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Meditations on Teaching What Isn't: Theorizing the Invisible in Law and Law School

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KRIS FRANKLIN

Meditations on Teaching What Isn't: Theorizing the Invisible in Law and Law School

66 N.Y.L. SCH. L. REV. 387 (2021–2022)

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*“Make an effort to remember. Or, failing that, invent.”*¹

I. INTRODUCTION

The hardest thing to comprehend is what is not visible. Because, of course, “not visible” does not mean “not present.” It simply means “not capable of being seen.”²

This essay is an effort to weave together disparate thoughts about what in law may be not visible,³ not seen, and yet, not (necessarily) not present. As other authors in this compendium make clear, race and racism are both omnipresent but not always visible in the law we study and teach.⁴ As a consequence, some of the issues and concerns that may be specific to the Black experience may not be seen in American legal analysis. Further, because Black people may sometimes consciously opt to reduce their intersections with systems that disadvantage them, there may be important aspects of their lives which inadvertently, or even deliberately, take place outside of legal constructs.

I want to show that certainly with respect to race—but also in many other respects—looking for that which is not fully visible in law, speculating about it, conjecturing or reasoning from its absence, and if necessary, bringing it into sight, may be some of the best work lawyers ever do.

To begin, I turn to an exercise I have introduced in my first-year Contracts class. The problem has multiple purposes, some obvious and some not. Most patently, it reinforces beginning law students’ analysis of contract formation. It is also deliberately constructed to make visible to these students a particular form of financial management common among Caribbean immigrants, which some Black and most non-Black students may be unfamiliar with, that is seldom considered in the standard Contracts curriculum. Simultaneously, the problem introduces first-semester law students to the notion that defining what something is not may be as valuable a definitional project as defining what something is.

The essay then moves from the specifics of this particular exercise to an observation that, while it may be generally true that many experiences are not recognized in law, inclusion (or not) is not random: Racism perpetuates the ongoing non-visibility of important parts of the lives of some Americans more than others.

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1. MONIQUE WITTIG, *LES GUÉRILLÈRES* 89 (David Le Vay trans., Univ. of Illinois Press 2007) (1969).
 2. *Visible*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/visible> (last visited Apr. 12, 2022).
 3. Which raises the fair question: not visible to whom? Some of what I discuss in this essay is genuinely obscured, but plenty has been clearly visible to many people for a very long time, just not included in the conventional legal discourse. I acknowledge that it is inaccurate and reductive for me to call some of that embedded cultural knowledge “invisible.” “Not seen” is somewhat closer, but even that phrasing begs the question: not seen by whom? Let’s recognize the implicit “not always seen by many, including the educationally-privileged and usually white constructors of much of American law.”
 4. *E.g.*, Edward A. Purcell, Jr., *Race and the Law: The Visible and the Invisible*, 66 N.Y.L. SCH. L. REV. 141 (2021–2022); Lynn Su, *Unpacking the Teaching Potential of a Hypothetical Criminal Case Involving a Cross-Racial Eyewitness Identification*, 66 N.Y.L. SCH. L. REV. 339 (2021–2022); Richard Chused, *Strategic Thinking About Racism in American Zoning*, 66 N.Y.L. SCH. L. REV. 307 (2021–2022).

Learning to see that and make it visible moves us ever so slightly in the direction of a more inclusive legal work and, possibly, a more just law. The essay concludes with an exploration of the ways that law teaching already works to help students cast light on what may not be immediately visible. And to view doing so as a skill to be developed, as well as a potentially important instrument in their legal toolkit.

II. THE SOU-SOU PROBLEM

As soon as we complete the introductory unit on contract formation, I ask the students in my Contracts class to analyze the following problem:

A sou-sou/susu is a rotating savings club drawn from West African and Caribbean traditions and commonly operated in some U.S. immigrant communities. The concept is simple: A group of people commit to putting an equal sum of money into a pool on a regular basis and each collects the full amount paid in by all members when it is their turn. If ten people joined a sou-sou and each contributed \$100 per week, at the end of every week one club member would receive a \$1,000 lump sum. Eight people in the savings club would mean an eight-week cycle, with the sou-sou ending or beginning a new cycle after that. Many members use the payouts from these savings clubs to finance new businesses, make down payments, or even pay for college tuition.

An agreed-upon treasurer manages the pool and creates the payout schedule. Interest is not collected or paid on club assets, and members are not required to complete credit checks or sign any official paperwork. These groups operate based on established trust among their community members, and therefore often comprise close-knit groups of extended family, co-workers, or fellow parishioners.

Jaden is deeply knowledgeable about antique teacup sets. He wanted to start an online antique ceramics business and needs funds to purchase inventory. A cousin told him about a sou-sou that was beginning in June. He joined the sou-sou with ten other people. The members decided to contribute \$1,000 per month each, and selected Landa as treasurer.

Four months into the eleven-month cycle, club member A.J. failed to make his monthly payment. Landa is unable to cover the missing contribution, which means the pool is now short \$1,000 for the month's collection, just when Jaden is scheduled to receive his payout. Jaden consults your law firm to find out whether he has any legal recourse in contract law.⁵

5. Many thanks to Simi Parikh, research assistant and co-author of the sou-sou problem.

A. What the Sou-Sou Problem Teaches About Contract Formation

In my Contracts class, students learn that the elements of contract formation are mutual assent and consideration.⁶ The problem requires students to consider whether those elements can be established for this sou-sou.

At first glance, they probably can. Identifying consideration in the plan is easy: There is unquestionably a bargained-for exchange among the members; each participant contributes money and expects to receive a payout in turn. In an initial or superficial examination, mutual assent might appear equally easy to satisfy: It seems both obvious and intuitive that all parties have agreed to the sou-sou's terms. Why else would they continually hand over their hard-earned money?⁷

If this is correct, the analysis of contract formation would pretty straightforwardly conclude that a contract had been created, and the problem would be helpful simply for providing beginning law students some practice in carefully articulating and explaining why a valid legal contract existed. But backing up to view the question from a different perspective,⁸ something might feel a little off about that conclusion. After all, there are banks and credit unions and mutual funds and many other ways to save money or manage one's finances, none of which are involved in the formation of this savings club. Doesn't it seem apparent that the sou-sou in our problem is designed to be a private arrangement, unencumbered by legal formalities, banking regulations, standardized interest rates, or the statute of frauds?⁹ Could it be possible for the sou-sou to meet the technical requirements of contract formation yet somehow

6. Many Contracts students learn instead that contract formation has three elements: offer, acceptance, and consideration. However, the casebook I use emphasizes that an offer coupled with its acceptance is the most common form of mutual assent, but that contractual assent may be discerned in some circumstances even where a specific offer and acceptance cannot be pinpointed. *See generally* MICHAEL HUNTER SCHWARTZ & ADRIAN J. WALTERS, *CONTRACTS* (3d ed. 2020); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981) (“[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent . . . and a consideration.”). In other words, on a Venn diagram, offer and acceptance are subsumed within the larger circle of mutual assent. *See* SCHWARTZ & WALTERS, *supra*.

7. Sou-sous are not without risk. They may be subject to abuse or dishonesty just like any other form of financial activity. *See Learn if a ‘Sou-Sou’ Is Legit or Fake Before Investing*, D.C. DEP’T INS., SEC. & BANKING, <https://disb.dc.gov/page/learn-if-sou-sou-legit-or-fake-investing> (last visited Apr. 3, 2022).

8. A commonsense perspective may be especially hard for beginning law students to hold onto as they struggle to master intricate legal doctrine while adjusting to legal ways of thinking. But that is all the more reason for teachers of law to emphasize its value. Law without sense is senseless.

9. U.C.C. § 2-201(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977) (statute of frauds).

not be a contract?¹⁰ Or is something missing from our conception of what constitutes a formed contract?¹¹

My students should start to refine their understanding of the mutual assent requirement in contract formation by considering what exactly it is that the parties are supposed to be assenting to. One answer might be that sou-sou members assent “to be bound” by their agreement: They really do intend to commit and they assume their partners are equally committed. They would likely be outraged if any members failed to pay their share.¹² Yet suppose someone did. A sou-sou is usually comprised of family members, close friends, congregants, co-workers, or others bound in close community who interact with one another regularly. Their lives are intertwined, often inextricably. Chances are, they were willing to take the significant risk of entering such a contingent financial bond with one another precisely because of their personal and community ties: They care for each other and for their standing within the group or larger community. Their personal ties undergird an obligation to all contribute their share.

Do such close community members plan to immediately file suit against one another if one fails to pay up?¹³ Probably not. In fact, they are probably well aware that they could create some form of a legally enforceable savings agreement with one another and have deliberately chosen a mechanism that operates outside of the legal

10. Only one published case that I found, *Speare v. Johnson*, decided in 2014, deemed a sou-sou agreement to be a formed contract, and it nonetheless rejected enforcement for default on other grounds. 978 N.Y.S.2d 644, 646 (N.Y. Civ. Ct. 2014). These sorts of partnership-based savings clubs also go by many different names. See Lihle Z. Mtshali, *Everything You Ever Wanted to Know About Those Sou-Sou Savings Clubs African and Caribbean Women Love*, ESSENCE, <https://www.essence.com/news/money-career/what-is-a-sou-sou-savings-club-facts/> (Dec. 6, 2020) (“Somalis call [a sou-sou] ‘hagbad’ or ‘ayuuto’; in Jamaica, it is known as a ‘partner’; in Guyana, a ‘box hand’; Haitians call it a ‘min’; and if you are Southern African, you may know it as ‘stokvel.’”). Accordingly, I make no representation that my research or conclusions are exhaustive or definitive. Only that they are reasonable reads of the particular fact pattern in my class problem and provide a fictional but fair representation of how many of these arrangements operate.
11. Or from our conception of the sou-sou itself? Maybe it includes some form of an alternative-dispute resolution clause? I do not mean by my problem to make any uniform claim about the legality or not of various savings clubs, or to represent the terms by which all are devised. There is considerable variety in expectation and construction. This variation even extends to whether the sou-sou agreement is written down in some form or is entirely oral. The analysis of contract formation here is intended to be just one viable approach to one sample sou-sou agreement.
12. Indeed, there may be an expectation that the sou-sou treasurer will enforce the requirements and timeliness of payments, and they may be expected to make up the difference if a participant shorts the club. See *‘Sou-Sou’: Black Immigrants Bring Savings Club Stateside*, THEGRIO (May 20, 2011) [hereinafter *Stateside Sou-Sous*], <https://thegrio.com/2011/05/20/sou-sou-black-immigrants-bring-savings-club-stateside/> (mentioning the unspoken pressure to honor the commitments of the sou-sou). In other arrangements, an additional payment may be factored in for the treasurer to hold to cover any default or keep as compensation for the organizational labor. Telephone Interview with Elizabeth Valentin, Professor of Law, New York Law School (Aug. 4, 2020).
13. Of course, it does happen that (formerly?) close friends, partners, and family members sue one another. But probably more frequently they do not do so, even when they might have a legally cognizable claim. The expense of litigation may also dissuade someone from filing suit.

system.¹⁴ Yet members' agreed-upon sou-sou contributions are hardly optional. It is simply presumed that familial or community affection and interdependence, reputation, desire for continued business with others in the community, honor, or ethics will suffice.¹⁵

Thinking all of this through helps students further refine their thinking about the central concept of assent in contracts. It is, they may eventually come to realize, assent not just to terms but also to create an enforceable contract, meaning an agreement that is intended as not a mere moral obligation (a promise), but a legal one.¹⁶ It is a desire to create a binding agreement that is private but will nonetheless be governed by American courts and law.¹⁷ That is essentially what a contract is, and it is why the sou-sou in my Contracts exercise might not be one.

B. *What the Sou-Sou Problem Teaches About How Law Works*

A key PowerPoint slide in my very first Contracts class session each fall tells students (in aggressively loud color and large font) that "Context Matters." It is a slide that I repeat at least two or three times as the semester progresses. It would probably not be overkill if I included it in every class session. Indeed, the slide is not limited to learning contract law—does a law school course exist that would not have use for that slide? Not one I have ever taught.

It is almost hackneyed to observe that many law students matriculate believing that they are entering *laws* school: a school in which they will learn about laws.¹⁸ To state it differently, beginning law students often naively think that Law is a set of rules. Lawyers, however, know that law's rules can be interpretable and are frequently contingent, and it is a not infrequent need to choose between different, arguably applicable legal rules. It would be more accurate to say that law consists of sets of

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14. See Sasha Abramsky, *New Yorkers & Co.; Newcomers Savings and Loan*, N.Y. TIMES, Oct. 22, 2000 (§ 14), at 4 ("There is no legal penalty if a [sou-sou] member fails to make regular contributions . . ."). *But see* *Duncan v. Campbell*, 984 N.Y.S.2d 631, 631 (N.Y. Civ. Ct. 2013) (suggesting that verbal sou-sou agreements would be legally enforceable and not barred by the statute of frauds if both parties were expected to perform within one year, and suggesting further that written sou-sou agreements provide a path to recovery for breach of contract).
 15. See Abramsky, *supra* note 14 ("[T]he power of community sanction is strong.").
 16. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 305 (1986) (teaching that a mere promise does not suffice for contract formation; the promise must be made with the intent to be legally bound). Randy Barnett's contractual theories have critics but none seem to dispute the premise that, whatever the required form of intentionality, a binding contract under the law requires at least an intention to be legally bound. See Lawrence Kalevitch, *Gaps in Contracts: A Critique of Consent Theory*, 54 MONT. L. REV. 170, 196–99 (1993) (criticizing Barnett's definition of "manifested consent," among other aspects of his consent theory of contract, but conceding that "[n]o one has claimed that promising is legally sufficient").
 17. See Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 634 (2002) ("[E]nforcement of private agreements is . . . about manifesting consent to be legally bound.").
 18. My review suggests that virtually all texts on the market aimed at introducing beginning law students to legal ways of thinking make this point. See, e.g., RICHARD MICHAEL FISCHL & JEREMY PAUL, *GETTING TO MAYBE* 4 (1999).

rules that are created and sometimes altered by actual people, and that those rules only have moral authority and meaning when they are applied thoughtfully to appropriate interactions in real people's lives.¹⁹ Formalism exists in law, but so too does good judgment and pragmatism.

Contracts courses tend to reinforce that lesson early and often. Virtually every casebook invites students to consider not just the words that parties use in their dealings with one another but also the setting in which those words are delivered and what the people in those dealings might therefore take them to mean.²⁰

For example, the statement, "I offer to sell this indicated item, my bicycle, for \$300," rather unambiguously manifests a present intent to be legally bound should the offeree accept, and is therefore sufficient to form a contract if the offer is indeed accepted. Yet contractual conversations are often far looser and more informal than that. Amid the context of two friends' discussions about plans one had to purchase a used bike from the other, there are circumstances in which even a very loose inquiry from the prospective purchaser, like "three-hundred bucks?" could convey the same meaning. In which case it too might be deemed an offer to form a contract. But not always. In one setting, if the friend were astride her bicycle at the time, and the "three-hundred bucks?" question were accompanied by a meaningful glance downward toward it, the inquiry might reasonably be understood to mean "I offer to sell this particular bicycle, which I indeed own, to you, for the sum of \$300." Conversely, in a conversation in which the friends were bemoaning the state of the economy, the same question might equally well be understood as only an inquiry into her companion's budget. Context matters because context shapes meaning. In this case, context constructs (or does not construct) the requisite contractual intent.

Thus, my students should eventually see, in the sou-sou problem they must consider what the parties say and do, and they must also consider what the context suggests the parties mean. The parties may each commit to the agreement; they may use the word "promise"; they may fully expect one another to treat it as a sacred

19. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 6 (2000) ("[L]aw is not simply a system of ideas but a series of consequences that human beings inscribe on the lives of other human beings . . .").

20. Which is probably why *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y. 1999), quickly became a casebook classic. The case addresses an intentionally humorous advertising campaign in which Pepsi apparently offered to provide a multimillion-dollar Harrier Jump Jet to customers who met certain criteria. *Id.* at 119–20. When one unexpectedly did and then sought to collect his personal airplane, the court had to consider whether the apparent satire of the advertisement was sufficient to alter the legal meaning of its offering language. *Id.* at 122–32. The court held that it was not. *Id.* at 127 ("In evaluating the commercial, the [c]ourt must not consider defendant's subjective intent in making the commercial, or plaintiff's subjective view of what the commercial offered, but what an objective, reasonable person would have understood the commercial to convey.")

Yet most Contracts texts also include the 1954 case of *Lucy v. Zehmer* to emphasize that context matters from the standpoint of the objective observer. 84 S.E.2d 516, 521–23 (Va. 1954) (enforcing a hastily-written agreement, formed in a bar and entered into by one party in jest, because to all external objective measures that party willingly assented to the deal). Both words and actions are crucial to construing context.

obligation. But in context, at least in my problem, the participants quite possibly do not expect that it will be governed by the U.S. legal system.²¹

Good contract lawyers, however, should be able to make both sides of the “is the sou-sou a contract?” argument. Ideally, they should be able to exercise the good judgment necessary to discern the stronger of the two sides.²² Or to put it more plainly, the sou-sou problem teaches something important about contract law while it also more broadly teaches something important about the law itself.

C. *What the Sou-Sou Problem Shows About Representation in the Law*

I have had students (even law professors) smile with pleasure on reading the sou-sou problem. Some report that this is because they so enjoyed having a part of their culture not commonly seen by outsiders recognized, and presumably valued, in the law classroom. The problem could be a valuable addition to my Contracts course for that purpose alone. Think here of how much more included some law students may feel if not all classroom hypotheticals feature “James” or “Jennifer” and instead some include “Jairo” or “Jehan.” I agree that the exercise is fairly intentionally signaling an embrace of cultural diversity which may not be as visible as it ought to be in the typical law school curriculum, despite the best intentions of most law schools. Yet I think the exercise has more to offer beyond just inclusiveness.

I do not want my students to limit their consideration of the sou-sou problem solely to the club’s legal status. If the savings mechanism turns out not to be legally enforceable and is not designed to pay interest on the sums put in, I want my students to nonetheless continue their inquiry on both legal and human grounds. I would hope they would ask themselves why anyone would choose to invest in a sou-sou rather than placing their money in, say, a bank account. What, exactly, are the members giving up their FDIC-backed security and compounding interest for?²³

One answer may lie in the pre-connectedness of the participants. People often do things to support family and friends even at a cost to themselves of out-of-pocket expense or lost opportunity. Another inducement might be the assured all-at-once payout. The reality that the same money could theoretically be saved and used

21. Though some community-based savings organizations might well intend to operate within traditional U.S. systems and may even work with existing banks. *See, e.g.,* Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 917–20 (1999) (describing efforts of Korean-owned banks to work with similar investment groups known as “kyes”). The claim in this essay is not that sou-sous cannot be contracts, only that the one in my class problem might very well not be, and students will refine their understanding of contract formation if they consider the question.

22. Legal judgment is a key part of what we hope to develop in our students. It might even be fair to describe law school exams as tests of legal judgment in using the domain knowledge of a particular subject matter.

23. The Federal Deposit Insurance Corporation (FDIC) is a U.S. agency that insures deposit funds placed in banks and savings associations against loss; this essay refers to such insurance as “FDIC-backed security.” *Deposit Insurance FAQs*, FDIC, <https://www.fdic.gov/resources/deposit-insurance/faq/> (Dec. 8, 2021). “Compound interest” is defined as “interest paid on both the principal and the previously accumulated interest.” *Interest*, BLACK’S LAW DICTIONARY (11th ed. 2019).

incrementally may be easy to recognize, but there is undoubtedly something more psychologically satisfying about receiving a big chunk of cash all at one time.²⁴

The large payout may be especially valuable in the low-income immigrant communities in which sou-sous most commonly thrive.²⁵ Scale matters enormously when it comes to money. Comparatively smaller amounts of cash paid into the sou-sou, even if they were saved and collected over time, would probably not feel like they have the potentially life-altering effect that the payout will have when it comes.²⁶ For families living on the economic edge—not true of all sou-sou participants, of course, but probably common in the immigrant communities that foster many—it may be especially tempting to use any available cash for everyday expenses and to delay or forego payments into individualized savings.²⁷ Meanwhile, the mutually obligatory performance of saving in the sou-sou might compel its prioritization.²⁸

Too, our question asking “why not just open a bank account?” presupposes that conventional banking is an available option. For sou-sou members, it may not be. Banks are expensive if you have access to them. The less wealthy the customer, the less access there is, and the more proportionally expensive they will be.²⁹ The unique challenges of effective financial organization for those with fewer means³⁰ has been

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24. The field of behavioral economics has arisen to study the role of psychology in individual economic decisions. Though behavioral economists researching “loss aversion” would take pains to note that fear of economic loss is a far more powerful motivator than expectations of gain, which suggests that the sou-sou members must have a great deal of confidence that they will indeed collect the payout when their turn comes. See Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q. J. ECON. 1039, 1056 (1991).
 25. *Stateside Sou-Sous*, *supra* note 12.
 26. The capacity for a significant financial payout to be paradigm-shifting in a way that ordinary savings may not be probably also helps explain why poorer people are most likely to play lotteries even as they are widely understood to be long-shot investments and highly unlikely to pay off. See Grace M. Barnes et al., *Gambling on the Lottery: Sociodemographic Correlates Across the Lifespan*, 27 J. GAMBL. STUD. 575, 584 (2011) (providing data on the prevalence of lottery participation among lower income groups, and especially among Black individuals).
 27. Categories of finance might matter as well, with sou-sou contributions being treated as far more pressing than individual savings just because the household’s “mental accounting” sees the obligation differently. See Julia Y. Lee, *Money Norms*, 49 LOY. U. CHI. L.J. 57, 64 (2017) (showing that household funds are often not viewed as fungible and are treated differently depending on where the funds come from or for what they are earmarked).
 28. In short, the club can serve as a self-imposed “nudge” toward beneficial economic choices. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 76–80 (2008).
 29. The comparatively large deposits required to open bank accounts and the fees charged for small accounts that are often waived for larger ones lead to what scholars refer to as “unbanked” or “underbanked” communities. See generally Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2004) (researching bank account ownership and the consequences of not having one).
 30. While poverty and race are not the same, the racialized effects of American income inequality continue to result in a significant overlap. See, e.g., Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 Nw. J.L. & Soc. POL’Y 265, 270–75 (2020) (examining the connection between race and wealth inequality, and the evolution thereof).

well documented,³¹ and has spawned a host of solutions from microlending to crowdfunding to payday loan operations, each of which pose their own difficulties. The sou-sou is one community-originated answer to an ongoing problem.

Yet even if every single member of a sou-sou had access to affordable commercial financial systems and there were no regulatory barriers to building a sou-sou agreement within the legal system, chances are many would nonetheless remain outside the legal realm. Its members might deliberately choose a savings plan that operates outside the law. For reasons of race or class or tradition or just comfort and feeling of belonging, they might mistrust banks (or bankers). Or courts (or lawyers and judges). Or any systems of power they feel tend to operate to the benefit of those with the most privilege.³² The non-legal status of the sou-sou might be a feature, not a bug.

III. WHAT IS NOT THERE WITHIN THE TRADITIONAL LEGAL CURRICULUM?

The sou-sou problem invites deeper consideration of contract law via the mechanism of asking students to reason through why a private sou-sou agreement may not be a legal contract. It works precisely because the analysis of what lies outside any grouping always helps to refine its definitional boundaries.³³

Simultaneously, the problem helps to introduce the notion that there may be a lot going on in society that our law does not recognize or does not know how to acknowledge. Chances are the sou-sou monetary fund was not visible to many law students before they encountered the class problem. My Contracts course is not about the economic adaptation of a particular immigrant Black community, of course, though it is a nice bonus to be able to provide students with a small glimpse of cultural differences that many might not be acquainted with.

And it is not by pure chance whom those unseen things are most likely to affect. Students of American law should learn what that law is and how it operates, but they should also learn something about whom it may not include. Their responsibility as lawyers is to learn what there is to learn, but it is also to ask what is not yet there to learn but could be. And part of the project of the work collected here has been to identify just a few topics that are typically “not there but could be” in our disparate legal fields, specifically but not only with respect to race.³⁴ There is certainly plenty more that remains not yet visible in this arena.

31. See Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U. L. REV. 1217, 1231–40 (2004) (discussing informal financial systems operating by and for low-income consumers).

32. As Regina Austin observes, “[t]he assumption that [B]lack people’s money is worth less taints commercial transactions of all sorts.” *Id.* at 1218. Thus, naturally, members of some immigrant Black communities would opt to create their own forms of self-reliant financial institutions like collective savings clubs. *Id.* at 1231–32.

33. A point made by multiple academic disciplines as disparate as mathematics (set theory) and sociology (deviance identified as socially useful to define and reinforce group coherence).

34. *E.g.*, Chused, *supra* note 4; Su, *supra* note 4; Richard Marsico, *The Intersection of Race, Wealth, and Special Education: The Role of Structural Inequities in the IDEA*, 66 N.Y.L. SCH. L. REV. 207 (2021–2022).

A. Race Profoundly Affects What Is Seen and What Is Not Seen

Is this statement still controversial? Must I footnote³⁵ and thoroughly search to find sufficient (and sufficiently credentialed) authority to reach a well-supported scholarly conclusion that American culture has very much overlooked the contributions³⁶ and dignity³⁷ of people of color generally, and Black Americans in particular? And that law and legal scholarship have done the same?³⁸ Or can we just please simply know in our bones that it is true?

B. We Don't Want to See Racism

One effect of the Black Lives Matter (BLM) activism, which erupted first in 2013–2014³⁹ and reemerged in the wake of the murder of George Floyd⁴⁰ in spring 2020, seems to be (somewhat) more widespread awareness among (some) white Americans that racism persists,⁴¹ and that it operates powerfully and perniciously in

35. I am reminded by Ruthann Robson that there is enormous power in the ability to take an assertion as given rather than as requiring citation. *See generally* Ruthann Robson, *Footnotes: A Story of Seduction*, 75 UMKC L. REV. 1127 (2007) (crafting an article consisting entirely of footnotes with no main text, save for a few subheadings, while interrogating what it means to provide supporting documentation for central aspects of people's lives); *see also* Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65, 69 (2010) ("Criticism of the footnote is just about as old as the footnote itself.").
36. Such as the economic productivity of enslaved people that is arguably the cornerstone upon which American prosperity was built. *See* EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD*, at xviii (2014) (narrating not free wage labor but the slave system's creation of the powerful cotton industry, which drove economic growth, prosperity, and industrialization in the nineteenth century).
37. There are too many sources on this point to cite, including material extensively considering racial microaggressions. *E.g.*, CHARISSE C. LEVCHAK, *MICROAGGRESSIONS AND MODERN RACISM* (2018). For an example of a recent resource squarely tackling the issue of racialized dignity, *see* AUSTIN CHANNING BROWN, *I'M STILL HERE* (2018).
38. Although many scholars have worked hard to fill in at least a small portion of those absences. *E.g.*, DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (2018); James W. Gordon, *Did the First Justice Harlan Have a Black Brother?*, 15 W. NEW ENG. L. REV. 159, 161–63 (1993); Peggy Cooper Davis, *Introducing Robert Smalls*, 69 FORDHAM L. REV. 1695, 1696–97, 1701–02 (2001).
39. BLM formed in response to the verdict in the case involving the killing of Trayvon Martin. *See* Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1092 (2018).
40. And, of course, too many others, including Ahmaud Arbery (February 23, 2020), Breonna Taylor (March 13, 2020), and Rayshard Brooks (June 12, 2020), within a period of a few months. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES, <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> (Feb. 7, 2022); Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>; Aimee Ortiz, *What to Know About the Death of Rayshard Brooks*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html>. A database tracking Black Americans killed in interactions with police officers was relied on in *Jamison v. McClendon*, 476 F. Supp. 3d 386, 392 n.22 (S.D. Miss. 2020). To view the database, *see* FATAL ENCOUNTERS, <https://fatalencounters.org/> (last visited Apr. 3, 2022).
41. Researchers suggest that BLM activism in response to the killings of Sandra Bland, Michael Brown, Philando Castile, Eric Garner, Freddie Gray, Trayvon Martin, Tamir Rice, and on, and on, did in part shift white social attitudes. *See, e.g.*, Jeremy Sawyer & Anup Gampa, *Implicit and Explicit Racial Attitudes*

the lives of people of color. But really, how much awareness? How much change? How much genuine recognition is there that, as Ibram X. Kendi teaches in *How to Be an Antiracist*, any actions which are not carefully and deliberately antiracist are supporting longstanding systems of pervasive racial oppression to the benefit of white people, and are hence supporting racism, and can therefore be understood as racist?⁴²

And the very premise of Robin DiAngelo's *White Fragility* is that white people, perhaps particularly white people who view themselves as proponents of racial equity, insist on a vision of race neutrality which erases the function of racism and its many effects.⁴³ Hence the immediately recognizable humor in Stephen Colbert's joke that opens this collection,⁴⁴ and its many variants.⁴⁵ Colbert's exaggerated caricature in *The Colbert Report* embodied an easily recognized trope, "I don't see race," as synonymous with, "I am therefore not (being) racist." Myriad articles have been written and read to try to combat this wildly incorrect presumption of racelessness,⁴⁶

Changed During Black Lives Matter, 44 PERSONALITY & SOC. PSYCH. BULL. 1039, 1046 (2018) (reporting declines in implicit and explicit "pro-[w]hite bias"). There is room for hope that the 2020 demonstrations prompted additional change. See Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> ("[Since spring 2020], at least [thirty] states and Washington, DC [sic], enacted one or more statewide legislative policing reforms . . ."). But see Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 2 (2021) (debating whether white Americans suffered the trauma necessary for lasting social change after George Floyd's killing and related protests); *Refunding the Police*, ECONOMIST, Jan. 15, 2022, at 35–36.

42. IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 9 (2019) ("One either allows racial inequalities to persevere, as a racist, or confronts racial inequities, as an antiracist."). But see John McWhorter, *The Better of the Two Big Antiracism Bestsellers*, 21 EDUC. NEXT 90, 90 (2021).

Kendi . . . would seem to have it all figured out: We are divided simply between racists and antiracists. Racists are bigots and allow a status quo under which Black people are not doing as well as whites. Antiracists are committed to working against that imbalance. For reasons Kendi seems to think obvious but are not, there is nothing in between these two categories—not to be actively working, or at least speaking, against the imbalance leaves one in the racist class. There is no such thing as someone simply "not racist."

Id.

43. ROBIN DIANGELO, *WHITE FRAGILITY* 58–62 (2018); see also KENDI, *supra* note 42, at 10.
44. See Purcell, *supra* note 4, at 142.
45. E.g., @StephenAtHome, TWITTER (Oct. 3, 2012), <https://twitter.com/StephenAtHome/status/253661786086182912> ("I don't see race..People [sic] tell me I'm white and I believe them because I think 'the Chronic' refers to lower back pain."); Comedy Central, *The Colbert Report – Who's Attacking Me Now? – #CancelColbert*, YOUTUBE (Apr. 1, 2014), <https://youtu.be/MBPgXjKfBXM?t=293> ("I don't even see race. Not even my own. People tell me I'm white, and I believe them because I just devoted six minutes to explaining how I'm not a racist.").
46. E.g., Ainslie Cromar, *A Harsh Wake Up: Here's How White People Can Broach Difficult Conversations About Race*, BOSTON.COM (June 16, 2020), <https://www.boston.com/news/local-news/2020/06/16/a-harsh-wake-up-heres-how-white-people-can-broach-difficult-conversations-about-race>; Tonya Mosley, *'Lean Into Discomfort' When Talking About Race*, WBUR (June 9, 2020), <https://www.wbur.org/hereandnow/2020/06/09/taking-about-race>. There also exists a subgenre of advice urging white parents to talk explicitly with their children about race and racism. E.g., Michel Martin, *How White Parents Can Talk to Their Kids About Race*, NPR (June 4, 2020), <https://www.npr.org/2020/06/03/869071246/how->

but the very fact that there needs to be so many may itself be evidence of just how hard it is to get people to openly acknowledge race and omnipresent racism. Is it any surprise that law—which ultimately is a refraction of how those living in a society decide to govern themselves—has presumed the same?⁴⁷

Racism pervades legal decisions whether we say so or not. In *Williams v. Walker-Thomas Furniture Co.*, the classic unconscionability case decided in 1965 and excerpted in my Contracts casebook⁴⁸ (and most others), the Court never mentions the race of the plaintiff.⁴⁹ Yet we do know who the usual targets are of the kind of predatory lending⁵⁰ the case considers, don't we? We can construct an image of who might be most frequently targeted by exploitative financial practices, can't we?⁵¹ Can race, as well as socioeconomic class, really be said to be “not there” just because it is not explicitly invoked in the *Walker-Thomas* litigation?

To push even further on the racial images we may automatically construct in our heads—Quick! picture a pre-trial scheduling conference for another unconscionability case my students read, *Lhotka v. Geographic Expeditions, Inc.*, which was decided in 2010 and addresses the legality of an extensive liability waiver in a contract for a guided expedition up Mount Kilimanjaro.⁵² In our most immediate mental images, what do the lawyers look like? The judge? The court clerk? The litigants?

Contract cases tend to resolve matters related to business deals gone wrong. Unless race is in some way marked for us, our imaginations likely use the heuristics we have grown up with⁵³: We expect business leaders, and the lawyers they employ,

white-parents-can-talk-to-their-kids-about-race; Heather Greenwood Davis, *Talking to Kids About Race*, NATGEO (June 1, 2020), <https://www.nationalgeographic.com/family/in-the-news/talking-about-race/>.

47. This presumption of racelessness has led to conclusions that seem untethered to the reality of American racism, such as Chief Justice John Roberts' simplistic assertion that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion). This kind of race-blind obfuscation creates space for rulings like *Shelby County v. Holder*, in which a majority of Supreme Court justices concluded that certain enforcement provisions of the Voting Rights Act were no longer needed. 570 U.S. 529, 556–57 (2013).
48. SCHWARTZ & WALTERS, *supra* note 6, at 308–18.
49. See 350 F.2d 445 (D.C. Cir. 1965); Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 926 (1997) (noting that *Williams* was Black).
50. See Austin, *supra* note 31, at 1256 (reporting that predatory lending has a disparate impact on Blacks because of prolonged racial and class discrimination and financial habits resulting therefrom).
51. Legal scholarship has extensively documented the racial and class targeting of Walker-Thomas' business practices. See, e.g., Anne Fleming, *The Rise and Fall of Unconscionability as the 'Law of the Poor'*, 102 GEO. L.J. 1383, 1392–1402 (2014) (describing Walker-Thomas' exploitative sales practices).
52. 181 Cal. Rptr. 3d 844, 847–48 (Cal. Ct. App. 2010).
53. E.g., Shamar Toms-Anthony, *Annalise Keating's Portrayal as a Black Attorney is the Real Scandal: Examining How the Use of Stereotypical Depictions of Black Women Can Lead to the Formation of Implicit Biases*, 27 NAT'L BLACK L.J. 59, 63 (2018) (“The first time that television audiences were exposed to the idea that a Black woman could be an attorney was in 1970.”)

and the judges who decide the cases, to be mostly white.⁵⁴ Whether or not they are. Legal reasoning teaches us to think in abstractions, and one consequence of those abstractions is that we tend to ignore the specifics, or unconsciously fill them in with default cultural presumptions, which far, far too often means “white,” and which unintentionally leaves invisible Black judges or business leaders who might actually be involved in a case.

Thus, the vibrancy of Black achievement and prosperity remains obscured by unexamined presumptions and implicit bias.⁵⁵ Meanwhile, racism does genuinely hinder Black economic development,⁵⁶ which also remains generally unspoken and not visible. Enterprises designed to help build and sustain wealth, like the sou-sou, are recognized within the communities that sustain them. Their absence from outsider view may serve the purpose of keeping them insular, which may in turn make them more internally reliable while shielding them from external legal governance. But the lack of visibility of this kind of means to shared accountability and wealth building also does little to challenge a racist presumption that some members of our larger community are simply not as fiscally responsible or innovative as their wealthier and whiter counterparts.⁵⁷ Racial stereotyping is pervasive whether we acknowledge it or not.

Similarly, the legal doctrine of contract unconscionability may not itself intersect directly with racism but, real or projected, the facts of the prominent case most law students are assigned to read (*Walker-Thomas*) to understand the unconscionability defense is steeped in negative associations among marketing to impoverished, Black consumer power and financial decision making.⁵⁸ Do we talk about that in class? If we do, where and when is it relevant? Should we research and critically scrutinize the races of all the actors in all of our cases? Even if I wanted to adopt that sort of approach and

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54. See A.B.A., PROFILE OF THE LEGAL PROFESSION 13 (2021) [hereinafter PROFILE OF THE LEGAL PROFESSION] (reporting that the legal profession is 85 percent white, 4.7 percent Black, 4.8 percent Hispanic, 2.5 percent Asian, 2 percent multiracial, and 0.4 percent Native American). Black attorneys represented less than 5 percent of the legal profession but 13.4 percent of the U.S. population in both 2011 and 2021; representation for white attorneys dropped to 85 percent in 2021 from 88 percent in 2011, while representing some 60 percent of the U.S. population at both points in time. *Id.* at 13, 109.
55. See Eleanor Marie Lawrence Brown, *The Blacks Who “Got Their Forty Acres”: A Theory of Black West Indian Migrant Asset Acquisition*, 89 N.Y.U. L. REV. 27, 54–55 (2014) (crediting traditional sou-sou savings systems employed in the United States for the economic success of West Indian Americans). Of course, it should be noted that this critique applies as well for members of other racial and ethnic categories, not only to Black Americans.
56. PBS NewsHour, *Black Men Face Economic Disadvantages Even if They Start Out in Wealthier Households, Study Shows*, YOUTUBE (Mar. 21, 2018), <https://youtu.be/Ix788WbSjXE> (correlating an upbringing in “areas with lower levels of racial bias among whites” with better economic outcomes for Black men).
57. See Michelle Singletary, *Systemic Racism, Not \$200 Air Jordans, Suppresses Black Wealth*, WASH. POST (Nov. 6, 2020), www.washingtonpost.com/business/2020/11/06/black-net-worth-wealth-gap/ (correcting the misconception that on the whole the Black community would be wealthier if its members did not live beyond their means).
58. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448 (D.C. Cir. 1965) (emphasizing Williams’ welfare status and apparent fiscal irresponsibility (citing *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964))).

were willing to take the class time to do so, the actual evidence of the plaintiff's race in *Walker-Thomas* is not visible in the opinion. We would therefore need to bring in outside information or treat our speculation about race and racism as conjecture rather than apparent and known.⁵⁹ (Do we do that for litigants in the other cases we read?)

But if I, a law professor whose chosen focus for class discussion implicitly suggests what matters in the law,⁶⁰ choose not to discuss the racism and class bias reinforced by the presumption of whiteness in business and in law, or the lending apparatus in the *Walker-Thomas* case when I teach it, what now is not visible in my classroom?⁶¹

C. Racism Ensures That Many Parts of Black Lives are Not Visible in Law

Given the kinds of lending practices that we saw in *Walker-Thomas*, is it any wonder that some people might deliberately choose the community investment of the sou-sou, even with its attendant risk of not being legally enforceable?

Legal rules could be—but currently are not—constructed in a way that might always and automatically include private culturally-centered savings clubs.⁶² Inevitably, in turn, the economic productivity that the sou-sou represents (and so much else like it) becomes less visible to anyone outside the community. Perhaps that is by design. Nonetheless, privatization of these financial arrangements can reinforce unfair stereotypes of Black and immigrant workers as not financially astute and/or not capable of economic self-discipline. Omitting informal collective savings clubs from contract and commercial law not only places club members at potentially greater risk in the event of a default, nor does it just reduce the respect owed to Black ingenuity. It also flattens our collective comprehension of the varieties of human flourishing. It omits from more widespread consciousness information about people's lives that would contextualize courts' understanding of the cases before them and perhaps alter their interpretation of the correct application of law.⁶³

59. This is not the fault of any one person or thing in particular, and it is not even necessarily wrong. But it replicates the conundrum of trying to be more thoughtful about race in a world in which we want it to matter less than it often does. Not talking about race does not diminish its importance; talking about race endlessly feels forced and unhelpful; and picking and choosing when to discuss it always makes those decisions fraught.

60. And also, a white woman, perhaps suggesting further that my omitting considerations of race and class in *Walker-Thomas* is something I am more comfortable with than including it. I am certain the racial identity of the professor teaching this material would have a significant effect on how it was received by the students, no matter what was covered or omitted, but I can only address my own experience.

61. And what is? If I opted to define racism and class bias as not worth considering when learning the unconscionability defense through *Walker-Thomas*, that choice to define what is and is not legally relevant would quite certainly be visible. I have little doubt that the context for this particular case would be little understood and even less reflected upon by some of my students. But for others, the image of who the case includes would loom large.

62. Though naturally there might also be reasons why that would not be what the members of these clubs wanted.

63. See *Joseph v. Monmouth County*, No. A-4044-13T3, 2015 WL 8547502, at *1 (N.J. Super. Ct. App. Div. Dec. 14, 2015) (mischaracterizing a sou-sou agreement as a "pyramid scheme"). It is important for lawyers to acquire this understanding and to become conscious of people's lives who otherwise do not

THEORIZING THE INVISIBLE IN LAW AND LAW SCHOOL

Another example from a different course I teach. In my Family Law class, my students read *Moore v. City of East Cleveland*, decided in 1977.⁶⁴ They can parse the language of the zoning ordinance⁶⁵ at issue that limited residents of certain zones to “members of a single family,” and defined that meaning very specifically and very narrowly.⁶⁶ Students reading that the zoning ordinance prohibited a grandmother and her grandson from living together as “immediate family” can grasp the Supreme Court’s reasoning that the ordinance unconstitutionally infringed on the “sanctity of the family” as “deeply rooted in this Nation’s history and tradition.”⁶⁷ Finally, they can consider the weight and meaning of the case’s concurrences and dissents,⁶⁸ and should be able to articulate that the case has come to be seen as a cornerstone in the Court’s recognition of a fundamental right to family integrity.

But in a world of rapidly shifting and quite contested norms about what a “family” consists of,⁶⁹ do they also see the *Moore* case as centrally recognizing familial autonomy in its own self-determined definition? Are students familiar with contemporaneous anthropological work on the extensiveness of Black kinship structure that helped surface differing cultural notions of familial connections?⁷⁰ Do they ask whether any of that work directly or indirectly helped to enable white Supreme Court justices to perceive the ordinance’s restrictions as inappropriately limited and not fully encompassing the reality of Moore’s lived family experience?⁷¹ If the cultural context

reflect the general demographic makeup of legal professionals, for example, Blacks and Hispanics, who together make up almost one third of the U.S. population but only represent a collective 10 percent of attorneys. PROFILE OF THE LEGAL PROFESSION, *supra* note 54, at 33–34.

64. 431 U.S. 494 (1977) (plurality opinion). Some of my students, in fact, may be re-reading the case if they have already completed Constitutional Law. There, it is likely given a rights analysis that is even further removed from the concept of differing cultural constructions of kinship to which I refer here. *See id.* at 500–04.
65. For a discussion on the racial origins of zoning statutes and how they led to segregated housing patterns, see Chused, *supra* note 4.
66. *Moore*, 431 U.S. at 495–96 (citing E. CLEVELAND, OHIO, HOUS. CODE § 1341.08 (1966)).
67. *Id.* at 503, 505–06.
68. *Id.* at 506–13 (Brennan, J., concurring) (family associational rights); *id.* at 513–21 (Stevens, J., concurring) (homeownership rights); *id.* at 521–31 (Burger, J., dissenting) (exhaustion requirements); *id.* at 531–41 (Stewart, J., dissenting) (municipal power); *id.* at 541–52 (White, J., dissenting) (due process limitations).
69. Particularly in the wake of such radical changes as legalized gay marriage, greater reliance on alternative reproduction methods, and increased openness about polygamous or non-monogamous commitments. *See Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding that same-sex couples have a fundamental right to marry); *id.* at 702–05 (Roberts, C.J., dissenting) (cautioning that the majority’s rationale applies just as readily to claims of a “fundamental right to plural marriage”); Courtney Megan Cahill, *After Sex*, 97 NEB. L. REV. 1, 58 (2018) (“*Obergefell* could be read to stand for the proposition that the Constitution rejects sexual supremacy not just in the law of marriage but also in the law of procreation.”); Deborah Zalesne & Adam Dexter, *From Marriage to Households: Towards Equal Treatment of Intimate Forms of Life*, 66 BUFF. L. REV. 909, 910 (2018) (employing principles of contract law to take polygamy mainstream).
70. For an important though now perhaps outdated example, see CAROL B. STACK, *ALL OUR KIN* 31 (1975) (describing a Black, Midwest community that broadened the nuclear family to include relatives and friends).
71. At the time of *Moore*, Justice Thurgood Marshall had already been appointed to the Court as the first Black associate justice. SPENCER R. CREW, *THURGOOD MARSHALL* 181–82 (2019). Joining the *Moore*

for Moore's family life is not fully cognizable to the students, then the significance of legally acknowledging family forms as their members understand them may limit the students' ability to deeply read and use the case.

And because the next project they will be asked to undertake in my course is to construct and critically evaluate a legal argument for a four-adult, two same-sex-couple shared parenting arrangement, students who read *Moore* only narrowly or superficially would potentially have fewer tools available for their reasoning. In short, missing the cultural context of people's lives makes it difficult or even impossible for the law they might encounter to fully respond to the facts as they may be differently experienced.

A third example from a course I have taught in the past. My Torts students might read the 2003 case of *Sawyer v. Southwest Airlines Co.* in a subsection of intentional torts addressing intentional infliction of emotional distress.⁷² Although the claim in this particular case did not succeed, I teach *Sawyer* to make visible the wildly different contexts out of which persons raised within Black America and persons raised outside thereof may be operating, and how, as a result, avoidable litigation may follow. The case is predicated on comments made over an aircraft intercom by a young white flight attendant while two older Black passengers were attempting to find seats: “[E]enie, meenie, minie, moe, pick a seat, we gotta go.”⁷³

The standing Black passengers believed the flight attendant to be referencing the racist children's nursery rhyme they had grown up with, which includes an incredibly offensive racial epithet.⁷⁴ They described feeling personally targeted, and humiliated. In her response, the twenty-two-year-old white flight attendant stated that she understood herself to be referencing a children's nursery rhyme that she had grown up with,⁷⁵ which mentioned a “tiger” in place of the epithet and included no facially-apparent racial allusions.⁷⁶ She resisted the suggestion that the rhyme had any racist implications at all.⁷⁷ And it is well possible that in her personal experience and to her knowledge, it did not. In her contemporary and white upbringing, the racist references in the rhyme may not have been visible to her. Does that mean they did

plurality, Marshall agreed that the Cleveland ordinance was inappropriately limited. 431 U.S. at 505–06 (“[T]he choice of relatives . . . to live together may not lightly be denied by the State.”).

72. 243 F. Supp. 2d 1257 (D. Kan. 2003). Although this case raises claims of both intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED), Torts casebooks tend to focus on the intentional claim, and that is where *Sawyer* would most likely be excerpted. My thanks to Professor Ryan T. Williams who introduced me to this case.

73. *Id.* at 1263.

74. *Id.*

75. *Id.* at 1264–65.

76. Though, as the expert witness testimony described in the *Sawyer* case makes clear, the substitution of a derogatory appellation for African Americans with a potentially dangerous, wild animal hardly represents a random or neutral choice. *Id.* at 1267.

77. Resisted quite aggressively, in fact. *See id.* at 1271 (“[T]he statement I made on Flight 524 was not racist or discriminating, and I am offended that because I have white skin suddenly I am a racist. Maybe those that run around pointing fingers yelling racist should stop and turn that finger around.”). I reproduce this parenthetical quotation with a heavy sigh.

not exist?⁷⁸ The court considering the question concluded that “the genesis of the phrase” was not a matter of common knowledge and agreed that such context was “essential” to its own and the jury’s understanding of the case.⁷⁹

But who is it, exactly, who is most likely to be familiar with the history of that phrase? White privilege can enable whole swaths of American populations to never encounter the racist version of the rhyme (and here, along with the flight attendant, I am a good example—I experienced the “tiger” version throughout my childhood and was not aware of any alternative until I was much older); the ages of the *Sawyer* plaintiffs, both in their sixties at the time of the airline incident, make it more likely that they would have encountered that more offensive version. Thus, the plaintiffs’ claim arose out of the interstitial chasm between what white Americans may or may not have been exposed to,⁸⁰ and what Black Americans know, thoroughly, through their own experiences.⁸¹

If law is always at least in part about factual context, we are simply going to have to do a better job of recognizing the rich multiplicity of those contexts. And though it will remain true that in some instances, we will not succeed,⁸² we must be willing to credit the instances in which we do, so that it is not just the cultural context that is made visible, but also the legal mechanisms that validate such visibility.⁸³

78. The *Sawyer* opinion illustrates well the near impossibility of achieving justice in cases involving people of different ages, races, and experiences, who really do not know how much they differ and are therefore not likely to understand or empathize with all positions. *See id.* at 1275 (“It bears repeating that [the flight attendant’s] remark was not expressly racist in nature. Its ability to offend lay exclusively in its history, of which—according to [expert testimony]—recent generations are increasingly unaware.”).

79. *Id.* The only claim that survived dismissal and summary judgment was a civil rights claim separate from plaintiffs’ tort claims. *Id.* at 1273. The IIED claim was dismissed because the plaintiffs met neither “the threshold requirement of showing ‘extreme and outrageous’ conduct” nor the additional requirement of showing “that they suffered emotional distress which was so severe that no reasonable person should be expected to endure it.” *Id.* at 1275 (“[N]o reasonable jury would agree that in these circumstances, [the flight attendant’s] language was so outrageous in character and so extreme in degree as to be regarded as atrocious and utterly intolerable in a civilized society.”). The NIED claim was dismissed on procedural grounds. *Id.* at 1277.

80. *See* Alex Abad-Santos, *The Racist Children’s Songs You Might Not Have Known Were Racist*, Vox (May 21, 2014), <https://www.vox.com/2014/5/21/5732258/the-racist-childrens-songs-you-might-not-have-known-were-racist>. In New York, intentional torts require only the causal action to be intentional, not the harm itself. 36 N.Y. JUR. 2D *Damages* § 56, Westlaw (database updated Feb. 2022). I view this as replicating the common white response to matters of racism: “I didn’t mean to be racist, so I could not have done something racist.” *Cf.* Rebecca Knight, *You’ve Been Called Out for a Microaggression. What Do You Do?*, HARV. BUS. REV. (July 24, 2020), <https://hbr.org/2020/07/youve-been-called-out-for-a-microaggression-what-do-you-do> (accepting that people make mistakes).

81. *See* Knight, *supra* note 80. And perhaps also what they learn and understand from the described experiences of their elders. *See generally* Rebecca A. Clay, *Did You Really Just Say That?*, 48 AM. PSYCH. ASSOC. 46 (2017).

82. Some things are simply not seen, or known, by everyone.

83. In *Sawyer*, the court’s permitting expert testimony as to the nursery rhyme’s racial origins represents due recognition by the law of the variety in our shared tapestry of factual context. 243 F. Supp. 2d at 1257, 1266–68 (admitting expert testimony “to educate the jury about the historical genesis of ‘eenie, meenie, minie, moe’ and to explain why the phrase is inherently offensive and racist”).

IV. HOW DO LAWYERS LEARN TO REASON FROM WHAT IS “NOT VISIBLE”?

So far, we have considered multiple and somewhat differing strains of what may be “not visible” in law: things that do not fall into a particular legal category (yet help delineate exactly how that category is constituted); things that are intentionally constructed to remain outside of the legal sphere; important parts of the lives of the people of color that the law touches; those people themselves; the racism that inescapably infects our lives. There is obviously a pretty strong overlap among these, and frequently a causal relationship.

What brings these incongruent “absences” together is the fact that something can be learned about law from considering each one carefully. Which suggests, in turn, that they can be taught.

A. We Typecast Legal Reasoning as an Intensely Concrete Process

“Thinking like a lawyer” has been portrayed in any number of ways, but despite occasional grumbling about its reductive simplicity, law faculty generally embrace some kind of depiction that emphasizes application of legal Rules to specific Facts. The legal profession even requires it as a central mode of reasoning for bar exam licensure. Within myriad descriptions,⁸⁴ the core elements of legal analysis remain: Relevant principles of law must be accurately and astutely applied to facts that are palpable, provable, and precisely articulated as possible.

Most of the dozen or so texts aimed at introducing law students to the processes of legal reasoning include extended examinations of deduction narrowing from a general premise to apply to specific conclusions, and induction extrapolating from individual circumstances to formulate general principles.⁸⁵ Many also separate these rules-based processes from more case-based reasoning by analogy.⁸⁶ All of these logical forms are taught to law students as requiring rigorous examination of tangible facts to ensure that conclusions based on them are well founded.

84. Some of those methods include “IRAC”: Issue, Rule, Application, Conclusion; “CREAC”: Conclusion, Rule, Rule Explanation, Rule Application, Conclusion; and “TRAC”: Thesis, Rule, Application, Conclusion. Other acronyms for the core processes of legal reasoning abound, but all seem to share some version of the same center as the ones included here: rules of law applied to material facts of a given case. See MICHAEL HUNTER SCHWARTZ & PAULA J. MANNING, *EXPERT LEARNING FOR LAW STUDENTS* 209–22 (3d ed. 2018).

85. At least, I count about twelve books on my shelf that I happen to group within that category. *E.g.*, MICHAEL EVAN GOLD, *A PRIMER ON LEGAL REASONING* 65–87, 88–113 (2018); BRETT A. BROSEIT ET AL., *APPLIED CRITICAL THINKING & LEGAL ANALYSIS* 133–35, 139–40 (2017). There is also considerable overlap in additional books geared more toward providing a general introduction to law school and those intended as texts on legal writing, which would expand the numbers further. All make some effort to describe the processes of legal reasoning, and my personal review suggests that they vary in focus and tone, but substantively their approaches do not drastically differ.

86. See GOLD, *supra* note 85, at 150–208; WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 201–16 (3d ed. 2014).

To introduce deduction, many legal volumes reference the steps of the classical syllogism: (1) All men are mortal; (2) Socrates is a man; (3) Socrates is mortal.⁸⁷ This form of reasoning works beautifully, of course, if both the major premise (step 1) and the minor premise (step 2) are unassailably true. The only way to attack the syllogism is to successfully contradict or at least introduce doubt about one of its factual premises: Maybe Socrates was really an alien? Or a god? Or a woman?

Induction may also be highly persuasive, even though it is inherently more speculative than deduction. It constructs a “rule” that is actually more of a theory or a prediction, and rests on a foundation of observably true specifics.⁸⁸ As an example: if it is noticed that every time the tide goes out it soon rises again, it might logically be concluded that because water levels are currently very low, they are likely to be higher again within a few hours. It is possible that the conclusion will turn out to be incorrect, though far more likely that it is true. But just because it can be objectively observed that Simone Biles is the greatest gymnast of a generation and outclasses her contemporary rivals by an order of magnitude,⁸⁹ it still did not automatically guarantee her success when she competed in 2021,⁹⁰ just as it does not automatically follow that she would have won gold had the 2020 Olympic Games taken place when initially scheduled.

There are more ways to attack an induction than a syllogism: poke holes in claimant’s explanatory rationale; find particulars that do not support the generalization;⁹¹ provide an alternative or more constricted generalization that the particulars also support. Given its contingent nature, then, lawyers are instructed to use as many particulars as possible to support their induced generalizations.⁹² The more facts an induction is built upon, the more likely it will turn out to be true. There certainly are ample data points suggesting Simone Biles was at peak prowess

87. See STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 45 (2d ed. 2001); ROBERT K. MILLER, THE INFORMED ARGUMENT 25–30 (5th ed. 1998) (following the same logical construction but altering the premises to whether people have hearts, so that John’s personhood can lead to a syllogistic conclusion that he must have one, too).

88. Although its origins are also Socratic. See PLATO, PHAEDO 16–50 (David Gallop trans., Oxford Univ. Press 3d ed. 2009) (c. 360 B.C.E.) (following Socrates induction of reincarnation from his observations about generation and transformation in the natural world).

89. See Jane Coaston, *Simone Biles is the Greatest Female Gymnast Ever*, Vox, <https://www.vox.com/culture/2019/10/10/20908435/simone-biles-gymnastics-best-ever> (Oct. 13, 2019).

90. Biles ultimately won a silver medal with her team and an individual bronze medal on the balance beam when the 2020 Tokyo Olympics were held in July 2021. Juliet Macur, *As Biles Heads Home, Gymnastics Glimpses a Future Without Her*, N.Y. TIMES, Aug. 5, 2021, at B15).

91. For classical criticism of inducing universal principals from incomplete sets of particulars, see SEXTUS EMPIRICUS, OUTLINES OF PYRRHONISM 283 (R.G. Bury trans., Harvard Univ. Press 1933) (c. 360–275 B.C.E.) (questioning the validity of inductive reasoning wherein conclusions are founded on probabilities (“some” particulars) and not certainties (“all” particulars)).

92. See STEVEN D. STARK, WRITING TO WIN 86–90, 132–36 (2012); see also Ruggero J. Aldisert et al., *Logic for Law Students: How to Think Like a Lawyer*, 69 U. PITT. L. REV. 1, 12, 14 (2007) (finding inductive generalizations strongest when constructed from as many particulars as possible).

in the lead up to the 2020 season,⁹³ and it is exactly the accretion of that evidence which renders it exceedingly likely—even though not absolutely certain—that she would have been triumphant in the Olympiad had the games not been postponed.

Law professors' teaching of reasoning by analogy similarly stresses the importance of precision in discernable specifics.⁹⁴ After all, the success of a legal analogy will be entirely dependent on facts and context. Comparisons only make sense if the right things are being compared, if the comparisons are accurate, and if they are meaningful. Thus, an analogy can be attacked if the facts are not actually similar, or if in context it does not make sense to compare them to one another.⁹⁵ Simone Biles and Michael Phelps⁹⁶ are both human, both American, and both superb athletes. They are quite comparable in any number of respects, but not in getting items from top shelves.

All of these logical forms, then, are predicated at least in part on assertions of solid, definite, discernable, identifiable, and ultimately (it is suggested) verifiable facts. But those facts are not necessarily unquestionably established. Instead, the lawyers may simply be trying to suggest that they are or should be. In other words, even when we build legal analysis on a foundation of (supposedly) concretely ascertained "facts," we are actually often speculating or hoping that a trier of fact will ultimately concur. In an adversarial legal system lawyers learn to create an appearance of uncontested factual grounded-ness to make their own positions seem inevitable and invulnerable.

And that is exactly what we should teach. It is usually how good attorneys construct persuasive analysis. We suggest that there is just enough "there" in precedent that the expansion or contraction of the rules we are seeking makes perfect sense. Or that the choice among competing rules for which we are advocating is the better one. What all that means, though, is that sometimes we are treating as "visible" that which we would like to be "there" but isn't, yet.⁹⁷ In which case our lawyerly reliance on the tangible and knowable is not always quite as watertight as it is intended to seem. Reasoning from visible, knowable facts and rules is unquestionably central to legal analysis. It is just not the only way those who are "thinking like a lawyer" actually think.

93. See Stephanie Apstein, *Simone Biles is a Legend in Her Prime*, SPORTS ILLUSTRATED (Dec. 10, 2019), <https://www.si.com/olympics/2019/12/10/simone-biles-2019-year-most-dominant-athletes>.

94. See GOLD, *supra* note 85, at 158–69 (considering truncated or incompletely specified analogies).

95. No two factual settings can ever be precisely the same, so the real question is always whether the commonalities matter more than the differences. In law, that determination is never a simple arithmetic accounting, but rather based on rationales—why is this difference more important than that congruence, or vice versa? See generally Grant Lamond, *Precedent and Analogy in Legal Reasoning*, STAN. ENCYC. PHIL. (2016) (“[T]heorists often speak of two cases being the same ‘in all relevant respects.’ Which of course simply raises the question of what makes two cases ‘relevantly’ the same.”).

96. Phelps competed in five Olympic Games and has won twenty-eight medals in total. *Michael Phelps*, INT’L OLYMPIC COMM., <https://olympics.com/en/athletes/michael-phelps-ii#b2p-athlete-olympic-results> (last visited Apr. 19, 2022).

97. Which no doubt lawyers and law professors recognize, but law students may not.

B. *Lawyering Work Requires Imagination*

In contrast to a popular image of lawyers' work as pointy-headed pedantry, a considerable amount of legal work is creative and generative. Much of it involves some form of trying to envision that which may be hidden, or not yet found, or at least not yet created as legal matter.

To "develop" facts requires litigators to investigate them. In some instances that means a purely open-ended inquiry: *Please tell me what happened*. But in many, many other instances, fact development looks less like pure discovery science and more like hypothesis-driven research. Lawyers develop postulates of what might be true and then seek evidence to support or disprove it.⁹⁸ *Let's subpoena the store's street camera recording because maybe it will show the defendant speeding off after the accident*.

Transactional lawyers frequently rely on imagination to prevent problems that might arise later if not anticipated and precluded now. *What if the advertising campaign is such a success that the company wants to expand it after this project? Who will own the intellectual property?*

Too, imagination is required not only for fact development but also as a key component of effective legal research. Since no lawyer can possibly be acquainted with all the laws in a jurisdiction—or even all the laws within her specialty—we are taught to imagine what rules might apply as a starting point in looking for the law we need. *Maybe there is some sort of limitation on my client's liability for his employee's conduct if it took place while my client was out to lunch*.

Even these examples of searching to find something that is not yet visible, though, represent only a subset of ways lawyers might reason from what is not seen or known. Sometimes our work entails reaching logical conclusions based on absence; on drawing significance from what could, in some possible world, be true but is not true in ours.⁹⁹

Compliance officers might pore over regulations to determine precisely what their clients are prohibited from doing, under the supposition that everything not specifically prohibited will be permitted. Judges may reason that the absence of legislative action in response to a judicial determination signals tacit approval of a court's direction. Or, taking a cue from Sherlock Holmes,¹⁰⁰ criminal attorneys might present juries with theories of events that are supported by observing what did not occur in contrast to what did. *The guard dog did not bark, which establishes that the thief was not a stranger*.

98. Though it is fair to acknowledge that, in a litigation context, "true" usually means some complicated interplay between "not false" and "narratively useful to my side's position." See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1189–90, 1252–53 (2005) (attributing a lawyer's search for alternative realities over objective truth to the adversarial nature of American litigation).

99. See Mike Skotnicki, "The Dog that Didn't Bark." [sic] *What We Can Learn from Sir Arthur Conan Doyle About Using the Absence of Expected Facts*, BRIEFLY WRITING (July 25, 2012), <https://brieflywriting.com/2012/07/25/the-dog-that-didnt-bark-what-we-can-learn-from-sir-arthur-conan-doyle-about-using-the-absence-of-expected-facts/> ("[T]he absence of . . . expected facts can have meaning.").

100. See Sir Arthur Conan Doyle, *Adventure 1: Silver Blaze*, in MEMOIRS OF SHERLOCK HOLMES (1894).

C. Lawyers Are Not the Only Ones Who Reason from an Absence of Evidence

There are whole subsections of science and philosophy devoted to considering the probity of the aphorism, “the absence of evidence is not evidence of absence.”¹⁰¹ In numerous public lectures on the potential existence of intelligent alien life forms, Carl Sagan¹⁰² argued against concluding that they did not exist simply because they had never been observed.¹⁰³ Sagan believed rigorous thinking on the topic required agnosticism, and he exasperatedly decried the “impatience with ambiguity” of both those who insisted UFOs had never been proven and must therefore exist, and those who conversely concluded that the lack of compelling evidence made it unequivocally clear that they did not.¹⁰⁴

But Sagan’s characterization leaves out the context that most lawyers would want to include. If alien life forms existed, how likely is it that we would see their evidence? Without knowing more about the supposed aliens, their technology, their culture, their travel habits, we cannot begin to guess whether their existence had much chance of being visible to us. But it is not always true that we must operate with such a paucity of information. Say, for example, it snowed last night and there are no animal prints near my garbage cans this morning. It is a fair inference that my property is probably not inhabited by raccoons. This is simply a more reliable conclusion than the “aliens exist” conjecture because of what is commonly known: Raccoons are nocturnal, they feed freely on human refuse when it is available, and they inevitably leave footprints if they travel through snow. Lack of evidence of their footprints quite simply means more in this context than the lack of evidence for intelligent alien life.

Epistemologists who root their work in the statistical analyses of Thomas Bayes¹⁰⁵ have even generated a theorem to use probability to more effectively evaluate these kinds of arguments from ignorance.¹⁰⁶ I find Christopher Stephens’ Bayesian approach¹⁰⁷ to be an especially helpful refinement of Sagan’s: Stephens argues that

101. Attributed initially to Martin Rees, a British cosmologist, though frequently invoked by American astronomer Carl Sagan. See BERNARD M. OLIVER ET AL., PROJECT CYCLOPS 3 (1971).

102. Carl Sagan was an astronomer, planetary scientist, leader in the American space program, professor of astronomy, and a scientific visionary. Leslie Mullen, *Carl Sagan (1934–1996), People*, SOLAR SYS. EXPL. NASA SCI. (Nov. 26, 2001), <https://solarsystem.nasa.gov/people/660/carl-sagan-1934-1996/>. He held “four degrees in physics, astronomy and astrophysics from the University of Chicago, and was known for his role in space exploration and for the study of life beyond earth. *Id.*; see also Dan Vergano, *Who Was Carl Sagan?*, NATGEO (Mar. 17, 2014), <https://www.nationalgeographic.com/science/article/140316-carl-sagan-science-galaxies-space>.

103. *E.g.*, Carl Sagan & Frank Drake, *The Search for Extraterrestrial Intelligence*, 232 SCI. AM. 80 (1975).

104. CARL SAGAN & ANN DRUYAN, *THE DEMON-HAUNTED WORLD* 200 (1997).

105. Bayes is most known for “Bayes’ Theorem,” a mathematical method of revising initial predictions with newly acquired evidence. See James Joyce, *Bayes’ Theorem*, STAN. ENCYC. PHIL. (2003) (“[A] hypothesis is confirmed by any body of data that its truth renders probable . . .”).

106. COLIN HOWSON & PETER URBACH, *SCIENTIFIC REASONING* 13–44 (3d ed. 2005).

107. Christopher Stephens, *A Bayesian Approach to Absent Evidence Reasoning*, 31 INFORMAL LOGIC 56, 60 (2011).

we may draw reasoned conclusions from absence of evidence only if we have actively and genuinely looked for it and it was not found.¹⁰⁸

If we have not adequately searched for evidence of that which is not visible or incorporated into law in the lives of people of color in America, we may not yet conclude that it does not exist. We must search more. We must move some of the writing and thinking on this front, that so many have already done,¹⁰⁹ away from the specialty knowledge of few and into a widespread, general recognition of what is. We must find and respect more of the cultural knowledge we are surrounded with but may not see or fully understand. We must think differently about where to look. We must ask different, or better, questions.

D. Thinking About What Is Not Visible Is Some of the Hardest and Most Important Work Lawyers Do

Business professors working together to formulate *The 5 Elements of Effective Thinking* consider at length what they deem the great “challenge” to “see what’s missing.”¹¹⁰ They view this project as a crucial component to their first element: Understanding Deeply. After they identify the enormous difficulty of seeing “what’s truly invisible,”¹¹¹ they offer one method to help uncover gaps in knowledge: adding in limiting modifiers to what is already known to suggest what details might be missing. For example, describing classroom instruction as “nonindividualized education,” might impel consideration of how a more individualized education might function in a group instructional setting.¹¹²

This technique may be helpful for lawyers seeking to elucidate the “not visible.” If we cast private savings clubs as “financial mechanisms not necessarily operating within the ambit of U.S. banking and legal systems,” the description itself invites consideration of what may exist that we have not yet considered. And once we begin to look for them, we may find more evidence than had previously cohered into a

108. This seems to merit a shout out to a comment made by Jeff Sessions, then the nominee for U.S. attorney general, at his confirmation hearings. Asked about discrimination against gays and women, Sessions said, “I just don’t see it.” *Confirmation Hearing on the Nomination of Hon. Jeff Sessions to be Attorney General of the United States Before the Senate Comm. on the Judiciary*, 115th Cong. (2018) (statement of the Honorable Jeff Sessions). Does the fact that Mr. Sessions “just doesn’t see” discrimination mean that it does not exist? By Bayesian logic, only if he has “actively and genuinely” searched for such evidence and none could be obtained. See Stephens, *supra* note 107, at 60.

109. See generally CRITICAL RACE THEORY (Kimberlé Crenshaw et al. eds., 1996) (collecting scholarship that contributed to Critical Race Theory, or “CRT,” curriculum).

110. See EDWARD B. BURGER & MICHAEL STARBIRD, *THE 5 ELEMENTS OF EFFECTIVE THINKING* 41 (2012) (challenging readers to see what is missing from that which is already apparent).

111. See *id.* (“One of the most profound ways to see the world more clearly is to look deliberately for the gaps . . .”).

112. *Id.* at 43–44.

“visible” category, such as the Chinese “*hui*,”¹¹³ private lotteries,¹¹⁴ and so on.¹¹⁵ It may be especially helpful to use the limiting adjectives to help make visible what is not already when we seek to change the law because it is not including what we need it to. And to take for granted that there are many factors determining what is visible and what is not, but race and racism are almost always among them.

Think here of the strategic brilliance of Thurgood Marshall and the entire NAACP litigation team in the 1954 case of *Brown v. Board of Education*.¹¹⁶ Arguing that segregation was thoroughly racist and embedded in a system of white supremacy may have been sorely tempting, but doing so might have posed considerable risk in a court of all white men.¹¹⁷ The odds of encountering those who “just didn’t see it,” were frighteningly high. Marshall therefore implicitly modified the term “racial segregation in public schools” to include a qualifier and frame the issue as “previously-not-understood-as-invidiously-harmful racial segregation in public schools.”¹¹⁸ The doll studies¹¹⁹ and related social science research¹²⁰ were provided as “new”

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113. A “*hui*” is a private rotating savings club like the sou-sou; in the United States, it is usually formed in Chinese immigrant communities. Cao, *supra* note 21, at 874; *see also* Mark Arax, *Pooled Cash of Loan Clubs Key to Asian Immigrant Entrepreneurs*, L.A. TIMES (Oct. 30, 1988), <https://www.latimes.com/archives/la-xpm-1988-10-30-me-891-story.html>. One common difference, though, is that rather than eschewing interest as sou-sous do, a *hui* often affixes market interest to certain lump sums. Cao, *supra* note 21, at 877. In some instances, the payout order may even be contingent on participant bids (on how much interest a participant is willing to contribute to the pot for other members to share). *Id.*
114. *See* Smith v. Williams, 698 F.2d 611, 613–14 (3d Cir. 1983) (concluding that a privately-run lottery agreement in the Virgin Islands violated neither anti-gambling statutes nor public policy and was enforceable under common law contract principles).
115. All of which are sometimes described under the Rotating Savings and Credit Association (ROSCA) umbrella. *See* James Chen et al., *Rotating Savings and Credit Association (ROSCA)*, INVESTOPEDIA, <https://www.investopedia.com/terms/r/rotating-credit-and-savings-association.asp> (Nov. 29, 2021) (“A ROSCA happens via set contributions and withdrawals to and from a common fund.”). For further survey of different savings organizations, *see* Lisa T. Alexander, *Cyberfinancing for Economic Justice*, 4 WM. & MARY BUS. L. REV. 309, 322–23 (2013).
116. 347 U.S. 483 (1954).
117. *See* Chused, *supra* note 4, at 313–16 (analyzing a white seller’s similarly strategic constitutional challenge to racially restrictive covenants in *Buchanan v. Warley*, 245 U.S. 60 (1917)).
118. *See* *Brown*, 347 U.S. at 492–93.
119. The “Doll Test” studied segregation’s psychological impact on Black children. *A Revealing Experiment: Brown v. Board and “The Doll Test,”* NAACP LEGAL DEF. & EDUC. FUND, INC., <https://www.naacpldf.org/brown-vs-board/significance-doll-test/> (last visited Apr. 27, 2022) (“[The study] used four dolls, identical except for color, to test children’s racial perceptions. . . . [C]hildren between the ages of three to seven[] were asked to identify . . . which color doll they prefer. A majority of the children preferred the white doll . . .”).
120. *See, e.g.*, KENNETH BANCROFT CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950).

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information to permit the Supreme Court justices to “see” the damage wrought by generations of repressive white supremacist policies.¹²¹

Were the insidious effects of racism really not previously visible to the Court before the studies were submitted to it in the 1950s? More to the point, were the egregious consequences of open racial bigotry really not visible? Of course not. But the effect of allowing the justices to ask a modified and narrower question was an important rhetorical move. It made space for the racism inherent in segregation to become at least visible enough to warrant overturning Supreme Court precedent that held directly to the contrary.¹²²

Imagining and “creating” are considered the highest order of thinking on Bloom’s Taxonomy.¹²³ It may be true that the bulk of lawyers’ work takes place in Bloom’s intermediate conceptual levels of Applying, Analyzing, and Evaluating, but that is not the only work we are capable of. And if we view the highest calling of the legal profession as seeking justice, then it cannot be all that we are charged with.

V. CONCLUSION

What I take from all of the foregoing is that reasoning from absence is important in law, and consequently important in law schools. We must teach our students to reason from absence, both in the sense of looking for what is not yet visible, and in the sense of making informed conjectures and conclusions when what is sought cannot be found. We need to know and be informed by the vast body of cultural knowledge (context) that has for too long been unseen in our legal system.¹²⁴ We have to make it a priority to find the time to do the background research and educational work to make that inclusiveness commonplace and unremarkable.

121. See *Brown*, 347 U.S. at 494.

Segregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.

Id. (alteration in original) (citation omitted). Execution of the social science portion of the *Brown* team’s litigation strategy has been attributed to NAACP litigator Robert Carter. See Frank H. Wu, *Robert Lee Carter: Continuing the Struggle for Civil Rights*, A.B.A. (Sept. 1, 2000), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol27_2000/fall2000/hr_fall00_wu/.

122. See *Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896) (upholding state-mandated segregation), *overruled by Brown*, 347 U.S. 483.

123. See A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING 67–68 (Lorin W. Anderson & David R. Krathwohl eds., 2000). “Bloom’s Taxonomy” was named after Benjamin Bloom, who worked with a team of educators to construct hierarchical models of learning and thinking that move from the most basic recall into the most conceptually advanced and abstract processes. *Id.* There are multiple versions, and the version that I rely on here was curated by a group of researchers in 2000. *Id.* It identifies six levels of thought processes: (1) Remember; (2) Understand; (3) Apply; (4) Analyze; (5) Evaluate; and (6) Create. *Id.* at 67–68.

124. A project we hope this entire collection contributes to in some small part.

Whenever possible, we should strive to include that context to help enrich our students' understanding of what law traditionally does and does not do. Audre Lorde teaches that "[o]ur visions begin with our desires."¹²⁵ We need to therefore show law students how to use their own knowledge and imaginations to envision what is not yet there in law but could be. Should be. Must be. Vision is a necessary precursor to making radical changes in the law, and in ourselves.

125. AUDRE LORDE, CONVERSATIONS WITH AUDRE LORDE 91 (Joan Wylie Hall ed., 2004). A native New Yorker, Lorde was born to West Indian immigrant parents on February 18, 1934. *Audre Lorde*, NAT'L WOMEN'S HIST. MUSEUM (June 2021), <https://www.womenshistory.org/education-resources/biographies/audre-lorde>. She used poetry and other writings to confront issues of racism, sexism, LGBTQ rights, and more, until her passing in 1992. *Id.*