opined that

a party who signs a written instrument, or who places his mark or allows his mark to be placed thereon, is presumed to know its contents, and he cannot avoid the obligations which may be imposed on him merely upon a showing that he had not read it, or that he had not had it read and explained to him, or that he did not understand its provisions.⁴

I teach this case as part of a discussion of a corollary rule to the objective theory of contract, the “duty to read.” In *St. Landry*, the defendant is seeking to have the contract vacated, but the majority holds that because the defendant signed the contract, he must be presumed to have read it and so must be held to it. The fact that the defendant is “an illiterate French-speaking Negro” (he “signed” the contract by placing an “X” on it) was deemed irrelevant. The court found that the defendant had not properly alleged and raised fraud or misrepresentation as a defense to liability, so it declined to invalidate the contract. The court ruled over the objections of the dissent, which protested that the defendant had

alleged . . . that he was unable to read or write and that he did not authorize anyone to place his X mark on the note as an endorsement ‘to make him . . . liable . . . for the debts of . . . Avie . . .’ If plaintiff’s employee placed this illiterate negro’s endorsement on the note without his authorization, it clearly amounted to a deceitful and fraudulent act.⁵

The dissent continued that even though the defendant’s “answer does not use the words ‘fraud or misrepresentation’ . . . the facts alleged clearly state a case of fraud.”⁶

The majority opinion, while brief, potentially carries with it the weight of liberal legality’s notion of individual freedom coupled with individual responsibility. This conception of individual freedom and accompanying responsibility for one’s choices in

4. *Id.* at 727.

5. *Id.* at 728 (Culpepper, J., dissenting).

6. *Id.*

turn translates into the imperative to enforce contracts once certain actions are taken that “objectively” signify consent, such as signing the contract. The dissenting opinion takes up this factual point to disagree with the majority opinion and also to point out that the majority is overruling the trial court opinion, which had found for the defendant. In so doing, the majority is disregarding the lower court’s factfinding (which obviously is procedurally questionable, a point the dissent doesn’t sharpen but that can be brought out in class, although at that stage of the year the students have very little notion of civil procedure, but the basic point can be made that the appellate court could have and arguably should have been more deferential to the trial court).

Our study of *St. Landry* on this first day of class is situated in a larger overview of the field and of the objective theory of contracts.⁷ I introduce the objective theory as a foundational perspective that is also contested, by presenting a case in which the objective theory is contrasted with a more subjective approach (for example, one that would allow a contract to be invalidated on the basis of an “honest mistake” by one party even if that party had undertaken actions that objectively signified consent). This contrast allows me to draw on the historical perspective on the law as influentially presented in Morton Horwitz’s *The Transformation of American Law*.⁸ That historical account of “classical legal thought” allows for a discussion of law and its relationship to political economy. Components of this relationship include the way in which the emergence of the objective theory was tied to the rise of industrialization and mass markets, replacing smaller communities in which social trust could undergird more forgiving rules, such as a “subjective” approach to contract law that would have allowed a party to avoid contractual liability on the basis of an honest mistake alone, with a doctrinal approach better served to transactions across greater distances and commercial contexts. This historical understanding conveys the contingency of the law, and the way in which it has

7. I begin the class by introducing the building blocks of contract law as we will study it throughout the semester (contract formation, contract interpretation, nonperformance of contractual obligation, and remedies for nonperformance).

8. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960* (1992).

adapted and, implicitly, therefore, the way it can continue to adapt.

The contrast between the objective approach of classical legal thought and the subjective approach of prior strains of common law in the United States also enables me to introduce the challenge to the objective theory that came after its ascendance. I personify these challenges by contrasting the classical perspectives of Holmes,⁹ Williston,¹⁰ and Hand,¹¹ explaining and justifying the objective theory, with the subsequent legal-realist perspectives of Cardozo,¹² Pound,¹³ and Llewellyn¹⁴ that raise equitable concerns with the objective theory. I explain that, over time, these objections reshaped aspects of contract law, swinging the pendulum away from the orientation toward classical liberal legality and strengthening equitable constraints on the law, such that today what prevails might be termed "modified objective theory." For example, modern contract law includes doctrines that might allow a party to void a contract on the basis of an honest mistake by one party¹⁵ or on the basis of undue

9. "The law has nothing to do with the actual state of the parties' minds. . . . [I]t must go by externals, and judge parties by their conduct." OLIVER WENDELL HOLMES, *THE COMMON LAW* 242 (Mark De Wolfe Howe ed., Little, Brown & Co. 1963) (1881). Though this statement exemplifies the objective theory of contracts that also characterizes classical legal thought, Holmes was of course considered to be a proto-realist in many ways. See, e.g., Wilfrid E. Rumble, Jr., *Legal Realism, Sociological Jurisprudence and Mr. Justice Holmes*, 26 J. HIST. IDEAS 547 (1965).

10. SAMUEL WILLISTON & GEORGE J. THOMPSON, *SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS* § 21, at 18 (1938) ("The only intent of the parties to a contract which is essential is an intent to say the words and do the acts which constitute their manifestation of assent.").

11. "If . . . it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes on them, he would still be held . . ." *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913).

12. "Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity or fairness . . ." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921).

13. "Equity is a stage in the growth of law whereby it is expanded and liberalized after the period of fossilization . . . that inevitably follows primitive struggles toward certainty and definite statement." Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 21 (1905).

14. Karl N. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 342, 402 (1937) ("A bargain . . . shows itself not to be a bargain, when lopsidedness begins to scream.").

15. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 153 (AM. L. INST. 1981) (setting forth criteria that may permit a party to avoid contractual liability on the basis of that party's unilateral mistake).

influence even where no fraud or duress had been committed.¹⁶ These doctrines were developed over the course of the latter twentieth century and would yield outcomes at variance with those in the cases we study on that first day, including *St. Landry*.

The *St. Landry* case allows me to bring these points home and to telegraph some of the larger debates that undergird the rules we will investigate. The case reflects (in a contracts setting) how rules that purport to be objective can reinforce injustice and inequality by disregarding factual context and even valorizing the disregard of such context. The case also reflects how procedural questions such as whether to deem a trial court holding as resting on a question of fact or law, where it is ambiguous, can obscure prejudice (i.e., the majority might have been motivated by racial prejudice to characterize the case differently, thereby enabling the setting aside of the trial court opinion). The year and place, 1962 in the U.S. South, also evokes a crucial era in the civil rights movement, and one can speculate that these judges might have had different views about the movement in general. The case sets up a “classical legal thought” versus “legal realism” discussion. It also spotlights, and provokes, the question of how structural inequality—such as racial hierarchy—is related to law.

The *St. Landry* case in this way provides an opportunity to begin to thread the multiple strands of a critically astute, technically proficient understanding of contracts that I weave together throughout the semester. It also allows me to give the interpretation of *St. Landry* that I would have wanted to receive on my own first day of contracts as a student almost thirty years ago. The *St. Landry* case was in an earlier version of the casebook that I still use as an instructor, though the case is no longer

16. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 177 (AM. L. INST. 1981) (setting forth criteria that may permit a party to avoid contractual liability on the basis of “undue influence”). In delineating these reforms to the common law, I by no means intend to provide an apology for or legitimization of the overarching arc of the law, nor to suggest that legal realist thinkers were without their own flaws. For scholarship on the troublesome embrace by the legal realists of racialized and eugenic approaches to criminal justice, in particular, see Jonathan Simon, “*The Criminal Is to Go Free*”: *The Legacy of Eugenic Thought in Contemporary Judicial Realism about American Criminal Justice*, 100 B.U. L. REV. 787, 794 (2020); Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 LAW & HIST. REV. 63, 67 (1998).

there.¹⁷ On this first day, at least in my memory, we read and discussed the case without attending to the question of racial hierarchy at all.¹⁸ There was simply no discussion of the fact that the defendant was an “illiterate French-speaking Negro” who had signed the contract in question by placing an X on it and was now being sued for breach; no discussion of how dynamics of race, class, and language might have played a role in shaping the facts of the case. In my recollection, as a young person with an emerging political consciousness, this was a sobering

17. The casebook that I read as a 1L student was CHARLES L. KNAPP & NATHAN M. CRYSTAL, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* (2d ed. 1987). To be fair, the casebook did contain an introductory chapter—which we ignored in class—that provided a bibliography which included some critical legal theory, though none focused on race. *Id.* at 23–24 (listing sources on “Critical Legal Studies” including Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Note, *Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983)).

The *St. Landry* case survived into the third edition. The presentation of the case was still unaccompanied by any discussion of critical legal theory or critical race theory in the case comments, though the bibliography in the first chapter now included sources on race and on feminist legal theory. CHARLES L. KNAPP & NATHAN M. CRYSTAL, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 33 (3d ed. 1993) (citing Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid – Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791 (1991)).

By the fourth edition, published in 1999, the *St. Landry* case had been replaced, though the first chapter bibliography now included critical race theory sources that had not been published at the time of the previous edition. See CHARLES L. KNAPP & NATHAN M. CRYSTAL, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 40 (4th rev. ed. 1999) (citing, e.g., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995)). In sharing this recollection of my first year and study of the Knapp & Crystal contracts book, I by no means wish to single out the book or its authors for special criticism. Indeed, the casebook if anything was distinctive in encouraging readers to explore different methodological approaches with the introductory chapter bibliography; and critical race theory as a school of thought was only nascent when I was a law student. Rather, this recollection is designed to report on a particular, widespread sensation of alienation that in fact helped to fuel the theoretical innovations within critical legal studies, critical race theory, feminist legal theory, and so on.

18. I am taking the liberty of interspersing my personal recollections as a law student through this essay. In doing so, I benefit from the inroads that narrative as a methodology has made into legal theory. See, e.g., Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). At the same time, I acknowledge the fallibility of human memory. See, e.g., Mark L. Howe & Lauren M. Knott, *The Fallibility of Memory in Judicial Processes: Lessons from the Past and Their Modern Consequences*, 23 MEMORY 633 (2015).

experience of the denuding of law from social context. There were several such moments from law school that remain vivid in my memory: moments in which the chasm between my sensitivity to social and political context, and the presentation of the law as divorced from it, became clear; and moments in which the law as taught to us in class, to me glaring in its internal contradictions, was presented in a way that downplayed such internal conflict. In other words, the external and internal critiques of law¹⁹ that, to me, felt obvious often went unstated or understated in our classroom studies.

ORIENTATION AND DISORIENTATION IN LAW SCHOOL

In this respect, my law school experience was fully, and distressingly, ordinary. Law schools typically offer an extensive “orientation” prior to the first year, where orientation sessions run the gamut from logistical and administrative items to the beginnings of acculturation into the sensibility of the profession. But for many law students, the first year generates a certain *disorientation* as well: a malaise related to the felt chasm between one’s own judgments and the life-world of the law as it is generally portrayed.

Generations of law students proceed through the same gauntlet. By the end of the first year, every law student has learned unequivocally that law, morality, and justice are critically distinct from each other. Such training is central to learning the technical and doctrinal specificities of the language of the law, as a distinctive language unto itself and separate from these other discourses. Yet somehow, in understanding that the vocabularies of law, justice, and morality—or put another way, law and politics—are distinct, the message is conveyed that they are distinct to a degree that is ultimately misleading. Rather than exploring how doctrinal and technical specificities relate to underlying policy debates that go to foundational questions of social organization and competing visions of justice, the presentation of the law often conforms to the paradigm presented within classical legal thought. This understanding saw the law in formalistic, and scientistic, terms: a self-enclosed structure that could be understood and applied on its own terms. Of course, the

19. I later fleshed out a typology of such critiques in Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195, 1195–96 (2000).

foregoing generalization overstates the case. Certainly, "we are all legal realists now,"²⁰ at least in U.S. law schools, and policy issues are certainly discussed as part of the study of the law. And yet, even where they are raised, they can be presented in a technocratic style that plays up the notion of the lawyer as expert technician and plays down the debates and the politics underlying the status quo.

What is so puzzling about this way of understanding, teaching, and learning the law is that one can hardly understand the arc of any legal field—the reasons for either retaining or changing rules over time—without understanding how it relates to these other questions. And this is all the more puzzling because, if there is any domain of law in which this practice of constantly evaluating and reevaluating legal rules to determine whether they should be continually applied or changed, it is the common law which continues to form the core of first-year law school study in the United States. The preservation of the law through the doctrine of *stare decisis* that contains within it a political justification for the importance of stability in law; together with tools for altering the law through disanalogy, through the introduction of new sociological data, through the consideration of equity—these are all the tools of the common-law judge.

In my own teaching, this set of observations is how I "black-letter-ize" the study of politics, philosophy, history, and political economy. Part of my mission is to disavow students of the impression that the law could be composed of purely technical rules that can be mechanically applied. The law is not only about stasis but also about change. As lawyers, the students I teach will at times advocate for stasis, at times for change, in the prevailing rule. For this reason, understanding the policy context, and the rationales for a particular legal rule, as well as why they may or may not apply to a particular case, is crucial to effective lawyering. The interplay between the larger context, and the formality and technicality of a given legal question—the ability to translate back and forth across this divide—is where true mastery of the law arises.

Unbeknownst to me when I first arrived in Cambridge, Massachusetts, in the fall of 1992, Harvard Law School had undergone a recent set of convulsions wrought by students who were seeking to reshape the institution to better reflect and

20. William Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988).

incorporate this set of critiques. Much of the focus only months before my matriculation, in the spring of 1992, had revolved around a cataclysmic sequence of events for the school: the resignation of Derrick Bell on the grounds of the school's failure to appoint a woman of color to the tenure-track or tenured faculty; and the student activism that accompanied Professor Bell's protest, including a student sit-in that, though now in many ways forgotten, profoundly affected the political discourse at the time.²¹

Over the years aspects of those student movements, and the powerful effect they ultimately had not only on the immediate law school environment of the students themselves but also by laying the groundwork for the pathbreaking legal, intellectual, and methodological achievements that many of those students went on to attain, have happily received greater attention and have been captured for posterity. Kimberlé Crenshaw, for example, has in recent years catalogued the critical race theory movement generally, and the battles at Harvard Law School specifically, beginning in the early 1980s. Crenshaw has recounted student reactions against "the curricular marginalization of race" and the ways in which, in her telling, "[a]s students of the post-integration generation, many of us were close enough to an activist tradition to question certain institutional arrangements—specifically the dearth of minority law professors and the relative complacency of those convinced that this problem lay outside the discourse of desegregation and antidiscrimination."²²

The connection between legal education and broader injustices in the law has been closely examined by Crenshaw and a few other leading lights of critical legal theory. Roughly contemporaneously with the glorification of the Socratic law school classroom in *The Paper Chase* (1973), Duncan Kennedy reported, while still a student himself, on "why the law school

21. Philip Lee, *The Griswold 9 and Student Activism for Faculty Diversity at Harvard Law School in the Early 1990s*, 27 HARV. J. RACIAL & ETHNIC JUST. 49, 49 (2011) (describing this episode through social movement theory as an unusually intense and robust moment of student activism that, though unsuccessful at the time, and "mostly forgotten" since, nevertheless may have had an "unacknowledged effect" in bringing about change, including the eventual fulfillment of the student demands related to faculty hiring).

22. Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door"*, 49 UCLA L. REV. 1343 (2002); see also Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011).

fails.”²³ This early critique gave us the broad strokes of the vagaries of law school training, at least in the “bad old days,” so to speak:²⁴ the atmosphere of “collective terror” on the part of the students and their intellectual “submission” to indoctrination by the status quo. Over time, Kennedy refined and expanded his interrogation of legal education, noting the multiple ways in which not only the beliefs but also the practices and customs became “training for hierarchy.”²⁵ The failures were not only due to the “trade-school mentality” and “endless attention to trees at the expense of forests”²⁶ but also to the reification of the law as somehow a question of mechanics rather than of politics or judgment. The other aspect of law school was “the ideological training for willing service in the hierarchies of the corporate welfare state.”²⁷ In order to bring this result about, a primary goal of law school had to be to “train students to accept and participate in the hierarchical structure of life in the law”²⁸ by training them to accept that, overall, it was “natural, efficient, and fair for law firms, the bar as a whole, and the society the bar services to be organized in their actual patterns of hierarchy and domination.”²⁹ Kennedy presented a meticulous analysis of the way in which interactions among faculty, between faculty and students, and between students helped to generate this result.

This analysis culminated in *Legal Education and the Reproduction of Hierarchy*, or as it was wryly called, “the little red book.” Kennedy had a stack of them in his office and handed me a copy during a visit to his office hours when I was a first-year law student enrolled in his Torts class. The book’s forensic presentation of the institutional “tilt” in the law school setting

23. Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970).

24. It would be remiss not to observe that, in the twenty-five years since this author graduated from law school, many law school administrations have done much to improve the ambiance and environment for law students. For a discussion of this trend at my alma mater specifically, see Kevin Washburn, *Elena Kagan and the Miracle at Harvard*, 61 J. LEGAL EDUC. 67 (2011). The somewhat consumerist focus on student satisfaction, though in many ways commendable and particularly so given the cost of legal education, may or may not complement the goals of broader pedagogy that I discuss here.

25. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40, 40 (David Kairys ed., 1982) [hereinafter Kennedy, *Legal Education as Training for Hierarchy*].

26. *Id.*

27. *Id.*

28. *Id.* at 41.

29. *Id.* at 40.

created a jolt of recognition, followed by relief that there were others that shared the unease that I had felt. Mind you, it was clear I was receiving a superlative education; and yet, there was the disorientation that mounted simultaneously. How could it be that, when we were discussing a case in criminal law, a student's question about the social context of poverty was dismissed as irrelevant? The fear that the entire classroom experienced in that moment, of embarrassment in the gladiatorial sport of Socratic dialogue, chilled any further discussion. Why was it the case that, although we were told that a law degree gave you infinite options, and of course our cultural understanding of the law included heroic personas from Clarence Darrow to Thurgood Marshall, the private sector law firm seemed by far the most salient career presented?

Pierre Schlag has also tackled this disorientation, focusing in particular on the Socratic dialogue in the first year as responsible both for opening the student up to a critical analysis of legal rules through the investigation of "opposing sides" and simultaneously closing the student off to intellectual possibilities beyond the established bounds of legal reasoning, as well as inculcating the student into a particular kind of "legal nonsense."³⁰ The student's confrontation with the Socratic moment, and the gladiatorial nature of that arena, plays a role in disciplining the student into an acceptance of beliefs and statements about the law that would be self-evidently fragmentary or flawed. The student acquires a certain kind of rigorous training, but in other ways can be lulled into abandoning a certain kind of common sense in favor of that legal nonsense.

Kennedy, Schlag, and many other critical theorists explored the concept of "legal nonsense."³¹ Kennedy wrote:

To say that law school is ideological is to say that what teachers teach along with basic skills is wrong, is nonsense, about what law is and how it works; that the message about the

30. Pierre Schlag, *The Anxiety of the Law Student at the Socratic Impasse - An Essay on Reductionism in Legal Education*, 31 N.Y.U. REV. L. & SOC. CHANGE 575 (2007).

31. Schlag writes, "In the early days of the Critical Legal Studies movement, much effort was aimed at showing the ways in which legal thought was nonsense. In particular, Critical Legal Studies thinkers spent a great deal of time demonstrating that legal process jurisprudence, the neutral principles school, grand normative theory and contemporary versions of doctrinal formalism were incoherent." *Id.* at 581. Schlag gives an extensive legal bibliography. *Id.* at 581 n.9.

nature of legal competence and its distribution among students is wrong, is nonsense; that the ideas about the possibilities of life as a lawyer that students pick up from legal education are wrong, are nonsense. But all this is nonsense with a tilt; it is biased and motivated nonsense rather than random error.³²

These critiques are even more acute when they are focused on the law in its relationship to racial hierarchy and racial dispossession. In some areas of the law, especially some areas of public law—constitutional law and criminal law, in particular—questions of racial inequality and racial justice explicitly form a central part of the subject matter. But in a broader sense, the law's contribution to a social system profoundly marked by racial hierarchy goes underexamined. The process of training students into relative complacency toward the legal status quo includes relative complacency toward the legal status quo's perpetuation of racial hierarchy. Consequently, this aspect of training can produce more acute crises for law students who are members of racial minority groups.

Kimberlé Crenshaw has detailed both aspects of this specifically racial critique, as well as the ways in which she has sought to develop a race-conscious pedagogy to address them.³³ The relationship between law and racial hierarchy is obscured through the presentation of "perspectivelessness."³⁴ The blindness to broader social context or critique becomes particularly salient, for example, for Black students with respect to cases where race is implicated in some way but those implications are not interrogated. The particular pressures of the law school classroom exert specific effects on minority students, Crenshaw explains. "To play the game right," minority students "have to assume a stance that denies their own identity and requires them to adopt an apparently objective stance as the given starting point of analysis."³⁵ If students resist, or if they seek to "step outside the doctrinal constraints, not only have they failed in their efforts to

32. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591 (1982); see also Kennedy, *Legal Education as Training for Hierarchy*, *supra* note 25.

33. Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1988) [hereinafter Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*].

34. *Id.* at 2.

35. *Id.* at 5.

‘think like a lawyer,’ they have committed an even more stigmatizing *faux pas*: they have taken the discussion far afield by revealing their emotional preoccupation with their racial identity.”³⁶ Students are under the dueling psychic stresses of what Crenshaw calls “objectification,” in which they are inculcated into what kinds of approaches are deemed “perspectiveless” even when their political biases and implications may be sharply apparent, and “subjectification,” in which, “after learning to leave their race at the door,” students’ “racial identities are unexpectedly dragged into the classroom by their instructor to illustrate a point or to provide the basis for a command performance of ‘show and tell.’”³⁷

Reading Crenshaw’s critique in light of Kennedy’s and Schlag’s discussions of “legal nonsense” calls to mind the particular brand of non-knowing described as central to Charles Mills’s conception of the “racial contract.”³⁸ In the same way that traditional social contract theory provided a heuristic lens through which to distill core political commitments as understood by the foundational philosophers of the liberal age,³⁹ Mills redeployed the social contract frame to take into account the centrality of white supremacy, racial hierarchy, and racial dispossession. Mills asserted that any social contract, to accurately describe Western history, would have to take into account that the traditional Western polity was a “racial polity”—formed either through “white settler states” or through “white presence and colonial rule over existing societies”⁴⁰—whose essential conditions of citizenship depended on a “preliminary conceptual partitioning and corresponding transformation of human populations into ‘white’ and ‘nonwhite.’”⁴¹ The corresponding social, political, economic, cultural—and legal—technologies and institutions of racialized governance contributed to constructing and perpetuating this reality.⁴² Yet, crucially, this reality is

36. *Id.*

37. *Id.* at 6.

38. CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997).

39. Such as Thomas Hobbes, John Locke, John Stewart Mill, and Jean-Jacques Rousseau, to name a few.

40. MILLS, *supra* note 38, at 12.

41. *Id.* at 13.

42. *Id.* at 11 (“[T]he general purpose of the Contract is always the differential privileging of the whites as a group with respect to the nonwhites as a group, the exploitation of their bodies, land, and resources, and the denial of equal socioeconomic opportunities to them.”); *id.* at 11–12 (“[T]he Racial Contract is not a contract to which the nonwhite subset of humans can be a genuinely consenting party

overwritten and obscured by a neutral set of governing social principles and practices, to which Western society nominally adheres. This creates as a central part of Mills's racial contract "an agreement to misinterpret the world":⁴³

So here, it could be said, one has an agreement to misinterpret the world. One has to learn to see the world wrongly, but with the assurance that this set of mistaken perceptions will be validated by white epistemic authority *Thus in effect, on matters related to race, the Racial Contract prescribes for its signatories an inverted epistemology, an epistemology of ignorance, a particular pattern of localized and global cognitive dysfunctions (which are psychologically and socially functional), producing the ironic outcome that whites will in general be unable to understand the world they themselves have made.*⁴⁴

According to this critique, the law, as a foundational frame supporting the racial contract apparatus, would most necessarily subscribe to this ignorance about itself. It would flow directly from these precepts that, not only would the majority opinion in *St. Landry* purport to know nothing of the structural inequalities that conspired to render the agreement between the *St. Landry* loan company and Skinner unjust, but also that, in teaching the principles of the case, a law school classroom would fail to observe these same inequalities. The term "racial contract" as applied to the *St. Landry* case generates at least a double meaning. The case is about an actual contractual agreement and, in its ruling, reveals one aspect of the way that racialized social inequality leads to exploitation of less powerful contractual parties by more powerful ones. Yet the case, both in the way it was decided and in the way it has been taught, arguably also exemplifies the underlying social and cultural frame that Mills's exposition of the term denotes.

(though, depending again on the circumstances, it may sometimes be politic to pretend that this is the case). Rather, it is a contract between those categorized as white over the nonwhites, who are thus the objects rather than the subjects of the agreement."). This discussion calls to mind Crenshaw's critique of the Gramscian conception of hegemony. See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350-60 (1988).

43. *Id.* at 18.

44. *Id.* (emphasis added).

The *St. Landry* case also of course included a dissenting opinion. The dissent is extremely helpful for pedagogical purposes, buttressing the kinds of critiques that I hope to highlight in my teaching of the case alongside the blackletter law. It also conveys another crucial aspect of the law: its internal and external contingency, notwithstanding its deep imbrication into patterns of social inequality. Legal rulings, interpretations, and institutions are contested, and the process of contestation can become a powerful vector both for dissent and, sometimes, incremental change.

METHODS OF CRITICAL LEGAL PEDAGOGY

What methods, then, could be used to better highlight these insights? Kennedy exhorts us to “develop our first year courses into systematic embodiments of our views about the present and future organization of social life”; to “teach our students that bourgeois or liberal legal thought is a form of mystification”; to “understand the contradictions of that thought”; and “how to overcome those contradictions.”⁴⁵ I still consider Kennedy’s 1L torts class to be a model of critical legal pedagogy. He was certain to announce when we were learning blackletter law, so that no one could claim otherwise. And yet we were also trained in the fundamentals of Kennedy’s “nesting” analysis—the way in which gaps, conflicts, and ambiguities play out within particular doctrinal parameters, so that indeterminacy is bounded by structures and vocabularies of legal reasoning.⁴⁶ Kennedy’s class was also the only first-year class I took in which even the existence, let alone the centrality, of racial hierarchy was acknowledged. In the other classes, there was the sensation, familiar undoubtedly to myriads of law students, that we were studying cases devoid of their social context in ways that omitted insights that would have been important to our understanding them.

Karl Klare’s *Teaching Local 1330* offers a precise and thrilling account of techniques in critical legal pedagogy.⁴⁷ Klare

45. Duncan Kennedy, *First Year Law Teaching as Political Action*, 1 L. & SOC. PROBS. 47, 47 (1980).

46. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

47. Karl Klare, *Teaching Local 1330 – Reflections on Critical Legal Pedagogy*, 7 UNBOUND: HARV. J. LEGAL LEFT 57 (2011).

begins by declaring his commitment to making the "law school classroom a site of empowerment," despite the fact that often "students do not experience legal education that way."⁴⁸ Klare also identifies dynamics of his home institution that run at odds with some of the more heavily critiqued aspects of law school classroom culture: law students are treated like "grown-ups" so that their social and political views of the world are not subdued as part of their training, greater interest and value is placed on public-sector and social justice work, etc.⁴⁹ Within this context, Klare is perhaps himself better empowered to lead the students in this kind of work. In discussing the *Local 1330* case, in which workers filed and lost an action to prevent a steel plant from closing,⁵⁰ Klare delves deeply into the common law theories offered by both sides as well as the ultimate adjudication of the issues, such that it is clear that the students are mastering "blackletter law" as part of the discussion. In addition, Klare provides crucial and fascinating social and economic context that includes the company's production and profit strategies, larger shifts in political economy, and the impact of the plant on the local community. Finally, Klare pushes his students to think "outside the box" and to investigate not only what the parties did argue, but also what they could have argued—how they could "translate their moral intuitions and sense of justice into legal arguments."⁵¹ Klare leads the students through a variety of options, each rejected on grounds of doctrinal plausibility, until they arrive at the recognition that the court could have applied "well-known and time-honored torts principles" to require the plant to internalize the harm to the plaintiffs of dislocation.⁵² A further discussion of how all the elements of torts analysis would have applied supports a further close consideration of both doctrinal elements and their social, historical, and economic context.⁵³ In this way, Klare hopes to further his objectives of conveying both "modesty about what legal work can accomplish and sensitivity to how law both constitutes and reflects illegitimate class, racial, gender, and sexual domination," while also

48. *Id.* at 58.

49. *Id.*

50. *United Steel Workers, Local 1330 v. U.S. Steel Corp.*, 492 F. Supp. 1 (N.D. Ohio), *aff'd in part, vacated and remanded in part*, 631 F.2d 1264 (6th Cir. 1980).

51. Klare, *supra* note 47, at 62.

52. *Id.* at 72.

53. *Id.* at 72-77.

challenging “students’ overblown sense of the constraining power of legal discourse.”

I share this sense with Klare, that the goal is to show how the law properly understood can be a vehicle for both stasis and change. Indeed, part of the goal in any subject is to show how the law *has* changed over time. Each time such a change was made, and indeed each time a decision is made against change—not only through legislation or through regulation but also through the common law or other judge-made law—this is reflective of an entire set of judgments that acknowledge the possibility of change and assess its plausibility or desirability in a particular case. Because we know the law is constantly changing, the presentation of its internal stasis is, as Klare indicates, overblown.⁵⁴

In the seminar that Crenshaw developed, like Klare and Kennedy, she began with an overall commitment to changing the dynamics of the classroom “to broaden the notion of what insight is relevant, and to empower students to feel as comfortable standing within their own consciousness as their classmates who are unburdened with the knowledge that theirs is not the universal view.”⁵⁵ The process of conveying legal knowledge and training need not divorce the students from their political commitments, but rather can help students see how these two would

54. An objection to the thesis presented here might be that it is illegitimate or unethical for professors to devote concerted attention to sharing their larger perspectives on the law with law students. The conventional mode, certainly in 1L law teaching, instead tended toward a “hide-the-ball” stance in which the instructor revealed as little as possible about her own views, and this supported the classical presentation of the law as formally objective and neutral. The critical rejoinder of course is that it is not possible to extract one’s personal views from one’s presentation of the law. Teachers inevitably inflect their teaching with their methodological and intellectual commitments. For example, to return to some of the reflections of this essay, as a law student taking 1L torts from Duncan Kennedy, I would hear from classmates taking torts with Steve Shavell, a law-and-economics guru, that they were learning – surprise – a lot of law and economics. Another professor with an interest in legal history might emphasize that perspective. It became clear that one of the privileges of studying with teachers who are also dedicated scholars was that one had the opportunity to learn not only about the law but also the instructor’s perspective as informed by her own scholarship. Rather than pretending toward objectivity, I concluded that a fairer and more ethical stance is to present one’s views with transparency, as well as competing views, so that students can acquire some agency in the process of learning and interpreting the law for themselves. As long as one is transparent about one’s perspective and makes clear that one welcomes opposing views, I think this greatly adds to the richness of the study of the law.

55. Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, *supra* note 33, at 13.

interrelate. Part of this process is training the students in critique: how to move beyond a general sense that a particular legal rule is “wrong” and to identify “specific arguments ranging from empirically or experientially based critiques of the accuracy of the claims being made, to criticism of the normative world view implicitly or explicitly adopted by the texts.”⁵⁶ The commitment to critical thinking then supported the seminar’s collective work, including assisting the students in sharpening their legal research, analysis, and writing skills to author publishable written work, as another way of empowering their perspectives and assisting them to develop their own critical voices.

While students in a seminar or otherwise elective setting presumably seek out such training, the challenge of introducing these dynamics into the 1L classroom environment can be significantly more fraught. In some ways, the “perspectivelessness” and “trade-school mentality” that Kennedy and Crenshaw disclaim renders it particularly difficult to bring these notions explicitly into discussion. The suspicion that might attend to such efforts to broaden discussion may intensify for instructors who are women and/or people of color.⁵⁷ There is now substantial data to show what many such instructors have intuitively felt: that their phenotypes may play a significant role in determining how they, and their knowledge and teaching, are perceived by students.⁵⁸ The combination of these dynamics raises the stakes even further for introducing critical perspectives into the generic law school classroom: the presumption against the substantive validity of these perspectives may become amplified by the relative presumption against the competence or qualifications of the instructor. To maintain hold on her authoritativeness, an instructor may decide that the safest way to teach 1L material is strictly “by the book” rather than risking their subversion or mutiny. The question, then, is how we as law school teachers can work toward the more regular incorporation within the law school of critical understandings, including critical understandings of racial hierarchy, such that these insights are not dependent entirely on individual instructors but reflect a greater institutional understanding and commitment.

56. *Id.*

57. PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutiérrez y Muhs et al. eds., 2012).

58. See, e.g., Kerry Chaves & Kristina M.W. Mitchell, *Exploring Bias in Student Evaluations: Gender, Race, and Ethnicity*, 53 POL. SCI. & POL. 270 (2020).

RELOADING THE CANON

“Any discipline has a canon, a set of themes that organize the way in which people think about the discipline. Or, perhaps, any discipline has a number of competing canons.”⁵⁹ So wrote the critical legal and constitutional theorist Mark Tushnet on the occasion of examining what the canon(s) of constitutional law were or should be. Debate over the literary canon formed a central part of the “culture wars” that took university campuses by storm in the 1980s—undoubtedly forming part of the larger cultural environment in which the law school “crit wars” described above occurred—and eventually migrated over to legal discourse.⁶⁰ Beyond a set of themes, a canon also typically includes “foundational texts that exemplify, guide, and constitute a discipline.”⁶¹

Debate over the canon of any particular discipline or genre, then, constitutes debate over the very heart of the meaning(s) and knowledge(s) that the discipline or genre seeks to impart. If we take as foundational that critical legal pedagogy should seek to remake legal education so as to better reflect all of the insights and experiences described above, how would we do so? What “set of themes” should take center stage? What texts should be read and assigned?

Certainly, in terms of the central themes, critical legal pedagogy would foreground the importance of not only understanding legal doctrine and positive law on their own terms, but also understanding them both in relation to larger social context and in relation to key debates on the nature of justice, equality, and freedom. To the skeptics who would be fearful that the core methods and tools of legal education would be diluted and that lawyers might become jacks of all disciplines, masters of none, my contention is that this way of teaching, though it must be carefully curated, profoundly enhances the depth of insight into the law. It also invites students to consider for themselves how the law they are learning accords with their worldviews—rather

59. Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187 (2000).

60. For a discussion of the literary canon debate and the emergence of “canon” discourse in legal scholarship, see Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 825–26, 826 n.1 (2004).

61. *Id.* at 826.

than treating them as blank slates from which previous knowledge must be erased.

Reflecting on all of these accounts makes it clear that institutional recognition and validation of critical legal pedagogy would play a significant role in opening the possibilities for instructors to introduce these perspectives. Instead, the general dynamic seems to be one in which these perspectives are offered, if at all, by a small number of instructors and possibly also in a boutique setting rather than as a regular feature of legal education. Here also there is a missed opportunity. Casebooks that incorporate law and economics approaches, or legal history approaches, or other scholarly commentary certainly can also incorporate critical approaches. Currently, though, “teaching by the book” too often excludes such approaches when, if the books were rewritten to incorporate them, the onus would not be placed on individual instructors to incorporate these materials.

For the first time in a long time, real momentum is emerging behind efforts to effectuate such transformations in legal education. Certainly, student politics in the 2010s appeared to reemerge as a force to be reckoned with, with Black Lives Matter and other groups making inroads into law schools. The racial justice protests of 2020 created an intense moment for deep introspection not only in general political discourse but also in the context of universities generally, and law schools in particular. Over the course of 2020, in the wake of a particularly salient but, chillingly, not unique string of atrocities, an outpouring of thought and action touched virtually every corner of society. The moment has called upon each of us to determine how we can do our part to achieve a fundamental and lasting transformation of our social structure.

How might such transformation manifest itself in legal education? Rewriting educational materials to incorporate critical perspectives; offering more courses and opportunities for study that center on critical perspectives; expanding research and scholarly resources available both to students and instructors—these are only some of the possible ways to “reload” the legal education canon. As I write this concluding paragraph, such efforts are underway at numerous law schools nationally and globally, including my own. Our efforts will necessarily be incomplete, and so I salute the law students of today and tomorrow who will reflect critically on those efforts, and, in so doing, carry the spark.