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## Teaching Slavery in Commercial Law

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## TEACHING SLAVERY IN COMMERCIAL LAW

Carliss N. Chatman\*

### Abstract

*Public status shapes private ordering. Personhood status, conferred or acknowledged by the state, determines whether one is a party to or the object of a contract. For much of our nation's history, the law deemed all persons of African descent to have a limited status, if given personhood at all. The property and partial personhood status of African-Americans, combined with standards developed to facilitate the growth of the international commodities market for products including cotton, contributed to the current beliefs of business investors and even how communities of color are still governed and supported. The impact of that shift in status persists today. The commodities markets and the nations that rose and prospered would not be possible without the slave trade, and that trade would not be possible without the legal, business, and social norms in place to facilitate private ordering and growth while reinforcing the subjugation of African-Americans. Yet, many business and commercial law professors devote class time to teaching foundational and historical material, without any consideration of the impact of slavery. To avoid slavery in business and commercial law courses is to ignore an institution that plays a pivotal role in much of what we do today. Slavery is not a frolic, it is foundational.*

*Many American universities played a role in the slave trade—either by receiving funds from the enterprise or receiving the enslaved as donations and using their labor or disposing of them for the financial advancement of the institution. In my Core Commercial Concepts course, a Uniform Commercial Code (UCC) survey class covering Articles 2, 3, 4, and 9, I devote time and space to discussions of race and the law by making the connection between the history of commercial concepts, slavery, and the role of the cotton industry in the shaping of international*

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commercial law norms. In my simulation, described in this Essay, I teach the story of Washington and Lee University’s sale of individuals for the purpose of ensuring the institution’s financial survival, then extrapolate from the facts to review the high points of commercial law. I incorporate materials on the legacy of slavery at my own institution to provide students with a scenario based on the acquisition of real property and construction of buildings they engage with on campus. In this Essay I explain the methods I use to explore these concepts. Working in a framework that focuses on classification and status, my students consider issues of federalism and the impact of statutory definitions on private ordering, while discussing how these definitions shape the relationship of African-Americans to commerce.

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INTRODUCTION

Law professors teach classical cases that take place in the shadow of slavery, Reconstruction, and Jim Crow without any mention of the context.<sup>1</sup> Such classes often take place on land belonging to Native Ameri-

1. Some cases that take place during slavery, Reconstruction, and Jim Crow that are considered foundational to the first-year curriculum are typically taught without engaging race. These cases include Marbury v. Madison, 4 U.S. 137 (1803) (establishing the principle of judicial review); Pierson v. Post, 3 Cai. R. 175 (1805) (discussing at which point a wild animal becomes property, and how property can be first possessed by a human being); Raffles v. Wichelhaus, 2 H&C 906, 159 Eng. Rep. 375 (EWHC Exch. 19 1864) (establishing that where there is a latent mutual mistake the court will attempt to find a reasonable interpretation); Palsgraf v. Long Island Railroad Co., 248 N.Y. 339; 162 N.E. 99 (1928) (establishing liability to an unforeseen plaintiff); Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) (establishing that federal courts must apply state law in cases that are not federal questions). For an analysis of the gaps in teaching, see Cheryl Wade, Attempting to Discuss Race in Business and Corporate Law Courses and Seminars, 77 ST. JOHN’S L. REV. 901, 905 (2003); Paul Finkelman, Teaching Slavery in American Constitutional Law, 34 AKRON L. REV. 261 (2000) (slavery is rarely discussed in most constitutional law courses). But see DOROTHY A. BROWN, CRITICAL RACE THEORY (3d. ed. 2003) (providing critical race theory methods for torts, contracts, criminal procedure, criminal law and sentencing, property, and civil procedure); ROY L. BROOKS, CRITICAL PROCEDURE (1998) (raising the question of whether federal procedure (including Federal Rules of Civil Procedure) would be different today if the views of people of color and women were consciously and systematically taken into account); BRIDGET J. CRAWFORD & ANTHONY C. INFANTI, CRITICAL TAX THEORY: AN INTRODUCTION (2009) (investigation into why the tax laws are the way they are and what impacts tax laws have on historically

cans and in classrooms constructed using funds generated by the “free” labor of African Americans. Business<sup>2</sup> and commercial law<sup>3</sup> professors, in particular, typically teach as if the law occurs in a vacuum, disregarding the cultural and policy phenomena that help shape the law.<sup>4</sup> Business and commercial law classes have resisted change despite ABA mandates that law schools shall provide “education to law students on bias, cross-cultural competency, and racism.”<sup>5</sup> Public law courses have begun to reference race, either in response to ABA mandates or demands from students.<sup>6</sup> Professors often teach business and commercial law courses as if systemic inequality did not shape the legislature or judiciary when they decided cases involving business principles. Ironically, it was the business norms and emerging commercial law norms that enabled the transactions of persons to occur so seamlessly and efficiently.<sup>7</sup> Moving past enslave-

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disempowered groups); Dylan C. Pennington, *Race in Contract Law*, 170 PA. L. REV. 1199 (2022).

2. When this Essay refers to business law, it generally includes corporations, partnerships and unincorporated entities, agency, securities regulation, mergers, and acquisitions.

3. Commercial law is the study of the Uniform Commercial Code (UCC), contracts, and other commercial legislation. In this Article, the focus is on the UCC and contracts.

4. See PATRICIA WILLIAMS, *ALCHEMY OF RACE AND RIGHTS* 15–18 (1991); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 6–7 (1995); Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 890 (1997); Deborah Zdesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23, 24 (2013) (“The law not only creates structures of subordination, it also makes them invisible. Revelation of the subordination effects of legal rules is an important first step in legal education); Steven A. Ramirez, Cheryl L. Wade & Andre Douglas Pond Cummings, *Toward a Critical Corporate Law Pedagogy and Scholarship*, 92 WASH. U. L. REV. 397, 398, 414 (2014) (reviewing five major corporate law texts and noting the absence of any attention to social and economic implications).

5. ABA Standard 303(c).

6. In the summer of 2020, business professors began a discussion on the AALS Business Associations list serve sharing resources on incorporating race and inequality into our courses. Many shared resources, and many others vehemently objected to the initiatives leading Ben Edwards, Cathy Hwang, and me to issuing a statement in support. Many law professors signed the letter, and Professor Jessica Erickson compiled a list of resources. See Jessica Erickson, *Race, Racism, and Business Law Courses*, PRAWFSBLAWG (Aug. 31, 2020), <https://prawfsblawg.blogs.com/prawfsblawg/2020/08/race-racism-business-law-courses.html>; Benjamin P. Edwards, *Business Law Profs’ Statement on Race/Racism in Business Law*, BUSINESS LAW PROF BLOG (Aug. 29, 2020), [https://lawprofessors.typepad.com/business\\_law/2020/08/business-law-profs-statement-on-raceracism-in-business-law.html](https://lawprofessors.typepad.com/business_law/2020/08/business-law-profs-statement-on-raceracism-in-business-law.html).

7. Matthew Desmond, *Capitalism*, in *THE 1619 PROJECT*, N.Y. TIMES MAG. 4, 30 (Aug. 2019); SHENNETTE GARRETT-SCOTT, *BANKING ON FREEDOM: BLACK WOMEN IN U.S. FINANCE BEFORE THE NEW DEAL* (2019) (discussing the role of Black women in banking); Michael Ralph, *Value of Life: Insurance, Slavery, and Expertise*, in *AMERICAN CAPITALISM* 257 (Sven Beckert & Christine Desan eds., 2018); CAITLIN ROSENTHAL, *ACCOUNTING FOR SLAVERY* (2018); SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* (2015); EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD* xv–xxix, 218

ment, during the era of Jim Crow and retrenchment, the freedom to refuse to contract was a hurdle that only federal legislation and landmark cases could overcome.<sup>8</sup> Business and commercial law actively helped create the social and economic conditions of marginalized peoples.<sup>9</sup> Our classrooms do not reflect this reality.

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(2014) (discussing slavery's connections to entrepreneurship); CALVIN SHERMERHORN, *THE BUSINESS OF SLAVERY AND THE RISE OF AMERICAN CAPITALISM, 1815-1869* (2015); Chase, *supra* note 4, at 14-15. There has been some work in real property on these issues. See, e.g., K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 *YALE L.J.* 1062 (2022).

8. Although the Civil Rights Act of 1866 extended freedom of contract to African-Americans through the Thirteenth Amendment, the Act has been limited by Supreme Court decisions. See U.S. CONST. AMEND. XII; Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27 § 1 (codified as amended at 42 U.S.C. § 1981). Section 1981(a) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

*Id.* Several Supreme Court cases limited the scope of the Thirteenth Amendment and §1981. See, e.g., *The Slaughter-House Cases*, 83 U.S. 36, 81 (1872); *Civil Rights Cases*, 109 U.S. 3 (1883); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Hodges v. United States*, 203 U.S. 1 (1906); *Virginia v. Rives*, 100 U.S. 313 (1879). More recently, the Supreme Court diminished the power of § 1981 in *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media and Ent. Studios Network, Inc.*, 140 S. Ct. 1009 (2020). See also Walter Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination under 42 U.S.C. 1981*, 16 *SAN DIEGO L. REV.* 207 (1979); Theodore Eisenberg & Stewart Schwab, *Importance of Section 1981*, 73 *CORNELL L. REV.* 596 (1987-1988); Robert J. Kaczorowski, *Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Rumyon v. McCrary*, *The Review Essay and Comments: Reconstructing Reconstruction*, 98 *YALE L.J.* 565, 567 (1989); Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South* 69 *UCLA L. REV.* 674 (2022).

9. See *supra* note 8; see also Carliss N. Chatman & Najarian Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, 69 *UCLA L. REV. DISC.* 4 (2021) (discussing systemic failures of law schools and the law to adequately address a lack of diversity in the profession, and the impact on students and the classroom); David B. Wilkins & Mitu G. Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 *CALIF. L. REV.* 493 (1996); Patricia J. Williams, *The Elusive Variability of Race*, in *RACE AND THE GENETIC REVOLUTION: SCIENCE, MYTH, AND CULTURE* 241-254 (2011) (hereinafter *Variability of Race*) (race is a hierarchical social construct, a human invention that is the product of mind and culture. Racism is “constructed from a complex intermingling of individual vision, historical happenstance, social milieu, political decision making, and legal structure.”); BAPTIST, *supra* note 7, at xv-xxix (discussion of entrepreneurship).

The Trans-Atlantic slave trade, occurring at a time when public and private actors developed and perfected many of our business and commercial norms, resulted in a shift of status for persons of African descent internationally.<sup>10</sup> Society required the subordination of these persons for what was perceived to be the greater good of mankind as a whole.<sup>11</sup> These structures and their underlying beliefs heavily influence many of our norms today.<sup>12</sup> The property and partial personhood status of African-Americans, combined with standards developed to facilitate the growth of the international commodities market for products including

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10. See ERIC WILLIAMS, *CAPITALISM AND SLAVERY* 22-38 (3d. ed. 1994); BECKERT, *supra* note 7. See also Pope Eugenius IV and Pope Nicholas V *Romanus Pontifex* (1436 and 1455), [papalencyclicals.net/nichol05/romanus-pontifex.htm](http://papalencyclicals.net/nichol05/romanus-pontifex.htm) (these papal bulls praise King Afonso V of Portugal for his war efforts and declaring that slavery serves as a natural deterrent and Christianizing influence on “barbarous” behavior among pagans and granting Portugal a monopoly); Marti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L. J. 1 (2011); Chase, *supra* note 4.

11. See THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, 150, 169-70 (Wells & Lilly ed., 1829). Jefferson believed that Black people were an inferior class, and that Blacks and whites could not live peacefully after emancipation. He also believed Black people were not capable of true artistic expression. *Id.*; James Farr, *Locke, Natural Law, and New World Slavery*, 36 POL. THEORY, 495-522 (2008); Pope Nicholas V, *Dum Diversas*, translated in *Unam Sanctam Catholicam* (2011) <http://unamsanctamcatholicam.blogspot.com/2011/02/dum-diversas-english-translation.html> (This papal bull, issued on June 18, 1452, confirms Portugal’s trade rights and the right to conquer pagans and subject them to perpetual servitude); see generally JONATHAN HART, *COMPARING EMPIRES: EUROPEAN COLONIALISM FROM PORTUGUESE EXPANSION TO THE SPANISH-AMERICAN WAR* (2003). But see ERIC WILLIAMS, *supra* note 10, at 14-15, 17 (“The features of the man, his hair, color, and dentifrice, his “subhuman” characteristics so widely pleaded, were only the later rationalization to justify a simple economic fact: that the colonies needed labor and resorted to Negro labor because it was cheapest and best. This was not a theory; it was a practical conclusion deduced from the personal experience of the planter. He would have gone to the moon, if necessary, for labor. Africa was nearer than the moon . . . .”); Chase, *supra* note 4.

12. See JULIE SAVILLE, *THE WORK OF RECONSTRUCTION: FROM SLAVE TO WAGE LABORER IN SOUTH CAROLINA, 1860-1870* (1994) (free labor ideology); Amy Dru Stanley, *The Labor Question and the Sale of Self*, in *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 60-97 (2007); Cheryl L. Wade, *African-American Entrepreneurs: Integration, Education, and Exclusion*, 32 W. NEW. ENG. L. REV. 483, (2010) (discussing the difficulty Black entrepreneurs face in the twenty-first century); LORENA S. WALSH, *MOTIVES OF HONOR, PLEASURE, AND PROFIT: PLANTATION MANAGEMENT IN THE COLONIAL CHESAPEAKE, 1607-1763* (2010); WILLIAMS, *supra* note 4, at 8-11; GARRETT-SCOTT, *supra* note 7, at 1-9, 47-55 (discussing Black entrepreneurship and the shadow economy, including the economy of banking and the church from the antebellum period through post-Emancipation); ROBERT W. FAIRLIE, *ETHNIC AND RACIAL ENTREPRENEURSHIP: A STUDY OF HISTORICAL AND CONTEMPORARY DIFFERENCES* (1996); MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017); MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 5, 106 (2006); CAITLIN ROSENTHAL, *ACCOUNTING FOR SLAVERY* (2018).

cotton, contributed to the current beliefs of business investors and how communities of color are still governed and supported.<sup>13</sup>

As a result, teaching commercial law in a way that reflects the reality of its foundations requires lessons on not just common law contracts and the Uniform Commercial Code (UCC), but also on issues of equality and justice.<sup>14</sup> Forming a common law contract requires the manifestation of assent, as demonstrated by offer and acceptance, adequate consideration, and the absence of defenses.<sup>15</sup> Persons, both humans and businesses, must have capacity to contract, as those without capacity cannot accomplish the manifestation of assent.<sup>16</sup> Those lacking capacity historically included non-persons and partial persons.<sup>17</sup> The UCC is built on the common law contract framework, with specific rules and exceptions

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13. See WILLIAMS, *supra* note 10, at 136–142 (“[T]he West Indian was an owner of slaves was not his fault but his misfortune; and if it was true that the production of slavery was more costly than that of free labour, that would be an additional reason for not depriving him for the advantage of his protecting duty.”); Kathryn Boodry, *August Belmont and the World the Slaves Made*, in *SLAVERY’S CAPITALISM* 163 (2016) (discussing the relationship of plantations and banks); DIANA RAMEY BERRY, *THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION* (2017) (examining how being treated as a commodity impacted the lives of the enslaved); GARRETT-SCOTT, *supra* note 7, at 13–19 (describing the role of Black women in society and the economy).

14. Many scholars have written on the importance of providing students with a more fulsome perspective on the law. See Dana Thompson, *Lawyers as Social Engineers: How Lawyers Should use Their Social Capital to Achieve Economic Justice*, 26 MICH. J. RACE & LAW, 1, 2 (2021) (for centuries African-Americans have faced systemic racism and discriminatory government and private policies and practices in all aspects of their daily lives. To accomplish economic justice, Black Americans need transactional lawyers to use their social capital to connect Black businesses with resources); L. Danielle Tully, *The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering*, 16 STAN. J. C.R. & C.L. 201 (2020); Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLINICAL L. REV. 1 (2015); Zdesne, *supra* note 4, at 25; Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN’S L. REV. 901, 905 (2003).

15. See Restatement (Second) of Contracts §§ 1–2.

16. See E. ALLEN FARNSWORTH, *CONTRACTS* § 4.2 (4th ed. 2004).

17. One of the major rights ancillary to personhood is the constitutional guarantee of equal protection. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”). See also Zoë Robinson, *Constitutional Personhood*, 84 GEO. WASH. L. REV. 605, 611, 613 (2016) (constitutional personhood refers to a specific form of legal personhood that denotes a legal status as a constitutional rights holder, entitled to the protection under the U.S. constitution. The Constitution extends protections to a variety of groups of classification including both “persons” and “citizens.” The legal distinction between these two groups lies in what types of rights they may vindicate). Although all persons are guaranteed equal protection under the law, there are some rights that flow from citizenship.

for various commercial scenarios that represent long-standing business norms.<sup>18</sup>

The law school commercial law curriculum is based on the law of the UCC,<sup>19</sup> which includes courses on common law contracts and the UCC, incorporates freedom of contract, and explains the capitalistic goal of private ordering.<sup>20</sup> Commercial laws make commerce efficient, promote enterprise by providing a set of norms that the market can rely upon to trade, and minimize the risk of impermissibly trading across state and national lines.<sup>21</sup> The actions and understandings of the people involved are key to interpreting these concepts and transactions. Commercial norms reflect the society in which they were developed.<sup>22</sup> There is a feedback loop between private ordering—which is rooted in social beliefs—the common law interpretation of agreements, beliefs in the courts, and the public commercial law. The UCC is both a mirror that reflects hundreds of years of commercial practices and a point on the loop that influences future private ordering.<sup>23</sup>

The institution of slavery incorporates all aspects of contracts and commercial law. As a result, slavery enables a professor to take a variety of approaches to pedagogy: it provides material that can be addressed directly through statutes and case law, comparatively through discussions of

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18. See CANDACE M. ZEIRDT, KRISTEN DAVID ADAMS & JULIET M. MORINGIELLO, *ESSENTIAL UCC CONCEPTS: A SURVEY OF COMMERCIAL TRANSACTIONS 1-5* (2018).

19. Commercial law specifically applies to law related to the commercial codes. See, e.g., U.C.C. §§ 1-102; 2-102; 3-102; 4-102, 9-102. Commercial law has its origins in the law of merchants. GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (Tony Honoré & Joseph Raz eds., 1986); CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 76-77* (1981); Charles Noble Gregory, *Bentham and the Codifiers*, 13 HARV. L. REV. 344, 356 (1900). A uniform set of commercial laws was first drafted in 1896. <https://www.uniformlaws.org/acts/ucc>.

20. Private ordering is the regulation, enforcement, and dispute resolution by private actors. W. A. WATT, *THE THEORY OF CONTRACT IN ITS SOCIAL LIGHT 2* (1897); W.G. MILLER, *LECTURES IN THE PHILOSOPHY OF LAW 216* (1884); see also KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS 1-8, 11-14, 16-17* (3d. ed. 1986).

21. WATT, *supra* note 20, at 2. Commercial law norms predate the development of the UCC. See SAVILLE, *supra* note 12, at 1870. There are also international commercial laws and model codes. See *United Nations Convention on Contracts for the International Sale of Goods*, Apr. 11, 1980, 1489 U.N.T.S. 3; MICHAEL JOACHIM BONELL, *AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* (3d. ed. 2009); U.N. COMM'N ON INT'L TRADE L., *MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION*, U.N. Sales No. E.08.V.4 (2008); U.N. COMM'N ON INT'L TRADE L., *UNCITRAL MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS*, U.N. GAOR, 47th Sess., Supp. No. 17, Annex 1, U.N. DOC. A/47/17 (1992), reprinted in 32 I.L.M. 587 (1993).

22. See KESSLER ET AL., *supra* note 20 (contracts reflect the value systems of the culture in which the legal system is embedded).

23. See ZEIRDT ET AL., *supra* note 18.



past and present statutes, and experientially through simulations and transactional drafting exercises. Thus, even in the absence of its foundational nature, slavery would be an apt subject to incorporate into first-year and upper-level courses. When I teach first-year Contracts, I use case law that either addresses slavery or discusses statutes that seek to resolve the impact of the slave trade in a comparative way to more broadly focus on issues of equality and justice, discussing the nature of public policy, how public sentiment is reflected in common law standards, and how those social norms have evolved over our nation's history.<sup>24</sup> However, given the breadth of necessary material in a first year Contracts class, especially a course that has only four credit hours, it is difficult to give these issues the time and treatment they deserve.<sup>25</sup>

In my Core Commercial Concepts course, a UCC survey course covering Articles 2, 3, 4, and 9, I have the time and space to discuss race and the law more specifically by making the connection between the history of commercial concepts, slavery, and the role of the cotton industry

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24. For example, through *In the Matter of Baby M*, 537 A.2d 1227 (NJ 1988) in combination with *State v. Mann*, 13 N.C. 263 (1829), and a discussion of the Thirteenth Amendment to introduce a discussion of status on the first day of class. I also introduce a discussion of freedom of contract under 42 USC § 1981 with a discussion of *Barfield v. Com. Bank, N.A.*, 484 F.3d 1276 (10th Cir. 2007). *Baby M* and *Barfield* are included in Marco Jimenez's book. See CONTRACT LAW: A CASE & PROBLEM-BASED APPROACH, Wolters Kluwer (2d. 2021).

25. A 4-credit first-year Contracts class must cover the life cycle of a contract, including formation through offer, acceptance, and consideration, the absence of defenses, exceptions to contract formation that can still create a binding arrangement, including promissory estoppel and unjust enrichment, and remedies. With 4-credits there are debates regarding whether professors should teach the UCC, third parties, or introduce race. For discussions of contracts coverage and teaching race in contracts see, e.g., Chaumtoli Huq, *Integrating a Racial Capitalism Framework into First-Year Contracts: A Pathway to Anti-Capitalist Lawyering*, 35 J. C.R. & ECON. DEV. 181, 184 (2022) (arguing that race and racism have always been deeply ingrained in business law); L. Danielle Tully, *What Law Schools Should Leave Behind*, 2022 UTAH L. REV. 837, 841 (2022) (“[T]o prepare future lawyers to build a more equitable, inclusive, and just profession, law schools must first relinquish three things: the faulty caste system . . . high-stakes, summative exams; and the curve.”); Alan M. White, *Stop Teaching Consideration*, 20 NEV. L. J. 503, 507 (2020) (explaining how the Consideration doctrine, and the courts’ dogged refusal to abandon it, causes confusion, undermines good contract analysis, and subverts the values that should drive the resolution of contract disputes); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 65 (1995) (“[M]y chief recommendation for enhancing legal education is that we attempt to incorporate into our curriculum those ideas of social relations that will allow us to construct and exercise no less rigorous standards of objectivity by taking into account the historical factors that have made our disciplinary discourse what it is now”); Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23 (2013).

in the shaping of international commercial law norms.<sup>26</sup> In this course, I use materials related to slavery directly, comparatively, and experientially. Students read cases in which the enslaved are the object of a contract,<sup>27</sup> and I compare modern norms post-Thirteenth Amendment to what would have occurred pre-Civil War. Thus far, I have incorporated slavery as a review session simulation spanning three hours of class time. A professor could cover the material in smaller parts by incorporating it into discussions of sales (Article 2), commercial paper (Articles 3 and 4), and secured transactions (Article 9). One could also teach the relevant parts in stand-alone Sales, Commercial Paper, or Secured Transactions courses, or even introduce them in first year Contracts if time permits.

As the simulation illustrates, aspects of slavery permeate every area of American law and commerce, and we can use it to teach foundational matters in many disciplines.<sup>28</sup> Business and corporate law courses are dependent on the classifications of persons and property, both real and personal.<sup>29</sup> Classes on business associations or organizations, agency, corporations, unincorporated entities, securities, and mergers and acquisitions have a tendency to focus on an allegedly neutral market, disregarding who develops the policies and how all stakeholders are impacted.<sup>30</sup> Pri-

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26. Although this is a survey course that covers vast material, there are fewer foundational cases, and it is possible to drop a case here and there to allow for this coverage.

27. For this class I assign *Bank of Ky. v. Vance's Adm'r*, 4 Litt. 168 (1823). Others have written on references to the enslaved and slavery in contracts and business cases, and the absence of reference to the condition in pedagogy. See, e.g., Chase, *supra* note 4; Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1202-1203.

28. The simulation covers personhood and status, contracts, sale of goods, commercial papers, and secured transactions. The same material could be framed to cover non-profits, trusts and estates, and corporate governance.

29. See *supra* note 17 (discussing personhood and status).

30. See *supra* notes 6-7. For a discussion of shareholder wealth maximization, shareholder primacy, and stakeholder theory, see, e.g., Matteo Gatti & Chrystin Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1, 9 (2020) ("Without specific mandates to corporations and without enforcement mechanisms, these measures do little more than increase managerial discretion."); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 165 (2020) ("[S]upport for stakeholderism may well be strategic: an attempt to advance a managerialist agenda dressed in stakeholder clothing to make it more appealing to the general public . . ."); Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1636 (2021) ("[I]t is possible that some management teams would use their enhanced discretion to waste money or maximize their private benefits, leading to economic harm—if not now, then at some time in the future."); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250, 275 (1999) ("Our analysis rests on the observation—generally accepted even by corporate scholars who adhere to the principal-agent model—that shareholders are not the only group that may provide specialized inputs into corporate production. Executives, rank-and-file employees, and even creditors or the local community may also make essential contributions and have an interest in an enterprise's success.") (footnote omitted);

vate law courses, which include Contracts and Torts in the first-year curriculum and all business and commercial courses in the upper-level law school curriculum, have a focus on the market and the invisible hand.<sup>31</sup> Professors reserve identity matters for public law courses, or, in the worst-case scenario, for elective courses.<sup>32</sup> This siloing of information fails to reflect reality.

In this Essay, I will explain the methods I use to explore these concepts further. Working in a framework that focuses on classification and status, my students can consider issues of federalism and the impact of statutory definitions on private ordering, while discussing how these definitions shape the relationship of African-Americans to commerce. The goal is to encourage students to question the symbiotic relationship of public and private law, recognizing that public status shapes private ordering in that without a recognition by the state of personhood, there is no freedom of contract.<sup>33</sup> Similar methodologies could be used to show how other marginalized groups relate to law and commerce.<sup>34</sup>

This Essay first discusses how a failure to discuss race and status in commercial law classrooms omits a foundational part of the story, advocating for the incorporation of the study of slavery in private law courses. While other areas of business law can make a case for a neoliberal economics frame, such justifications do not carry weight in the commercial law curriculum, where so many of the international concepts have a foundation in the international market for cotton as fueled by the slave

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Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2456-57 (2020) (discussing the differences in regulation-related roles played by shareholders, employees, creditors, suppliers, and consumers).

31. See Spencer J. Pack & Robert W. Dimand, *Slavery, Adam Smith's Economic Vision and the Invisible Hand*, 4 HIST. ECON. IDEAS 253 (1996) (discussing Smith's opposition to slavery on grounds that it was less economically efficient than paid labor); Elias Khalil, *Making Sense of Adam Smith's Invisible Hand: Beyond Pareto Optimality and Unintended Consequences* 22 J. HIST. ECON. THOUGHT 49 (2000) ("As currently used by neoclassical economists, the invisible hand signifies the welfare theorem, i.e., competitive equilibrium guarantees (under some strict conditions) Pareto optimality"); Robin Paul Malloy, *Invisible Hand or Sleight of Hand - Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 U. KAN. L. REV. 209 (1988).

32. See *supra* notes 4, 6-7.

33. Public law is social control and a set of duties for public good to protect the community interest; private law comes about as the result of free bargaining and genuine agreement based on promises voluntarily given. See KESSLER ET AL., *supra* note 20.

34. Women, African-Americans, Asian-Americans, Native Americans, and non-citizens did not have the freedom to contract, engage in commerce, own property, and for some, be recognized as a person. See, e.g., WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769) (coverture); *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (holding that the discovery power grants sovereignty over native lands, thus Native Americans cannot convey property).

trade.<sup>35</sup> Then, this Essay explains the pedagogical methods I apply to ensure that all students benefit from the exercise.<sup>36</sup> In the classroom, I utilize problem- and case study-based small group discussions, visual aids, and real-time in-class review. Finally, this Essay explains the resources used to teach the simulation and provides suggestions for adoption at other institutions. The simulation provides students with an opportunity to learn about the impact of the institution of slavery on commercial law while reviewing fundamental aspects of the course while engaging with the new material in three ways: reading, application, and assessment.

### I. THE CASE FOR SLAVERY IN THE BUSINESS AND COMMERCIAL LAW CLASSROOM

Even in the absence of its foundational nature, slavery would be a fitting subject to incorporate into first-year and upper-level courses.<sup>37</sup> This is because while the slave system played a foundational role in the creation and development of American capitalism,<sup>38</sup> which should be reason enough to focus on slavery, globalization and other trends in business make avoidance of these issues economically inefficient.<sup>39</sup> A failure to incorporate slavery leaves law students both uninformed regarding the history of business and commercial law and unprepared to serve a changing client base and workforce.<sup>40</sup>

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35. Neoliberalism advocates for a return to a laissez-faire free market economy and argues in favor of transferring the power of controlling the economy from public sector to private sector. Although an economic philosophy, this sentiment has greatly impacted legislation and political policy making. See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1 (2014); Zdesne, *supra* note 4, at 25 (discussing the problems with neoliberal framing); Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 SAN DIEGO L. REV. 55, 58 (2004).

36. See *infra* Part II.

37. See Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 1, 9-10 nn. 33-35 (2001). K-Sue Park notes that slavery was a part of the curriculum in the early 20<sup>th</sup> century, with many casebooks including cases with enslaved persons as the subject of contracts. These courses did not address the morality of slavery. Park, *supra* note 7, at 1080. The University of Virginia maintains a collection of materials from students before 1865 that reflect the way slavery was taught before the Civil War. *Teaching Slavery*, U. VA. SCH. OF L., <https://slavery.law.virginia.edu/teaching>.

38. See *supra* notes 8, 10. See also Williams, *supra* note 4, at 220-22.

39. Williams, *supra* note 4, at 220-22

40. See Cary Martin Shelby, *Race and Systemic Risk*, 118 NW. L. REV. (forthcoming Nov. 2023) (manuscript at 7-8) (explaining her Race and Systemic Risk theory and the impact of neoliberal theory and political economy). See also, e.g., Marleen O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2002); Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms' Risk Oversight?*, 70 SMU L. REV. 327 (2017); Maureen J. Miller-Kahle & Krista B. Lewellyn, *Did Board Con-*

In a marketplace where purchasers desire fast delivery and reliable goods, the sale of goods as governed by UCC Article 2 allows merchants to move quickly without the necessity of ironing out details.<sup>41</sup> Article 2 makes performance acceptance of the contract, relies on industry standards and prior relationships to fill in the gaps, and sets standards for remedies when it is more economically efficient to breach an agreement than to perform.<sup>42</sup> In a society that has gradually moved from cash and direct exchanges of goods to payments that are the equivalent of cash, the payment systems in Article 3 allow contracting parties to substitute negotiable instruments, increasing security while giving the market a means of exchange that is as reliable as currency.<sup>43</sup> Where entrepreneurship and job creation are valued, secured transactions, as governed by Article 9 of the UCC, democratizes commerce, enabling those without a legacy of wealth to use their personal property as collateral so that they may launch and expand businesses using the engines of commerce themselves as security.<sup>44</sup> Common law contracts incorporate the principle of good faith and require that negotiating parties have the capacity for a meeting of the minds, a bargained for exchange, and no legal defenses as defined by custom or statute that invalidate the bargain.<sup>45</sup> For these reasons the status of persons, both natural and corporate, and the classifications of property are essential elements of every contract.<sup>46</sup>

Personhood status determines whether one is a party to or object of a contract, and for much of our nation's history the law deemed all persons of African descent to have a limited status, if given personhood status at all.<sup>47</sup> This status has lasting impact, as it influences many of our norms

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*figuration Matter? The Case of US Subprime Lenders*, 19 CORP. GOV. INT'L REV., Issue 5, 405 (2011) (subprime lender boards were less diverse); Roland Bérabou, *Groupthink: Collective Delusions in Organizations and Markets*, 8016 REV. OF ECON. STUD., Issue 2, pg. 439-62 (2013) (discussing wishful thinking, willful blindness, and other problems with groupthink).

41. See ZEIRDT ET AL., *supra* note 18; John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L. J. 1, 2-4 (1981).

42. See, e.g., U.C.C. §§ 2-207, 2-711, 2-706, 2-204.

43. See ZEIRDT ET AL., *supra* note 18.

44. *Id.*

45. See FARNSWORTH, *supra* note 16. See also ZEIRDT ET AL., *supra* note 18.

46. See *supra* note 19.

47. See, e.g., U.S. CONST. art. I, § 2 (3/5ths clause) and various state codes (VA, LA, FL, MS, Black Codes). While there are many differences between civil and common law jurisdictions, the subordinate personhood of African persons is not one of them (French and Spanish Codes from Caribbean, Portuguese Codes). Notably, commercial standards are also international, as American terms found in the UCC are often the standard in international exchanges of goods involving an American affiliated entity. The CISG and UNIDROIT have many norms similar to UCC.

today. The commodities markets and the nations that arose and prospered would not be possible without the slave trade, and that trade would not be possible without the legal, business, and social norms in place to facilitate private ordering and growth while reinforcing the subjugation of African-Americans.<sup>48</sup> Yet, many business and commercial law professors devote class time to teaching foundational and historical material without consideration of the impact of slavery.<sup>49</sup> To avoid slavery in business and commercial law courses is to ignore an institution that plays a pivotal role in much of what we do today.<sup>50</sup> Slavery is not a frolic; it is foundational.<sup>51</sup>

The dominance of private-ordering marks the evolution from a status-organized society, where a sovereign makes all decisions and the ability to advance is a grant from a higher power, to a self-determined and self-asserted society, where the power to contract controls one's fate.<sup>52</sup> Not everyone enjoyed the newfound privilege embodied in the transition from monarchy to private-ordering. Merchants and masters replaced the single sovereign or dual sovereign of monarchs and religious figures. In its initial stages, the more modern society embodied merchants and masters, who were empowered by the government to buy, sell, and trade "lesser" human beings.<sup>53</sup> Once government evolved further away from monarchy, private ordering and contracting allowed men to enter into bargains privately without oversight and interference from a sovereign, but that freedom was not for all.<sup>54</sup> It gave some men the ability to enslave

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48. See Park, *supra* note 7, at 1067 (discussing the erasure of the history of colonialism and slavery from US law and legal institutions). See, e.g., WILLIAMS, *supra* note 10, at 51-107 (Williams explains three hypotheses: (1) emancipation was motivated by economics, not human rights, and was entirely motivated by self-interest; (2) slavery produced racism, as racism provides rationalization and is the beginning of white supremacy; and (3) the slave trade fueled capitalism and the British industrial revolution such that the decline of slavery is linked to the decline of the revolution in manufacturing it facilitated); ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST*, First Mariner Books (1999) (retelling the history of the Congo's encounters with Europe from trading in weapons and persons with the Portuguese in the late 1400s to the war crimes of King Leopold from 1886 to 1908).

49. See notes 20-23.

50. See generally Desmond, *supra* note 7.

51. Others have discussed the foundational nature of slavery. See e.g., Park, *supra* note 7, at 1069; Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087 (1990); Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79 (2020).

52. KESSLER ET AL., *supra* note 20, at 1-17.

53. See WILLIAM A. PETTIGREW, *FREEDOM'S DEBT: THE ROYAL AFRICAN COMPANY AND THE POLITICS OF THE ATLANTIC SLAVE TRADE, 1672-1752* 5-8, 11-44 (2013).

54. Chase, *supra* note 4.

other men, women, and children.<sup>55</sup> If in a progressive society all law is based in the ideals of freedom of contract as opposed to the power of a sovereign, it is essential that professors integrate commercial law and the influences of capitalism into so-called public law courses, and that commercial law acknowledge its influence on public law in private law courses.<sup>56</sup> This symbiotic relationship is the foundation of modern government and the modern economy.

The transatlantic slave trade changed the global economy in a way that facilitated revolution.<sup>57</sup> Those revolutions—industrial, political, and social—resulted in great freedoms for some at the sacrifice of others.<sup>58</sup> The revolution led to the diminished role of the monarchy and the church, rise of commerce, and new prominence of merchants and entrepreneurs.<sup>59</sup> The norms governing this new economy are formed in the shadow of the slave trade.<sup>60</sup>

As a result, there is a need to understand the origins and evolution of law and power in the United States.<sup>61</sup> Unfortunately, business and commercial law pedagogy are woefully lacking in this understanding. For students in law and business school, the curriculum reserves the issues of socioeconomics and equality for other courses and other disciplines. By ignoring the influence of slavery on the development of our laws and the

55. WILLIAM G. MILLER, *LECTURES ON THE PHILOSOPHY OF LAW* 216 (Wentworth Press 2019) (1884) (“It is through contract that man allows freedom. Although it appears to be subordination of one man’s will to another, the form gains more than he loses.”).

56. See WILLIAMS, *supra* note 10.

57. See DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1775-1820* (Oxford Univ. Press ed. 1999) (1975); JEFFERSON, *supra* note 11, at 289; WILLIAMS, *supra* note 10, at 21-38, Chapter 6 (discussing the role of the slave trade in industrial revolution) (discussing the role of slavery in the American Revolution); Park, *supra* note 7, at 1068 (citing ALICE H. JONES, *WEALTH OF A NATION TO BE: AMERICAN COLONIES ON THE EVE OF REVOLUTION* 95-98 (1980) (by eve of American Revolution property acquired by enslavement and theft accounted for 75% of all wealth in the colonies)).

58. *Id.*

59. BAPTIST, *supra* note 7, at 215-259 (discussing the role of slavery in the rise of entrepreneurs, and the additional risk tolerance as the enslaved were used for credit in addition to labor). Baptist also draws a parallel between the sexualized commodification of enslaved women and the behavior of white entrepreneurs.

60. *Id.* See also notes 5 and 14.

61. See L. Danielle Tully, *The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering*, 16 *STAN. J. C.R. & C.L.* 201, 202 (2020); see also Susan Sturm, *Commentary, Law School, Leadership, and Change*, 127 *HARV. L. REV. F.* 49 (2013); Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 *MICH. L. REV.* 1123, 1125 (2012); Kathryn M. Stanchi, *Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy*, 43 *HARV. C.R.-C.L. L. REV.* 611, 612-13 (2008); Imani Perry, *Cultural Studies, Critical Race Theory and Some Reflections on Methods*, 50 *VILL. L. REV.* 915, 915-23 (2005).

structures of business, we have created a pedagogical void that cannot reconcile how a system founded on freedoms—of liberty and of contract—can result in such disparate outcomes.<sup>62</sup> The academy's siloing of information sends law students into the world with mistaken and limited beliefs.<sup>63</sup> Law school curriculum teaches that equality is the domain of criminal law, constitutional law, or property, that slavery is a matter for historical review, and that we can reduce the contributions of the enslaved to just free labor.<sup>64</sup>

The erasure of slavery from the private law curriculum does not just impact our students. Professors are trained in a system that disregards a fundamental aspect of our legal and business history, which results in scholarship and legislation that lacks properly calibrated solutions.<sup>65</sup> We cannot fully train the lawyers of tomorrow without a realistic view of the past. The claim that these matters fall within the domain of public law disregards the role of private ordering in systemic inequality.<sup>66</sup> This leaves tomorrow's judges, lawyers, politicians, and business leaders with an incomplete picture of legal reality.<sup>67</sup>

The need to teach slavery is not merely a matter of historical accuracy; a failure to do so also results in market inefficiencies.<sup>68 69</sup> Business and commercial law, from the classroom to the c-suite, have a pattern of

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62. See e.g., GARRETT-SCOTT, *supra* note 7, at 1-5 (explaining measures taken by free Black women, before and after the Civil War and through the New Deal, to combat the historical exploitative relationship of Black people to banking and capitalism); see also PAUL STARR, *ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES* 71 (2019) (discussing the role of slavery in the Constitution); LINDERT & WILLIAMSON, *infra* note 109, at 93.

63. See *supra* notes 5-7.

64. *Id.*

65. Martin Shelby, *supra* note 40, at 7-8 (explaining her Race and Systemic Risk theory and the impact of neoliberal theory and political economy); Park, *supra* note 7, at 1079-1080 (discussing the impact of the erasure of slavery from the property curriculum); see Lucy Jewel, *Neuro rhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 680 (2017); Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081 (2018) (discussing the impact of erasure of slavery on politics); Perea, *supra* note 61, at 1125.

66. See Thompson, *supra* note 14.

67. Ronald C. Chen & Jon D. Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1239 (2004).

68. See *supra* note 42.

69. See BAPTIST, *supra* note 7, at 215-259 (quoting Thomas Jefferson's admission of the danger of unchecked power) (citing ANNETTE GORDON-REED, *THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY* (1997); and then citing SALLY HEMINGS AND THOMAS JEFFERSON: *HISTORY, MEMORY AND CIVIC CULTURE*, (Jan E. Lewis & Peter S. Onuf, eds., 1997)).



homosocial leadership and homosocial thought.<sup>70</sup> A homosocial environment is one which promotes non-romantic same-sex relationships, such as friendship and mentorship, that acts to uphold the power of male dominance.<sup>71</sup> In publicly traded corporations and venture capital firms that drive the funding of corporations and the future of corporations, homosocial relationships act to prevent the diversification of leadership, despite evidence that diversity improves outcomes.<sup>72</sup> Our retirement funds are collectively invested in these institutions as they are deemed the safest and poised for long-term growth.<sup>73</sup> Yet, we are acutely aware of the risk of failing to diversify.<sup>74</sup> Ironically, in times of crisis, diversity, or a focus on diversity, is blamed for failures.<sup>75</sup>

The way that we teach these subjects represents the homosocial environment as if it is a coincidence not worthy of question or examina-

70. See ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION, 48, 63, 68 (1977) (defining homosocial reproduction as a selection process by which corporate managers select individuals who are socially similar to themselves for hiring and promotion); Ramirez, Wade & Cummings, *supra* note 4, at 399-400, 411-12 (discussing corporate leadership structure); Janis Sarra, *Class Act: Considering Race and Gender in the Corporate Boardroom*, 79 ST. JOHN'S L. REV. 1121, 1124-25 (2005); Cheryl L. Wade, *Transforming Discriminatory Corporate Cultures: This is Not Just Women's Work*, 65 MD. L. REV. 346, 372 (2006); Charlotte Holgersson, *Recruiting Managing Directors: Doing Homosociality*, 20 GENDER, WORK, & ORG. 454, 461 (2013) (homosociality is done through redefining competence and doing hierarchy, resulting in a preference for certain men and the exclusion of women); Anat Alon-Beck, Michal Agmon-Gonnen & Darren Rosenblum, *No More Old Boys' Club: Institutional Investors' Fiduciary Duty to Advance Board Gender Diversity*, 55 U.C. DAVIS L. REV. 445, 461 (2021).

71. *Id.*

72. See Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 884 (2011); Alon-Beck, Agmon-Gonnen & Rosenblum, *supra* note 70.

73. Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV. 1105 (2005); Kristin Johnson, *Things Fall Apart: Regulating the Credit Default Swaps Commons*, 82 U. COLO. L. REV. 101, 148.

74. See generally Fairfax, *supra* note 73; Johnson, *supra* note 73. See also Martin Shelby, *supra* note 40, at 12. Another example of blaming too much diversity emerged during the collapse of Silicon Valley Bank. See Andy Kessler, *Who Killed Silicon Valley Bank?*, WALL ST. J. (March 12, 2023), [https://www.wsj.com/articles/who-killed-silicon-valley-bank-interest-rates-treasury-federal-reserve-ipo-loan-long-term-bond-capital-securities-startup-jpmorgan-bear-stearns-lehman-brothers-b9ca2347?mod=article\\_inline](https://www.wsj.com/articles/who-killed-silicon-valley-bank-interest-rates-treasury-federal-reserve-ipo-loan-long-term-bond-capital-securities-startup-jpmorgan-bear-stearns-lehman-brothers-b9ca2347?mod=article_inline). Another example of homosocial culture and its impact on diversification of corporations lies in Ellen Pao's tenure at Reddit. See, e.g., Aimee Picchi, *Did Ex-Reddit CEO Pao Plunge Off a "Glass Cliff"?*, CBS NEWS, <https://www.cbsnews.com/news/the-fallout-continues-at-reddit/> (July 14, 2015).

75. Picchi, *supra* note 74. Although diversity is blamed for failures, studies show that groupthink and a lack of diversity may be responsible. See, e.g., *supra* note 40.

tion.<sup>76</sup> Initiatives to diversify business have fallen short of making the business world a reflection of the demographic makeup of the country.<sup>77</sup> Boards that successfully diversify face criticism, and corporate leaders who are female or of color face greater scrutiny.<sup>78</sup> Yet, cyclical financial crises and studies repeatedly show that a lack of diversity contributes to these failures.<sup>79</sup> Group think and institutional capture, facilitated by homosocial environments and thought, lead to corporate fraud, breaches of duty and other corporate governance failures, and in the worse cases market collapse.<sup>80</sup> The lack of diversity at the front of the classroom, in the board room, and in the subject matter taught in business and commercial law courses contributes to a cycle of erasure that ultimately leaves students and future leaders woefully uninformed.<sup>81</sup> It also leaves the capital markets vulnerable and inefficient.<sup>82</sup>

Exposing students to the slave trade's influence on modern business institutions shows them that the status quo is not a natural occurrence.<sup>83</sup> Instead, our nation's intentional structure and economic foundation in the slave trade ensures that we continue to maintain white male supremacy.<sup>84</sup> The modern exploitation of borrowers as evidenced by the subprime lending crisis, the lack of diversity in business leadership, and other incidents evidencing structural inequality would not come as a surprise if lawmakers and their advisors understood the history of the business structures and policies that facilitate this inequality.<sup>85</sup> Banking, commercial

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76. Steven A. Ramirez, *What we Teach When we Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365, 371-72 (2004).

77. See Fairfax, *supra* note 73, at 1120; see also Russell G. Pearce, Eli Wald & Swethaa S. Ballakrishnen, *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2409-10 (2015) (highlighting the growing number of minority and woman students at feeder law schools but law firms still remaining largely white and male).

78. Pearce, et al., *supra* note 77, 2409-10.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. See Thompson, *supra* note 14, at 2; see also, ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM COURTROOM* 57 (2000) (discussing slavery in the courtroom and the disconnect between commodities as moral agents); ORLANDO PATTERSON, *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES* (1999) (discussing the lasting impact of slavery on African-American social relationships).

84. See sources cited *supra* note 83.

85. Ramirez, Wade & Cummings, *supra* note 4, at 399-400, 411-12 (discussing impact of subprime lending crisis); GARRETT-SCOTT, *supra* note 7, at 1-4 (describing her role in the subprime lending crisis, the impact of the crisis on Black people and Black women, stating "The subprime mortgage debacle in many ways became a black woman." Garrett-Scott notes that Black people lost between \$71 billion and \$93 billion through foreclo-

law, and corporate law have a 400-year-old pattern—the exploitation of Black labor for profit, with the cover and assistance of the government.<sup>86</sup>

When teaching the UCC in first year Contracts, Sales, and Core Commercial Concepts, I began to contemplate a way to incorporate information on the evolution of modern capitalism and our commercial law norms. Colonialism is responsible for American political and financial dominance, and both American and international commercial law customs.<sup>87</sup> By incorporating a review module on slavery, with a focus on its impact on the development of my own institution, I have been able to give students the more nuanced and complete perspective. Teaching slavery is not a woke detour, but it is instead a necessary method for fact-based learning.<sup>88</sup> We can explain nearly every aspect of the UCC through the lens of the slave trade.

Our singular focus as academics on public systemic oppression ignores the role of private ordering in the development of these systems.<sup>89</sup> Private actors flying the flags of sovereign nations colonized the Americas, but slavery and the social norms it created came at the hands of corporations and the ventures fueled by private trade for slaves, spices, and other commodities.<sup>90</sup> Slavery provides insight into the origins of commercial principles because the development of commercial paper, the insurance industry, and norms governing the sale of goods made the ubiquity of a slave economy possible.<sup>91</sup> The cotton plantation was not

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sure and from higher fees and interest rates on subprime loans); Sandra Phillips, *The Subprime Mortgage Calamity and the African American Woman*, 39 REV. BLACK POL. ECON. 227, 227-37 (2012).

86. See, e.g., THAVOLIA GLYPH, OUT OF THE HOUSE OF BONDAGE: THE TRANSFORMATION OF THE PLANTATION HOUSEHOLD 137-203 (2008); JONATHAN LEVY, FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA 111-17, 121, 126 (2012) (discussing the purpose of banks in New Orleans and the idea of creating separate banks based on race); see generally BRIAN P. LUSKEY & WENDY A. WOLOSON, CAPITALISM BY GASLIGHT: ILLUMINATING THE ECONOMY OF NINETEENTH CENTURY AMERICA (2015); Jesse Stiller, *The Freedman's Savings Bank: Good Intentions Were Not Enough; A Noble Experiment Gone Awry*, OFF. OF THE COMPTROLLER OF THE CURRENCY, <https://www.occ.treas.gov/about/who-we-are/history/1863-1865/1863-1865-freedmans-savings-bank.html>.

87. BECKERT, *supra* note 7; WILLIAMS, *supra* note 10, at 29-56.

88. See NIKOLE HANNAH-JONES, THE 1619 PROJECT: A NEW ORIGIN STORY (2019) (“Bring slavery and the contributions of Black Americans from the margins of the American story to the center, where they belong.”).

89. See CHARLES W. MILLS, THE RACIAL CONTRACT 137 (1997); see also *supra* note 4.

90. See WILLIAMS, *supra* note 10.

91. See W.E.B. DU BOIS, BLACK RECONSTRUCTION 11-16 (1976); W.E.B. Du Bois, *Negroes and the Crisis of Capitalism in the U.S.*, MONTHLY REV. (reprinted April 2003); ERIC EUSTACE WILLIAMS, CAPITALISM AND SLAVERY 77-78 (1911); SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT (Sven Beckert & Seth Rockman eds., 2016).

economically practical without an international market.<sup>92</sup> Government facilitation of private ordering developed this market.<sup>93</sup>

Students have one source to learn about the legal foundations of private ordering—the law school classroom. Yet, law school and business school curricula fail to provide students with information on any origins of corporate law or commercial structures before the growth of railroads or outside of the frame of the industrial revolution.<sup>94</sup> Our brand of capitalism has its origins in the Atlantic slave trade, which used African slave labor to drive global profits as early as 1441, but our courses pick arbitrary points from later in history as the origin story.<sup>95</sup> This framing enables the false siloing of public and private law. Racial disparities have origins outside of the public policies studied in constitutional law, some property classes, and in all race and the law and critical race theory courses.<sup>96</sup> Private law has operated to solidify these policies, and in some cases is the original source of these policies. If we wish to train culturally competent lawyers, we must incorporate the reality of contract and business norms.<sup>97</sup> Incorporating slavery into the business and commercial law curriculum helps to accomplish this goal.

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92. DAVID JAFFE, *A NEW NATION OF GOODS: THE MATERIAL CULTURE OF EARLY AMERICA* (2010); CALVIN SCHERMERHORN, *THE BUSINESS OF SLAVERY AND THE RISE OF AMERICAN CAPITALISM, 1815-1860* 7 (2015); *SLAVERY'S CAPITALISM*, *supra* note 91, at 3.

93. *See supra* note 8.

94. *See* ZEIRDT ET AL., *supra* note 18, at 5.

95. *See* D. Wendy Greene, *Determining the (In)Determinable: Race in Brazil and the United States*, 14 MICH. J. RACE & L. 143, 160 (2009) (explaining the origins of chattel slavery from Portuguese and Roman law where slaves were treated as chattel for the purposes of the commercial code but only as persons for the purposes of the criminal code). With this ideology embedded, Prince Henry of Portugal is believed to be the founder of the Trans-Atlantic slave trade. He sponsored Nuno Tristao's exploration of the African coast, and Antao Goncalves's hunting expedition in 1441, where they captured several Africans and brought them to Portugal. One of the captured men, a chief, negotiated his own return to Africa, promising in exchange to provide the Portuguese with more Africans. *See generally* Kenneth Baxter Wolf, "The 'Moors' of West Africa and the Beginnings of the Portuguese Slave Trade," 24 J. MEDIEVAL & RENAISSANCE STUD. 449, 460 (1994) (identifying that Prince Henry of Portugal is believed to be the founder of the Trans-Atlantic slave).

96. *See e.g.*, LAW DEANS ANTIRACIST CLEARINGHOUSE PROJECT, <https://www.aals.org/about/publications/antiracist-clearinghouse/>; Kim Diana Connolly and Eliza Lackey, *The Buffalo Model: An Approach to ABA Standard 303(c)'s Exploration of Bias, Cross-Cultural Competency, and Antiracism in Clinical Education and Experiential Law*, 70 WASH U. J. L. & POL'Y, 71 (2023) (establishing that most efforts to teach implicit bias have little to no focus on business law).

97. *See* 2022-2023 STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCH., INTERPRETATION 302-1 (AM. BAR ASS'N 2022) ("For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, docu-

Those within the legal system have acknowledged the need to be more inclusive for purposes of providing a more fulsome and accurate legal education.<sup>98</sup> While addressing the need to provide students with an accurate picture of legal history and producing students who can competently practice the law of the future, incorporating slavery enables my commercial law courses to meet learning objectives that help shape my students into attorneys who will approach the law in a holistic way.<sup>99</sup> This exercise enables me to fulfill the mandates of ABA Standard 302, which requires law schools to provide:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.<sup>100</sup>

This Standard, particularly in conjunction with Standard 303, has been interpreted to include cultural competency and the development of skills, not just rote memorization of the law.<sup>101</sup> Attorneys should have more than the typical understanding of statutory interpretation and application.<sup>102</sup> Through my pedagogical approach and the slavery and commercial law simulation, students gain an understanding of legal history and the interplay of public policy and private law. They develop the skills to analyze law and facts more fully and to review commercial documents for compliance with statutory norms. Most importantly, they begin to develop the skill of taking a critical lens to the law, considering the why and rejecting the notion that they should simply memorize and regurgitate the law without question.

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ment drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.”).

98. *Id.*

99. *Id.*

100. 2022–2023 STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCH., NO. 302 (AMER. BAR ASS’N 2022) (articulating the mandate for law schools to provide an education that promotes ethics in their students).

101. *See supra* note 14 (discussing alternative interpretations of meeting the mandate’s requirements).

102. *Id.*

II. PEDAGOGY<sup>103</sup>

In my simulation I teach the story of Washington and Lee University's sale of individuals for the purpose of ensuring the institution's financial survival, then extrapolate from the facts to review the high points of commercial law. I incorporate materials on the legacy of slavery at my own institution to provide students with a scenario based on the acquisition of real property and construction of buildings they engage with on campus.<sup>104</sup> A professor may use Washington and Lee as the focus, or may also customize it to fit another institution.<sup>105</sup> Many American universities played a role in the slave trade—either receiving funds from the enterprise or receiving the enslaved as donations and using their labor or disposing of them for the financial advancement of the institution.<sup>106</sup>

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103. The full text of the simulation is available at <https://mjrl.org/issues/>. The Teacher's Manual is on file with the author.

104. Washington and Lee's sale of the enslaved persons followed a trend of westward movement. See Christopher Tomlins, *Revulsions of Capital*, in *AMERICAN CAPITALISM: NEW HISTORIES*, 195, 196-197, (Sven Beckert & Christine Desan eds., Columbia Univ. Press 2019).

105. Many scholars and university archivists have chronicled the history of slave trading and ownership by their institutions or their institution's benefactors. See, e.g., *African-Americans at William and Mary: A Historical Timeline*, THE LEMON PROJECT, <https://www.wm.edu/sites/lemonproject/researchandresources/historicaltimeline/index.php> (last visited Aug. 20, 2022) (noting that William and Mary purchased 17 slaves in 1718 and sold most of them in the early 1800s); MAURIE D. MCINNIS & LOUIS P. NELSON, *EDUCATED IN TYRANNY: SLAVERY AT JEFFERSON'S UNIVERSITY* 5 (2019) (Jefferson "understood the [University of Virginia] to be an institution with slavery at its core, both in how it operated and in its purpose. He believed that a southern institution was necessary to protect the sons of the South from abolitionist teachings in the North . . . Jefferson believed it was important to educate Virginians, and other southerners, in an institution that understood and ultimately supported slavery."); *The Georgetown Slavery Archive*, GEO. UNIV., <http://slaveryarchive.georgetown.edu/> (last visited Aug. 20, 2022); 1-3 ROBERT RUTLAND, *THE PAPERS OF GEORGE MASON 1725-92* (1970). The University of Virginia also created and leads the Universities Studying Slavery Consortium (USS). UNIVERSITIES STUDYING SLAVERY, <https://slavery.virginia.edu/universities-studying-slavery/>.

106. Notably, this is not limited to southern institutions. See LOLITA BUCKNER INNIS, *THE PRINCETON FUGITIVE SLAVE: THE TRIALS OF JAMES COLLINS JOHNSON* (2019); BROWN UNIV., *SLAVERY AND JUSTICE: REPORT OF THE BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE* (2006), <https://digitalpublications.brown.edu/read/first-readings-2020/section/fe52cb22-c7d8-4a15-898b-03c8de1086de>; COLUM. UNIV., *COLUMBIA UNIVERSITY AND SLAVERY*, <https://columbiaandslavery.columbia.edu/> (last visited Aug. 20, 2022); Eric Foner, *Eric Foner's Report*, COLUM. UNIV. ACADEMIC COMMONS <https://academiccommons.columbia.edu/doi/10.7916/D8XP8MV0> (last visited Feb. 15, 2023) (explaining the history of slavery on Columbia's campus); *Report of Presidential Committee on Harvard & the Legacy of Slavery*, HARV. UNIV. (2022), <https://legacyofslavery.harvard.edu/report>; *Slaveholders: Letters, Sale Receipts, and Related Documents*, RUTGERS UNIV. SCARLET AND BLACK DIGITAL ARCHIVE, <https://scarletandblack.rutgers.edu/archive/collections/show/10> (last visited Aug. 20, 2022) (a collection of

The simulation includes four hypotheticals, broken into roughly equal parts. I spent approximately ten minutes introducing the simulation, then ten minutes closing, which allowed approximately forty minutes for each hypothetical. In those forty minutes I alternated between discussions as a class and discussions in small groups. A fifth simulation serves as a follow-up assessment that students responded to in writing. Goals of this simulation include: (1) providing students with an opportunity for review while giving some consideration to the impact of definitions and status; (2) giving students the opportunity to practice what they might do as attorneys: I expect students to analyze the fact patterns, determine which parts of the readings are relevant, then apply the readings and their pre-existing knowledge to a real-life scenario; and (3) reviewing the concepts with a focus on how public policy and legal standards outside of the UCC can impact the operation of the UCC.

On a tour of Washington and Lee University, as you pass the Colonnade, tour guides will explain that conveyances of persons and property funded the construction of some buildings on campus. While there is a memorial to the enslaved, commissioned at the behest of Dr. Ted Delaney, it is situated in line with the obelisk that marks the grave of their owner, John Jockey Robinson, and Lee Chapel (now University Chapel), where the entire family of Robert E. Lee is interred. Here, tourists leave pennies face down.<sup>107</sup> As the institution attempts to take a more fulsome view of Southern history, it has not let go of Lee and his legacy.<sup>108</sup> These words are spoken casually, typically without further explanation or acknowledgment beyond a memorial in honor of the enslaved persons.<sup>109</sup> If one tours Monticello or the University of Virginia in Charlottesville, or Mount Vernon, enslaved persons and the role their labor and financial

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letters and slave sale receipts that document slaveholding among Rutgers officers and benefactors); KRIS MANJAPRA, *BLACK GHOST OF EMPIRE: THE LONG DEATH OF SLAVERY AND THE FAILURE OF EMANCIPATION* 11-44 (2022) (discussing the role of slavery in the northern economy); JONATHAN DANIEL WELLS, *THE KIDNAPPING CLUB: WALL STREET, SLAVERY, AND RESISTANCE ON THE EVE OF THE CIVIL WAR* 135 (2020).

107. See The Experiment Podcast, *Confronting the Legacy of Robert E. Lee*, THE ATLANTIC (Mar. 4, 2021), <https://www.theatlantic.com/podcasts/archive/2021/03/countering-the-lost-cause-narrative-the-experiment/618196/>. Ty Seidule explains why the pennies are face down: “The first is so that Lincoln’s head won’t be visible to the great Robert E. Lee. And so that Lincoln will have to kiss Traveller’s ass.”

108. W&L has changed its name several times. <https://www.wlu.edu/the-w-l-story/university-history/>. The board voted 22-6 to retain the name on June 4, 2021 <https://www.wlu.edu/the-w-l-story/leadership/board-of-trustees/messages-from-the-board-2/the-future-of-washington-and-lee-university/>.

109. W&L Strategic Plan: <https://www.wlu.edu/the-w-l-story/strategic-plan/#Citizenship>; Commitment to institutional history: <https://www.wlu.edu/the-w-l-story/diversity-equity-and-inclusion/institutional-history/> (mentioning how slavery has been discussed by the institution).

value had in shaping our nation is reduced to a moment in time that belongs squarely in the past.<sup>110</sup> The role of the enslaved persons in the fortunes of so many of our nation's founders and in most institutions is just one illustration of how the slave trade was a driver of the American economy and capitalism.<sup>111</sup>

For this simulation I provided students with copies of an Archival Guide prepared by Dr. Rainville on the enslaved persons left to Washington College, John Robinson's will,<sup>112</sup> Board of Trustee meeting minutes, the university records on the names, ages, and values of the enslaved persons, the ad for their sale, and other materials from the archives.<sup>113</sup> These materials provide a timeline of events and insight into the business decisions that led the university to sell enslaved persons in violation of the Robinson will.

The bequest from Robinson included seventy-four enslaved men, women, and children. In his will, he required that the university keep these people on the Hart's Bottom Plantation, until 1876, fifty years after

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110. See *Slavery at Monticello*, MONTICELLO, <https://www.monticello.org/slavery/?ref=homeblock> (last visited Feb. 15, 2023); *Montpelier Enslaved Community*, MONTPELIER, <https://www.montpelier.org/learn/tag/enslaved-community#:~:text=Enslaved%20Community%20%7C%20Montpelier&text=The%20Madison%20family%20enslaved%20over,needs%20of%20the%20Madison%20family> (last visited Feb. 15, 2023); *Slavery at George Washington's Mount Vernon*, MOUNT VERNON, <https://www.mountvernon.org/george-washington/slavery/slavery-at-mount-vernon/> (last visited Feb. 15, 2023); Patricia Samford, *The Archaeology of African-American Slavery and Material Culture*, 53 WM. & MARY Q. 87 (1996); LUCIA C. STANTON, "THOSE WHO LABOR FOR MY HAPPINESS": SLAVERY AT THOMAS JEFFERSON'S MONTICELLO (2012); James Oliver Horton, *Presenting Slavery: The Perils of Telling America's Racial Story*, 21 PUB. HISTORIAN 19 (1999); Jean B. Lee, *Mount Vernon Plantation: A Model for the Republic*, in SLAVERY AT THE HOME OF GEORGE WASHINGTON 13-55 (Philip J. Schwarz ed., 2001); CLINT SMITH, HOW THE WORD IS PASSED 1-51 (2021) (discussing the experience of the enslaved at Monticello). Although George Washington's slave ownership is known, his active participation in continuing enslavement is often overlooked. The story of Ona Judge provides insight into the rigor with which Washington embraced slavery. See ERICA ARMSTRONG DUNBAR, NEVER CAUGHT: THE WASHINGTONS' RELENTLESS PURSUIT OF THEIR RUNAWAY SLAVE ONA JUDGE (2017); PETER LINDERT & JEFFREY WILLIAMSON, UNEQUAL GAINS: AMERICAN GROWTH AND INEQUALITY SINCE 1700 33-43 (2016) (discussing wealth of southern colonies from rice and tobacco).

111. See sources cited *supra* note 110. See also *More than 1,800 Congressmen Once Enslaved Black People. This Is Who They Were, and How They Shaped the Nation*, WASH. POST (Jan. 10, 2022), <https://www.washingtonpost.com/history/interactive/2022/congress-slaveowners-names-list/>; THE RECORDS OF THE VIRGINIA COMPANY OF LONDON, <https://www.loc.gov/item/06035006/>.

112. See *infra* Part III for Robinson's connection to Washington and Lee.

113. Full archive and index on file with author.



his death.<sup>114</sup> Specifically, Robinson instructed the Trustees to retain “all the negroes I may die possessed together with their increase . . . For the purposes of labour, upon the above Lands [Hart’s Bottom] for the space of fifty years after my decease.” Only after this five decade period had passed would Robinson release the Trustees “from all restraint as to the disposal of the negroes,” enabling them to “sell or retain them as the results of their labour shall be demonstrated to be best.” From 1827 to 1835, Washington College honored Robinson’s request. The Trustees hired out one of the enslaved individuals so they could earn cash from the skilled labor. However, as a college and not a plantation, they did not have enough work on campus for seventy-four individuals.

After obtaining a legal opinion from Chapman Johnson, an attorney in Staunton, Virginia,<sup>115</sup> the Trustees believed they could break some of the requirements of the will.<sup>116</sup> The Trustees voted to contravene one of the will’s integral tenants. They decided to sell fifty-five of the enslaved individuals to an infamous slave trader, Samuel Garland of Lynchburg, Virginia, forty years ahead of the time designated in the Robinson will.<sup>117</sup>

Like many wealthy Virginians, Garland owned land in Mississippi.<sup>118</sup> In 1836, most of the enslaved community of Hart’s Bottom was forced to go to Hinds County, Mississippi, most likely on foot, with Garland, where they were sold to work on cotton plantations and permanently separated from their families.<sup>119</sup> In addition to the enslaved people sold to Garland, the College also sold five other African-Americans to in-

114. John Robinson slave list, Rockbridge County Will Book 6, July 7 & 8, 1826, 404 (on file with author) (listing John Robinson’s desired transfer of his enslaved people after his death).

115. *The Expansion of the Vote: A White Man’s Democracy*, U.S. HISTORY ONLINE TEXT-BOOK, <https://www.ushistory.org/us/23b.asp> (discussing that the White Basis Party was a part of the White men’s campaign, which sought to obtain suffrage for all White men, not just landowners active in the “White Basis Party” that sought to increase the influence of White men in the courts).

116. For further detail on Chapman Johnson’s efforts at the Virginia Constitutional Convention of 1829–30, see *Chapman Johnson (Concluded)*, THE VA. MAG. OF HIST. AND BIOGRAPHY 246–57 (1927).

117. List of slaves for the purchase of Samuel M. Garland, Oct. 27, 1835 (on file with author). Garland was also a lawyer, Clerk of Court for Amherst County, and was elected to the Virginia Secession Convention of 1861. Garland’s wife’s mother was James Madison’s sister. Garland’s son, Samuel Garland, Jr., was a Confederate General during the Civil War, killed in action during the Maryland campaign in 1862.

118. The transition from a tobacco economy to a cotton economy led to a westward migration from Virginia to Mississippi and Louisiana. See Edward Ball, *Retracing Slavery’s Trail of Tears*, SMITHSONIAN MAG (Nov. 2015), <https://www.smithsonianmag.com/history/slavery-trail-of-tears-180956968/>.

119. BECKERT, *supra* note 7; BAPTIST, *supra* note 7, at xv–xxix, 218 (2014) (discussing slavery’s connections to entrepreneurship); SHERMERHORN, *supra* note 7, at 1815–69 (2015); Chase, *supra* note 4, at 14–15.

dividuals in Lexington and Rockbridge County, while retaining six men and one woman. The total of the sale to Garland was \$22,974.91. There was a commission of \$459.50. The net amount received was \$22,515.41.<sup>120</sup> In today's dollars, the sale was worth \$694,553.46.<sup>121</sup>

The Trustees were unable to sell some of the older and/or sick African Americans. In 1849 three of these individuals died while still enslaved by Washington College. In this same year, Washington College hired at least two (younger) Black men to work at the institution. In 1857, three elderly enslaved individuals from the Robinson Estate were still alive, costing the Trustees \$130 a year to maintain them.<sup>122</sup>

The facts surrounding the sale of enslaved persons at Washington and Lee fit sale of goods, leases, trusts and estates, contracts, non-profits, property, and numerous other subjects, but they do not provide the factual scenarios required for a full review of UCC Articles 3, 4, and 9. With some minor expansions and alterations, I was able to craft fact patterns that reviewed the entire course. The direct connection to slavery is information that students at Washington and Lee and the University of Virginia should be aware of, but slavery's omnipresence and impact on the entire United States economy makes it a necessary subject matter for all institutions. Notably, on Washington and Lee's campus, students have welcomed these insights.<sup>123</sup>

It is important in all classrooms to ensure that discussions are based on the law and facts, not outside bias or personal feelings.<sup>124</sup> This is especially important when discussing a topic like slavery, which is laden with many preconceived notions and can be triggering for some students. Whenever I discuss slavery in class, I open with a reminder that I intend the classroom to be a safe space for dialogue for all, and this is particularly important when the material asks us to explore difficult subject matter. I also remind students that this simulation reviews the entire course, so the focus should be on the commercial law aspects not the social or policy implications. This simulation merely skims the surface of the role of the slave trade on the development of commercial law and gives a bird's eye view of everything covered in a UCC survey course. The exercise shows

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120. *Statement of Sale of Washington College Slaves 1836*, WASH. & LEE, <https://my.wlu.edu/working-group-on-african-american-history/timeline-of-african-americans-at-wandl/account-of-sale/statement-of-sale-1836> (listing the account of sale).

121. *The CPI Inflation Calculator*, OFFICIAL DATA, <https://www.officialdata.org/us/inflation/1836?amount=22974.9> (last visited Feb. 16, 2023). See also *supra* notes 109-11 (discussing the ownership of slaves by prominent historical government officials).

122. *Supra* note 119.

123. Peter Jetton, *Slavery and Commerce*, COLUMNS (Mar. 29, 2021), <https://columns.wlu.edu/slavery-and-commerce/>.

124. See *supra* notes 16-18, 22, 27.

the type of analysis needed to answer exam questions and what questions one should ask when confronted with a UCC fact pattern.

Before getting into the hypotheticals, I explain to students that these state classifications matter because how one is classified determines not only one's freedom, but their relationship to commerce.<sup>125</sup> Whether a person has the freedom of contract, to own property, or whether they are an object of contract and commerce is defined by state law. The ability to establish a person's race as Negro or Black in most states meant that those in power could determine whether someone went to trial and paid a fine or were imprisoned, or whether any legal encounter would result in their enslavement.

During the introduction to the simulation, I take time to explain the purpose of the readings and the simulation, and I provide more information for context. I explain that like the current UCC and other model codes before the Civil War, many legal statuses were defined by the laws of individual states.<sup>126</sup> The personhood status of African-Americans, be it free, enslaved, negro, mulatto, and other terms indicative of race and status, were defined by codes without the uniform legal standards we have today.<sup>127</sup> Post-Civil War, federal law defines the rights and the status of human beings, but state law continues to define business and commercial law—although statutes like the UCC and Model Business Corporations Act (MBCA) provide more consistency.<sup>128</sup> Although

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125. See Patricia Williams, *supra* note 4; ALEJANDRO DE LA FUENTE & ARIELLA J. GROSS, BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA, 14-18 (2020); Ariella J. Gross, *Beyond Black and White: Cultural Legal Histories of Race and Slavery*, 101 COLUM. L. REV. 640, 659-60 (2001); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 89-107 (Cambridge Univ. Press, 2018); Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 640 (2012); MANJAPRA, *supra* note 106, at 11.

126. See sources cited *supra* note 125.

127. *Id.*

128. One of the major rights ancillary to personhood is the constitutional guarantee of equal protection. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”). See also Robinson, *supra* note 17, at 611-13 (constitutional personhood refers to a specific form of legal personhood that denotes a legal status as a constitutional rights holder, entitled to the protection under the U.S. constitution. The constitution extends protections to a variety of groups of classification including both “persons” and “citizens.” The legal distinction between these two groups lies in what types of rights they may vindicate). Although all persons are guaranteed equal protection under the law, there are some rights that flow from citizenship. The Fourteenth Amendment asserts the principle of birthright citizenship. For the Framers, citizenship was a matter of race, not birth, and legal personhood was a matter of race, birth, and gender. For historical and contemporary definitions of citizenship see e.g., John Feere, *Birthright Citizenship in the United States: A Global Comparison*, CENTER FOR IMMIGRATION STUDIES (Aug. 31, 2010), <https://cis.org/sites/cis.org/files/birthright->

the entire nation endorsed the treatment of the enslaved, the laws governing their status were a matter of individual state law.<sup>129</sup>

The State of Virginia and Washington and Lee provide a special perspective. Between 1687 and 1865, Virginia enacted more than 130 statutes on slavery, including seven major slave codes with over fifty provisions.<sup>130</sup> I provide students with excerpts of the 1860 version of the slave codes, which shows the legislature's primary concerns were inheritance and racial mixing. The earliest codes in all states take care to ensure that race is determined by the mother—the child of an enslaved mother is enslaved, regardless of the identity of the father.<sup>131</sup>

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final.pdf; 8 U.S.C. § 1101(a)(3) (the term “alien” means any person not a citizen or national of the United States); Naturalization, 8 U.S.C. § 1101(a)(23) (the term “naturalization” means the conferring of nationality of a state upon a person after birth, by any means whatsoever); *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898); The Naturalization Act of 1790, 1 STAT. 103 (1790) (restricting immigration to free white persons and limiting citizenship to white men); The Act of July 14 1870, 16 STAT. 254 (1870) (amending the Naturalization Act to include African Americans after the Civil War, but excluding non-White immigrants); *Dred Scott v. Sanford*, 60 U.S. 393, 407, 427 (1857) (holding that people of African descent were not American citizens—and never could become citizens, even through an act of Congress. Chief Justice Roger B. Taney wrote “[Black people were] regarded [by Whites] as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”); Chinese Exclusion Act of May 6, 1882, ch. 126, 22 STAT. 58 (1882) (prohibited Chinese workers from becoming citizens); *Hudgins v Wright*, 11 Va. 134, 137 (1806); *Guyer v. Smith*, 22 Md. 239 (1864) (denying citizenship to the foreign-born children of a Black father and white mother because foreign-born illegitimate children cannot be citizens); *Daniel v. Guy*, 19 Ark. 121, 131-32 (1857) (noting the application of the one drop rule follows the maternal line, therefore to be free one must be born of a free woman); Act of Feb. 10, 1855, ch. 71 § 2, 10 STAT. 604 (a woman's legal existence is suspended during marriage, such that a foreign woman who is eligible for citizenship—i.e. a white woman—who marries an American man is an American).

129. See, e.g., JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOS IN THE UNITED STATES* (1995) (exploring the miscegenation of whites and Blacks in the United States from the colonial period to the present); D. Wendy Greene, *All in the Family: Interracial Intimacy, Racial Fictions, and the Law*, 4 CALIF. L. REV. 179, 182 (2013) (discussing the history of racial classifications, and how a study of the legal history of interracial marriage in America, like that done by Professor Onwuachi-Willig in her book *According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family*, is both relevant and essential for understanding fundamental rights jurisprudence).

130. For a discussion of the differences between British colonial slave codes and Spanish codes, and the evolution of British law see MANJAPRA, *supra* note 106, at 18-20. Manjapra notes that in British colonies, including the future United States, a large free population would disrupt the social order. See also ELSA GOVELA, *THE WEST INDIAN SLAVE LAWS OF THE 18TH CENTURY* 9 (1970). JARED ROSS HARDESTY, *BLACK LIVES, NATIVE LANDS, WHITE LORDS: A HISTORY OF SLAVERY IN NEW ENGLAND* 143-54 (2019).

131. See *supra* note 129.

Without national banks or currency, enslaved persons represented wealth.<sup>132</sup> In most states, enslaved persons were more valuable than the property they worked.<sup>133</sup> For collateral purposes, the value of an enslaved person was more certain than real property, particularly in territories where the ownership of real property was speculative due to battles with Native Americans.<sup>134</sup> The enslaved were used for inheritance and collateral for loans: they were repossessed by banks and resold to cover debts, and states had strict rules for freedom.<sup>135</sup> For example, under the Virginia Code of 1860, a free Black person did not go to prison if they committed a crime; instead, they were sold.<sup>136</sup> In addition, a slaveowner could not free an enslaved person without paying all debts first.<sup>137</sup>

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132. See BAPTIST, *supra* note 7, at 1-37 (discussing the difficulty in expansion following the Revolutionary War); see also Finkelman, *supra* note 1, at 265 (discussing the history of banking as it relates to the concerns over the growth of federal power by southerners); RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH 1820-1860* (Oxford Univ. Press, 1941); BERRY, *supra* note 13 (discussing the value of enslaved persons from conception until and after death); BONNIE MARTIN, *NEIGHBOR-TO-NEIGHBOR CAPITALISM: LOCAL CREDIT NETWORKS AND THE MORTGAGING OF SLAVES IN SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN DEVELOPMENT* (Univ. of Pa. Press, 2016); Edward E. Baptist, *Toxic Debt, Liar Loans, Collateralized and Securitized Human Beings, and the Panic of 1837*, COMMONPLACE: THE JOURNAL OF EARLY AMERICAN LIFE (Apr. 2010), <http://commonplace.online/article/toxic-debt-liar-loans/>; MICHAEL ZAKIM & GARY J. KORNBLITH, *CAPITALISM TAKES COMMAND: THE SOCIAL TRANSFORMATION OF NINETEENTH-CENTURY AMERICA*, 72, 78-79, 90-91 (2010); Bonnie Martin, *Slavery's Invisible Engine: Mortgaging Human Property*, 76 J. S. HIST. 817 (2010).

133. See *supra* note 131.

134. *Id.* Many scholars have attempted to estimate the total value of enslaved labor, with many estimates placing it at over \$10 trillion dollars in today's dollars. See Tala Hadavi, *Support for a Program to Pay Reparations to Descendants of Slaves is Gaining Momentum, But Could Come with a \$12 Trillion Price Tag*, CNBC (Aug. 12, 2020), <https://www.cnbc.com/2020/08/12/slavery-reparations-cost-us-government-10-to-12-trillion.html>. For methods on valuation see RONALD P. SALZBERGER & MARY TURCK, *REPARATIONS FOR SLAVERY: A READER* (2004); WILLIAM A. DARITY AND KRISTIN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* (2nd. ed. 2022); BAPTIST, *supra* note 7, at 254-55.

135. See, e.g., STEPHANIE JONES-ROGERS, *THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH* (2019); John C. Williams, *Slave Contracts and the Thirteenth Amendment*, 39 SEATTLE U. L. REV. 1009 (2016); GRABER, *supra* note 12, at 18-20.

136. VA. CODE 1860. See also DE LA FUENTE & GROSS, *supra* note 125, at 14-18 (recounting the story of John Casor, an indentured servant of Anthony Johnson, who sued for his freedom after 7 years of service in 1653, yet was returned to bondage even with testimony from neighbors certifying his service and status. Upon his death in 1670, his property was escheated to the Crown because "he was a Negroe and by consequence an alien." Virginia first passed codes declaring Blackness to be an inferior condition in 1600s. Virginia created race through law).

137. Amanda Kleintop, *The Balance of Freedom: Abolishing Property Rights in Slaves after Emancipation*, YALE MACMILLAN CENTER (Apr. 13, 2020), <https://macmillan.yale.edu>

I then highlight for students the various definitions of Negro or Black that existed throughout the country during the antebellum period. Virginia had a “one black grandparent rule,” where a person with only one quarter of African ancestry was classified as Negro.<sup>138</sup> Virginia defined Mulatto while making clear that it was a status equal to Negro, which subjected someone to enslavement if they were free and then committed a crime.<sup>139</sup> Virginia case law articulated a standard for Negro that included anyone with “ascertainable any Negro blood” with not more than one-sixteenth Native American ancestry.<sup>140</sup> I compare Virginia to Louisiana, with its origins in French slavery and slightly less emphasis on strict definitions of whiteness, and Texas, which had a “one drop” rule.<sup>141</sup>

The first hypothetical asked students to consider how the current definitions of goods and the current classifications of collateral were impacted by the definitions found in the Constitution and in the Virginia Code. I then asked them to consider how these definitions impacted how African-Americans were classified in the 1830s. A portion of the 1830 Code of Virginia states:

1. None shall be slaves in this state except those who are so when this chapter takes effect, such free negroes as may be sold as slaves pursuant . . . .
9. Every person who has one-fourth part or more of negro blood shall be deemed a mulatto, and the word “negro” in any other section of this or in any future statute, shall be construed to mean mulatto as well as negro.
10. No free negro shall be capable of acquiring (except by descent) any slave.
11. Slaves shall be deemed personal estate.<sup>142</sup>

With this statute in mind, I asked students how they would define and classify the African-Americans owned by Washington and Lee under

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/news/balance-freedom-abolishing-property-rights-slaves-after-emancipation (discussing how debt was managed amongst slaveowners).

138. VA. CODE 1860.

139. *Id.*

140. J. Douglas Smith, *The Campaign for Racial Purity and the Erosion of Paternalism in Virginia, 1922-1930: “Nominally White, Biologically Mixed, and Legally Negro”*, 68 J. S. HIST. 65, 100 (2002) (citing Virginia law regarding racial classifications).

141. Kenneth A. Davis, *Racial Designation in Louisiana: One Drop of Black Blood Makes a Negro*, 3 HASTINGS CONST. L. Q. 199 (1976) (discussing the one-drop rule in Louisiana, which determined racial identity according to the law).

142. VA. CODE 1830.

Articles 1, 2, and 9 of the UCC, considering the definition of “goods” and the classifications of collateral.<sup>143</sup>

An exploration of how the enslaved persons would be classified forces students to consider which definitions and concepts they need. It also forces them to struggle with the mental gymnastics required to declare human beings legal personal property. When applying 1860 definitions to modern UCC Article 2, which governs the sale of goods, students must consider what counts as a sale and whether the African-Americans would be goods.<sup>144</sup> The 1860 statute defined African-Americans as non-persons; therefore, students must learn how goods is defined. Article 9 applies to personal property, not real property, so students must decide how the persons would be classified.<sup>145</sup> If the enslaved are not persons, and they are not real property, such that they are chattel that would be classified as farm products or inventory under modern Article 9. To guide them further, I specifically ask how Articles 1 and 2 define goods, and what kind of property Article 9 covers.<sup>146</sup>

Students struggled with the idea that persons were chattel, so it is important to anchor them with the definitions in the Virginia statutes. They tend to discuss the morality of the statutes or the circumstances surrounding the sale of the enslaved persons. Many students attempt to rely on the UCC definition of “person” found in Article 1.<sup>147</sup> I also show the students the advertisement used by the University to promote the sale. It states:

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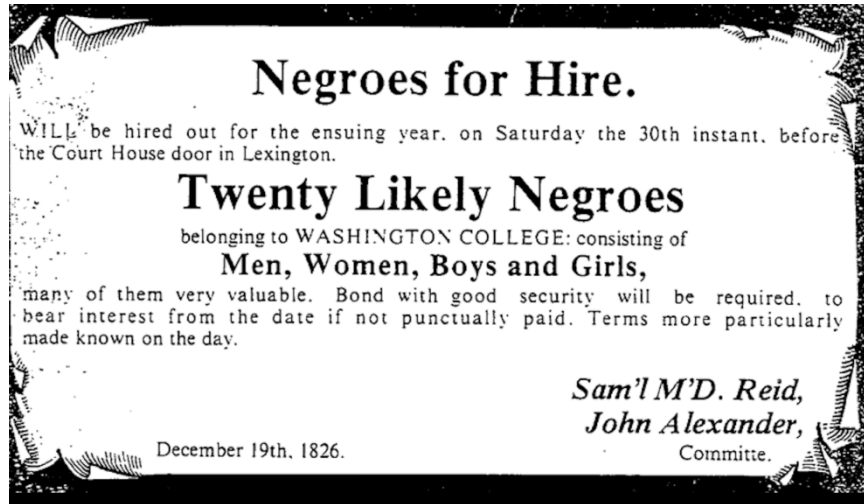
143. U.C.C. § 2-105 (1) (“Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107)); U.C.C. § 9-102 (listing definitions of types of collateral).

144. U.C.C. § 2-102 (“[T]his article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.”).

145. U.C.C. § 9-109 (“[T]his article applies to: (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract; (2) an agricultural lien; (3) a sale of accounts, chattel paper, payment intangibles, or promissory notes; (4) a consignment; (5) a security interest arising under Section 2-401, 2-505, 2-711(3), or 2A-508(5), as provided in Section 9-110; and (6) a security interest arising under Section 4-210 or 5-118.”).

146. U.C.C. § 1-201(b)(27) (“Person means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.”).

147. See *supra* notes 144–46.



Negroes for Hire. Will be hired out for the ensuing year, on Saturday the 30<sup>th</sup> instant, before the Court House door in Lexington. Twenty Likely Negroes belonging to WASHINGTON COLLEGE consisting of Men, Women, Boys and Girls, many of them very valuable. Bond with good security will be required, to bear interest from the date if not punctually paid. Terms more particularly made known on the day.

It is dated December 19, 1826, and signed Samuel M.D. Reid and John Alexander.

In addition to the statutes and supplemental materials, I reminded students that if there is not a definition in Articles 2 or 9 specific to the Article, then the general definitions in Article 1 apply.

The objective of the second hypothetical is to review first year Contracts in addition to UCC Article 2. Although I and their Contracts professors taught them otherwise, students will skip the steps of determining whether something is a contract and apply contract principles to a real property, family law, or trusts and estates transaction.

Students operate with the same facts regarding the gift of the enslaved persons in the Robinson Will. I added an additional fact during this hypothetical: Washington College (now known as Washington and Lee)<sup>148</sup> hired out several of the enslaved persons for one-year periods. This advertisement highlights the details of those arrangements.

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148. The name was changed to include Robert E. Lee following his death in 1870 to recognize “[H]is transformative presidency of Washington College from 1865 to 1870.” *University History*, WASH. & LEE, <https://www.wlu.edu/the-w-l-story/university-history/>.



To incorporate commercial paper, I tweak the facts slightly to include promissory notes. In the third hypothetical, the notes are transferred, which facilitates a discussion of indorsements, warranties, holder in due course status, and remedies.<sup>149</sup> I provide students with some images of notes and drafts from the 1800s located in the Library of Congress to demonstrate that the magical words and other elements of a negotiable instrument have not changed. One may search the Library of Congress, state archives, and even one's own university archives to find historical documents that are the same or very similar to instruments used today. Many documents related to the presence of enslaved persons in commerce are avoidable. I have found students to be moved by these simulations, the casual mention of enslaved persons in the materials, and the fact that instruments for historical figures, including the country's founders, contain reference to slavery.<sup>150</sup>

The final hypothetical involves a completely fictitious scenario that asks students to assume that instead of selling the enslaved persons, in 1836 Washington College took out a loan for the construction of Robinson Hall and for the purchase of additional land in the amount of \$22,500. Here, case law is introduced to demonstrate how classifications of collateral and prioritization of lenders pre-dates the development of model codes like the UCC.<sup>151</sup>

Following this part, I take some time to debrief and decompress with the students and introduce an additional out of class assessment. I find students to be more invested in this exercise than in a typical review problem. I believe it is because we discuss places they see every day in Lexington, Virginia and on Washington & Lee's campus. I encourage students who want to explore the subject matter further to visit our University Archives.

Many business and commercial courses have no discussion of race or class.<sup>152</sup> Yet the vestiges of the framework covered in my slavery and commercial law simulation persist today, including in Lexington and Rockbridge County, Virginia where Washington College, now known as Washington and Lee, is located, and the Hart's Bottom Plantation in Buena Vista, where many of the enslaved persons owned by the Univer-

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149. U.C.C. § 3-302.

150. See e.g., Promissory Note from Andrew Jackson to John C. Hicks (July 6, 1816), <https://www.loc.gov/item/maj006497/>; George Washington Papers, Series 4, General Correspondence: Thomas Freeman, October 5, 1786, Bill of Sale of Slaves, <https://www.loc.gov/item/mgw435695/>.

151. This simulation has students read *Bank of Ky. v. Vance's Adm'r*, 4 Litt. 168 (1823). See also *supra* notes 26-27 and 29.

152. See *supra* notes 8, 10, 14 (discussing the education of enslavement in the legal classroom).

sity resided.<sup>153</sup> Counties with large slave populations in 1790 have the largest Black populations today, such that neighboring Amherst County continues to have more African-Americans than Rockbridge County.<sup>154</sup> At its peak, Virginia had a population that was 42% Black and primarily enslaved persons.<sup>155</sup> The population of Black people declined first after the first great migration westward to plantations in Mississippi and beyond, as cotton became the premier cash crop and later, after the end of slavery.<sup>156</sup> In most areas, it has not recovered. In some areas, policies enacted as an affront to first Reconstruction and later the civil rights movement helped to grow the geographic divide. The erasure of African-Americans both physically and from the history of Virginia and Lexington did not occur at the hands of government actors alone.<sup>157</sup> Private businesses have also played a role in the decline of African-Americans and their exclusion, including institutions of higher education.<sup>158</sup>

### III. RESOURCES AND THE RESEARCH

Slavery was a pervasive force in the entire American economy for generations.<sup>159</sup> Most long-standing institutions in this country, including

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153. See William Cohen, *Thomas Jefferson and the Problem of Slavery*, 56 J. AM. HIST. 503 (1969) (discussing the population of enslaved persons between 1774 and 1778, noting one in three Southerners was an enslaved person); GREGG D. KIMBALL, *AMERICAN CITY, SOUTHERN PLACE: A CULTURAL HISTORY OF ANTEBELLUM RICHMOND* 254 (2000); PETER J. RACHLEFF, *BLACK LABOR IN RICHMOND, 1865-1890* 5-6 (1984); ELSA BARKLEY BROWN, *UNCLE NED'S CHILDREN: NEGOTIATING COMMUNITY AND FREEDOM IN POSTEMANCIPATION RICHMOND, VIRGINIA* (1994).

154. *Amherst County*, U.S. CENSUS, <https://www.census.gov/quickfacts/amherstcountyvirginia>.

155. *Affidavit, 1693*, VIRGINIA MUSEUM OF HISTORY & CULTURE, <https://virginiahistory.org/learn/affidavit-1693> (“By the eve of the American Revolution, Black people comprised about 42 percent of the colony’s population.”).

156. The migration from Virginia and other eastern states to Mississippi and Louisiana is often referred to as a great migration or slavery’s trail of tears. See BAPTIST, *supra* note 7.

157. Audrey Horning, *Reflections on Research: Race and the Virginia Blue Ridge*, 56 HIST. ARCHAEOLOGY 32, 33 (2022).

158. Many universities with a connection to the slave trade have formed commissions to study slavery through the Universities Studying Slavery (USS) – USS Consortium. *President’s Commission on Slavery and the University*, UNIVERSITY OF VIRGINIA, <https://slavery.virginia.edu/>; *Universities Studying Slavery*, FRANCIS MARION UNIVERSITY, <https://www.fmarion.edu/education/uss/>; *Brown & Slavery & Justice*, BROWN UNIVERSITY, <https://slaveryandjustice.brown.edu/>.

159. See Stanley L. Engerman et al., *Slavery for Historical Statistics of the United States Millennium Edition*, University of California Project on the Historical Statistics of the United States Center for Social and Economic Policy, March 2003 at 8 (exploring the profitability of slavery through American history).

institutions of higher education, have some connection to slavery.<sup>160</sup> If the institution itself did not trade in enslaved persons, major donors and even the financial institutions providing funding had a connection to slavery.<sup>161</sup> For this reason, it is useful to explore an institution's own history through this simulation. The primary goal of the simulation is for students to review what they have learned throughout the course while providing a fact-based hypothetical situation to work through applying the materials.

Lexington, Virginia, Washington & Lee, and Virginia generally have some elements unique to their history and geography, but many of the phenomena have occurred throughout the country. There is value in engaging with issues of equity and in particular slavery at all institutions, not just those in the south or those founded pre-Civil War.<sup>162</sup> If your institution does not have a direct connection to slavery, looking at legal relations with other marginalized groups can serve the same purpose. For example, the University of Michigan owns land in northern Michigan that it acquired after the original Native inhabitants were violently evicted from it in the early 20th century.<sup>163</sup>

I relied heavily on Washington and Lee's Archives, the research support of Dr. Lynn Rainville, our Director of Institutional History, and the work of Professor Ted Delaney, a historian focused on the south. To provide students with primary and secondary sources about the persons enslaved on our campus.<sup>164</sup> I combined these materials with documents from the Library of Congress and the Virginia Foundation for the Humanities to provide a historical perspective on concepts incorporated into the UCC.<sup>165</sup> In addition, students read excerpts from *The 1619 Project*, articles from scholars in law and the humanities, and other materials from general audience resources that provided them with an understanding of slavery's im-

160. See *supra* note 158 (establishing that many universities have connections to the slave trade).

161. *Id.* (highlighting various institutions' connections to slavery).

162. Code Switch, *How Slavery Shaped America's Oldest and Most Elite Colleges*, NPR (Sept. 17, 2013), <https://www.npr.org/sections/codeswitch/2013/09/17/223420533/how-slavery-shaped-americas-oldest-and-most-elite-colleges>.

163. See Letter from Mark S. Schlissel, President, Univ. of Mich., to Joseph P. Gone, Ph.D., Director, Native Am. Stud., Univ. of Mich. & John M. Petoskey (May 7, 2018), <https://lsa.umich.edu/content/dam/umbs-assets/umbs-docs/Burt%20Lake%20Burnout%20Report%20and%20Letter%2020180507.pdf>.

164. See *Conversations with Theodore C. ("Ted") DeLaney, Jr.: Compiled Transcripts with an Introduction and Index*, WASH. & LEE LIBR., <https://dspace.wlu.edu/handle/11021/35022>. Part 7 relates to Washington and Lee's history.

165. Virginia Humanities has scanned historical statutes, and the Library of Congress has personal financial documents of many historical figures. You can search for commercial papers signed by historical figures by searching their names or by form of commercial paper (e.g., note, check, draft). Most content is digitized and easily accessible.

pact on modern commerce.<sup>166</sup> In this Part of this Essay, I explain how I combined these institutional history resources with legal and historical readings to provide students with a framework for the simulation. I also explain my approach to coverage of these materials in the classroom.

Washington and Lee's story is unique in that it includes facts related to testamentary gifts and restrictions, the use of the enslaved labor on campus, and the lease and sale of enslaved persons. In 1825, John Robinson, a prominent businessman in Rockbridge County, Virginia, authored a will that left his entire estate to Washington College.<sup>167</sup> Robinson was an Irish immigrant who became wealthy after training and selling horses, making whisky, and purchasing and running a 100-acre plantation known as Hart's Bottom, which eventually became the site of Buena Vista, Virginia. John Robinson was a benefactor of Washington College before his death, donating both land and money to the university. He provided land in 1800 so that Washington College<sup>168</sup> could rebuild after a fire at Liberty Hall, and he funded the construction of the "Centre Building," now Washington Hall. When John Robinson died in 1826, his will (the "Robinson Will") was entered into the Rockbridge County Deed book, and the assets were transferred to Washington College.

The University Archives at Washington and Lee include the original documents detailing the sale and lease of African-Americans at Washington College. Most of the materials are indexed and digitized. The Archives include Board of Trustees minutes, accounting logs, the Robinson Will, and images of advertisements. Many of the materials are handwritten and have been transcribed for ease of review. Many institutions, especially those throughout the south, have archival resources as extensive as Washington and Lee's with materials on slavery. While researching this project, I spoke with archivists at the University of North Carolina, the University of Virginia, and Tulane University. Many universities also host websites chronicling their connection to the slave trade.<sup>169</sup>

The resources used for this simulation are not limited to institutional history. The additional assigned outside of the facts of the simulation provide perspective on the role of the slave trade on business and commercial law. The additional materials provide some historical context on

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166. Desmond, *supra* note 7; Mehersa Baradaran, *Mortgaging the Future in The 1619 Project*, N.Y. TIMES MAG. 4, 32 (Aug. 2019); Tiya Miles, *Good as Gold, in The 1619 Project*, N.Y. TIMES MAG. 4, 35 (Aug. 2019); Tiya Miles, *Fabric of Modernity, in The 1619 Project*, N.Y. TIMES MAG. 4, 36 (Aug. 2019); Tiya Miles, *How Slavery Made Wall Street in The 1619 Project*, N.Y. TIMES MAG. 4, 40 (Aug. 2019).

167. The Robinson Will. *Excerpt from "Jockey John" Robinson's Will*, WASH. & LEE, <https://my.wlu.edu/working-group-on-african-american-history/timeline-of-african-americans-at-wandl/robinson-will-image/robinson-will> (last visited Feb. 16, 2023).

168. *See supra* note 148 (discussing institutional history and name).

169. *See supra* note 158.

the impact the slave trade has had on modern American business norms. Most of the additional readings are not traditional legal scholarship; instead, they are historical, sociology, and economics readings, as well as materials found in non-academic literature. I assumed that these concepts would be new to students, even law students who have majored in those areas. The contextual readings provide a necessary historical foundation.

From *The 1619 Project* I assigned materials by Matthew Desmond, Mehersa Baradaran, and Tiya Miles. The readings include the essays: “American Capitalism is Brutal. You Can Trace That to the Plantation,” “Mortgaging the Future,” “Good as Gold,” “Fabric of Modernity,” and “How Slavery Made Wall Street.”<sup>170</sup> These essays explain the role that slavery, the plantation economy, and cotton economy played in the development of modern business norms.

In addition to *The 1619 Project*, I provide students with additional materials that will help to contextualize the simulation. Students read *Bank of Kentucky v. Vance’s Administrators*.<sup>171</sup> In the case, business partners A. Morehead and Robert Latham pledged twenty enslaved persons and several tracts of land as collateral for loans from the Bank of Kentucky. Morehead and Latham pledged nineteen of the twenty enslaved persons again as collateral for a second loan from Vance. Both Vance and the Bank of Kentucky had the right to sell the enslaved persons in the event of default. While analyzing the persons as property, the court explained priority of lenders and the rights of those who receive a pledge of collateral, and it provided a general overview of many of the commercial law norms studied in a class covering Article 9 of the UCC.<sup>172</sup> The remaining readings, some required and some optional, provide historical and economic context.<sup>173</sup> Because much of this material is absent from the law

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170. Desmond, *supra* note 7, at 32, 35–36, 40.

171. *Bank of Ky. v. Vance’s Adm’r*, 4 Litt. 168 (1823).

172. *See supra* note 29.

173. Kelley Deetz and Alfred L. Brophy, *Slavery on Campus—Recovering the History of Washington College’s discarded slaves*, THE CONVERSATION (Aug. 21, 2016), <https://theconversation.com/slavery-on-campus-recovering-the-history-of-washington-colleges-discarded-slaves-63491>; *1619 Project Podcast 2: The Economy that Slavery Built*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/30/podcasts/1619-slavery-cotton-capitalism.html>; Stephanie Smith and Kate Ellis, *Shackled Legacy: Universities and the Slave Trade*, APM REPORTS (Sept. 4, 2017), <https://www.apmreports.org/episode/2017/09/04/shackled-legacy>; Greg Timmons, *How Slavery Became the Economic Engine of the South*, HIS. (Sept. 2, 2020), <https://www.history.com/news/slavery-profitable-southern-economy>; Mehersa Baradaran, *Jim Crow Credit*, 9 U.C. IRVINE L. REV. 887 (2019); Robert L. Reece, *Whitewashing Slavery: Legacy of Slavery and White Social Outcomes*, 67 SOC. PROBS. 1 (2019); Joe Mulhern, *Human Collateral: British Banking’s Long-Neglected Connection with Slavery in Brazil*, THE LONDON SCH. OF ECON. (July 1, 2020), <https://blogs.lse.ac.uk/latamcaribbean/2020/07/01/human-collateral-british-bankings-long-neglected-connection-with-slavery-in-brazil/>; Elizabeth Caldwell, *The Financial Frontier:*

school curriculum, these materials give students who desired it historical context for the simulation. To date, there is no casebook or other source that consolidates this material in relation to business and commercial law.

Given Washington and Lee's unique positioning, and the comprehensiveness of the archives and the facts, it could benefit students from other institutions to study Washington and Lee's history. Students will have an opportunity to review the UCC with a focus on how public policy and legal standards outside of the UCC can impact the operation of commercial laws. Students also consider the impact of definitions and status, and of the legacy of the slave trade, by studying the history of another campus.

### CONCLUSION

Today the equality gap, particularly when placed in a global context, has reached unprecedented levels.<sup>174</sup> Capitalism allows the wealthiest of us to self-fund expeditions into space, while the poorest go without necessities like access to clean water and housing. In law schools, we train the lawyers of the future to only learn the law, rather than consider the law's role in creating and promoting systemic inequality.<sup>175</sup> As a result, these issues of race and inequality are examined primarily in public law courses. The typical contracts or corporate law course teaches the elements and the legal theories without questioning the reasoning behind the standards or the context in which the standards were developed. Many believe that our casebooks, already bloated with the cases that must be taught and the concepts that cannot be skipped, have no room for an examination of modern and historical inequalities. As a result, these matters are left to constitutional law, property law, and criminal law, if they are taught in law school at all. Many students graduate without the perspective that comes from examining the history and legal origins, particularly when that history requires confrontation of the ways the law helped to perpetrate mass atrocities.

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Slave Mortgaging and the Creation of the Deep South (Apr. 6, 2012) (B.A. thesis, Brown University) (on file with the Department of History, Brown University) (although this is a senior thesis, it includes a thorough historical analysis, including from a feminist theory perspective).

174. See Erika George, *Racism as a Human Rights Risk: Reconsidering the Corporate 'Responsibility to Respect' Rights*, 6 BUS. & HUM. RTS. J., 576, 581 (2021); Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1 (2019); Paolo Buonanno & Juan F. Vargas, *Inequality, Crime, and the Long Run Legacy of Slavery*, 159 J. ECON. BEHAVIOR & ORG., 539 (2019); Rodrigo R. Soares, Juliano J. Assunção & Tomás F. Goulart, *A Note on Slavery and the Roots of Inequality*, 40 J. COMP. ECON. 565 (2012); Ramirez, Wade & Cummings, *supra* note 4, at 397-99.

175. *Supra* notes 5, 8, 14, 16.

As professors we owe it to our students to provide them with a more fulsome presentation of the law. Incorporating slavery into commercial law courses helps students gain some perspective on the reasoning behind customs while also providing an opportunity to confront issues of inequality. The focus on their own universities, or even on historical incidents in the area related to the slave trade, can also provide students with an understanding of how the production of cotton and the trade of persons of African descent touched every aspect of the American economy. The goal is to give students a much-needed perspective. Having perspective means that the next generation of law students, legal scholars, and attorneys may not act to perpetuate systems of inequality that slavery originated.

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