

August 23, 2023

Dear Colloquium Participants,

Thank you so much for taking the time to read and engage with my writing. Enclosed you will find a very early-stage draft of a new piece that I have tentatively titled “The Other *Walker-Thomas*.” In it, I examine *Williams*’ role as “the” race case in first year contracts courses. My broader aim with the piece is to tee up a different kind of conversation about the multiple roles that race plays in contract doctrine, scholarship, and pedagogy than ones we (in the legal academy) have had to date.

As you will see, there are still sections that need to be written as well as some segments that are very much under construction. I’d be happy to talk through what my plans are for those yet-to-be written segments when we meet. I would also welcome a discussion about the writing process itself, as I think there is a close connection between the style and substance of writing.

Thank you again in advance for your time and engagement. I’m very much looking forward to our conversation.

Sincerely,

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THE OTHER *WALKER-THOMAS*: READING RACE IN CONTRACTS

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When Ora Lee Williams walked into the Walker-Thomas Furniture store in 1957 to purchase a pair of drapes, she could never have guessed how public her purchasing decisions would ultimately become. In a matter of decades, thousands of soon-to-be lawyers would be reading about and debating the nature of the fourteen Walker-Thomas contracts that she would eventually sign. Entered into between 1957 and 1962, these fourteen contracts enabled Ora Lee Williams to lease—with the intent to purchase—a range of furniture, appliances, and household goods, as well as toys for her children.¹

Unfortunately, these contracts also authorized the furniture store to reclaim any items with an unpaid balance if Williams defaulted. After nearly five years of timely payments this is precisely what happened. Williams fell behind on her payments, and a US marshal seized everything she had purchased from the store. Williams would go on to challenge this seizure in court, becoming the defendant in one of the most well-known US contracts cases to date.

Ora Lee Williams is, of course, the defendant in the canonical case *Williams v. Walker-Thomas Furniture, Co.*² The case has been a part of American contracts casebooks since it was decided in 1965, by Judge Skelly Wright of the D.C. Circuit. By 1976, every major contracts casebook included Judge Wright’s D.C. Circuit Court opinion, as well as Judge Daneher’s dissent.³ And by 1989—just under twenty-five years after being decided—*Williams v. Walker-Thomas* was being described in legal scholarship as canonical.⁴

Given its near-ubiquitous presence in casebooks, and scholars’ recognition of its place in the canon, it is likely that hundreds of thousands of American lawyers have read and discussed *Williams v. Walker-Thomas* in the past fifty-eight years.⁵ To be sure, *Williams* is not the only contracts case for which this might be true. *Hawkins v. McGee* (otherwise known as the “hairy

¹ The leased items included: a wallet, drapes, an apron set, a pot holder, rugs, beds, mattresses, chairs, a bath mat, shower curtains, sheets, a portable fan, a portable typewriter, a washing machine, a stereo, and toy guns and holsters. Pierre E. Dostert, *Appellate Restatement of Unconscionability: Civil Legal Aid at Work* 54 ABA J. 1183, 1183 (1968).

² 350 F.2d 445 (1965).

³ Seven general introduction contracts casebooks were published between 1965 and 1980, beginning with Dawson and Burdett’s casebook in 1969. (Casebook string cite: Dawson; Murphy; Mueller; Fuller; Jackson; Knapp; Major) This number does not include revised editions of any of those seven casebooks, or more specialized titles, such as Paul Dauer’s *A Deskbook of Public Contract Law*. The revised editions that were published during this period—Murphy, Mueller, and Jackson—continued to include *Walker-Thomas*.

One of these seven casebooks also included the D.C. Court of Appeals opinion. See, e.g., EDWARD J. MURPHY & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* (1970).

⁴ Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes* 26 HOUS. L. REV. 575, 579 (1989) (“The *Williams* decision quickly became a favorite of law review and casebook authors. It still is. For example, my survey of fourteen casebooks published since 1980 shows that nearly everyone includes it.”).

⁵ According to the American Bar Association, just over seventy-eight thousand students were enrolled in law schools in 1970. In 2021, total law school enrollment across the US was 117,501. Contracts has been a required law school class throughout this time period. To be sure, it is not possible to know how often contracts professors taught unconscionability and used *Walker-Thomas* to do so. Nevertheless, even a conservative, back-of-the-envelope estimate would put the number of law school attendees who have studied *Walker-Thomas* in the hundreds of thousands. ABA, “Law School Applicants and Enrollees,” <https://www.abalegalprofile.com/legal-education.php#:~:text=For%20the%20fourth%20straight%20year,the%20highest%20number%20since%202014>

hand” case), *Hadley v. Baxendale* (the case with two ships ironically named “Peerless”) and *Sherwood v. Walker* (which involved a cow that was whimsically named Rose 2d of Aberlone) are all at least as canonical as *Walker-Thomas*, if not more-so.⁶

What distinguishes *Williams v. Walker-Thomas* from other canonical contract cases, however, is that *Williams* is the only one that is “about” race. Chiefly, the *Williams* opinion paints a picture of Ora Lee Williams that is brimming with racial connotations. Williams was living in a majority Black city. She was poor. She was raising her seven children on her own. And she was enrolled in the Aid to Families with Dependent Children (AFDC) program.⁷ When taken together, these details about Williams’ life—her city, her poverty, her status as a single mother, and her receipt of government aid—situate her firmly within the contours of two well-worn mythic images of Black women: namely, the welfare queen and the bad Black mother.⁸

What’s more, many of the supplementary notes and readings that accompany *Williams* in casebooks reinforce the case’s association with racially-charged subjects such as welfare,⁹ inner-cities,¹⁰ and economic exploitation.¹¹ Thus, the text of *Williams* as well as its framing within casebooks prime students and instructors alike to associate the case with the subject of race.

⁶ *Hawkins v. McGee*, 146 A. 641 (S.Ct. N.H., 1929); *Hadley v. Baxendale*, 156 Eng.Rep. 145 (Ex. 1854); *Sherwood v. Walker*, 33 N.W. 919 (S.Ct. Mich., 1887). For more on the contracts canon, see Ayres, *Empire or Residue*; Chantal Thomas, *Reloading the Canon*; Aditi Bagchi, *Perspective of Law on Contract*; Lenora Ledwon, *Storytelling and Contracts*, 120.

As the first legal subject to be put to the casebook method of teaching, one might expect that Contracts would be replete with canonical cases. An examination of contracts casebooks, as well as a survey of the literature on contracts pedagogy bears this intuition out. There are, after all, good reasons for having a canon of cases in the legal curriculum. Bagchi, *id.* at 1229, (explaining the value of a canon of legal cases, writing, “It is also useful for attorneys to have a shorthand and common reference for fundamental rules. The common law is more common if students from law schools in different states, studying under professors with various priorities, come away with a common understanding of the most important rules and even the most important justifications offered for them.”).

⁷ The majority and dissenting opinions describe Williams’ AFDC assistance as a “monthly stipend from the government” and “relief funds,” respectively *Williams*, *supra* note x, at 448, 450.

⁸ For more on representations of black motherhood see, PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* (2004); RODERICK FERGUSON, *ABERRATIONS IN BLACK: TOWARD A QUEER OF COLOR CRITIQUE* (2003); ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* (2004); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1998); ⁸ Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law* 34 BC J. L. & SOCIAL JUSTICE, 233 (2014); Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1991); Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse* 25 S. CAL. INTERDISC. L. J. 257 (2016); Wahneema Lubiano, *Black Ladies, Welfare Queens and State Minstrels: Ideological War by Narrative Means* 323-363 in TONI MORRISON (ED.), *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS AND THE CONSTRUCTION OF SOCIAL IDENTITY* (1992); Melissa Murray, *What’s So New about the New Illegitimacy* 20 J. Gender, Soc. Pol’y & the L. 387 (2012); Hortense Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book* 17 DIACRITICS 64, 68 (1987).

⁹ See, e.g., IAN AYRES & GREGORY KLASS (EDS.), *STUDIES IN CONTRACT LAW* 569 (9th ed.) (excerpting a Wall Street Journal article that discusses how Rent-A-Center takes advantage of poor customers. The article states that former Rent-A-Center managers “unanimously report that sales always spiked on “Mother’s Day,” as they call the day when welfare mothers get their checks.”).

¹⁰ See, e.g., ROBERT E. SCOTT & JODY S. KRAUS (EDS.), *CONTRACT LAW AND THEORY*, 60 (5th ed.) (2013) (This analysis suggests that the effect of a decision ... declaring cross-collateral clauses to be unconscionable will be to make credit in the inner-city less available, stereos more expensive, or both. Some inner-city residents who could have purchased stereos before will no longer be able to.)

¹¹ AYRES & KLASS, *supra* note xx, at 568-571; E. ALLEN FARNSWORTH ET AL. (EDS). *CONTRACTS: CASES AND MATERIALS* (9TH ED.) 643 (2019) (discussing the *Frostifresh* case where “Spanish speaking people [were] deceived into buying a home freezer at a high price) (internal quotations and citations omitted).

And yet, in spite of this wealth of racial associations, nearly all prominent casebooks leave out one significant detail: the actual fact that Ora Lee Williams was Black. Of course, and as numerous commentators have noted, so do the *Williams v. Walker-Thomas Furniture* opinions.¹² How then did a case without any explicit racial identifications become contracts' most famous race case? And what does it even mean to say that a case like *Williams* is about race?

These two questions lie at the heart of this Article. By excavating how layers of racial meaning have sedimented onto the case, particularly in the first-year-contracts classroom, I aim to open up an orthogonal, and thus hopefully more pliable, way of thinking about race in the context of contracts. As I will explore in the Article's conclusion, this way of thinking race and contracts is less about racialized bodies and more focused on relationships, institutions, and epistemologies.

[Signposting paragraph TK]

I. *Walker-Thomas Furniture* and First Year Contracts

This Part canvasses the scholarship on legal pedagogy, focusing specifically on arguments and descriptive accounts that address the place of *Williams v. Walker-Thomas Furniture* in legal education. Two themes run through this literature. First, is that in a pedagogical environment where colorblindness remains the norm, *Williams* stands out as a case where questions of race are readily apparent to both students and teachers alike. This is true in spite of the fact that neither the *Williams*' opinions, nor any of the major contracts casebooks explicitly identify Ora Lee Williams as Black. Second, given the legibility of race in *Williams*, the case stands apart in the contracts curriculum as one that consistently sparks race-focused classroom conversations, which are often experienced as uncomfortable, fraught, and/or controversial. When examined collectively, the literature on teaching *Williams* paints a picture of law professors caught in a double bind. Whether they confront the racial issues head-on or elide them to focus on other themes in the case—such as poverty or institutional competence, for example—the snares and pitfalls of racial stereotyping and raced reasoning persist.

A. Whither Race in Contract Law

Contract law has not generally been understood as a fertile landscape for race talk. Indeed, it was not until 2022 with the publication of Dylan Penningroth's "Race in Contract Law," that legal scholarship even *had* a systematic investigation of "the role of African Americans and race in the development of modern contract law."¹³ As Penningroth illustrated in that piece, race's historical role in the development of contract law has been obscured since the doctrine's formative years in the 1870s.¹⁴ Against this historical backdrop, the dearth of race-focused cases and conversations in the first-year contracts course should hardly come as a surprise.

¹² See, e.g., Justin Driver, Anne Fleming, Kris Franklin, Blake Morant, Amy Kasteley, Duncan Kennedy, Muriel Morisey Spence.

In fact, the only reason that we now know for certain that Williams was Black is thanks to the investigative work of Professor Blake Morant, who confirmed Williams' racial identity with an attorney who had worked with the legal aid office that had represented her. Morant also noted that at the time he wrote the article—1997—"none of the prominent casebooks and treatises that report the *Williams* case mention Ms. Williams race." Blake Morant, *The Relevance of Race and Disparity in Discussions of Contract Law* 31 New Eng. L. Rev. 889, fn.208 p. 926 (1997).

¹³ Dylan Penningroth, Race in Contract Law, 1202.

¹⁴ Id.

When combined with legal pedagogy’s norm of “perspectivelessness,” introducing race into a race-less contracts classroom becomes a significant challenge.¹⁵ It was over thirty years ago that Critical Race Theorist Kimberlé Crenshaw critiqued perspectiveless teaching, which purports to “neither reflect nor privilege any particular perspective or world view.”¹⁶ As Crenshaw, and many others since, have observed, it is not possible to truly teach law free from any perspective.¹⁷ And while there has certainly been an increase in the range of perspectives incorporated into law classrooms in the intervening decades, critical theories of race remain marginal.¹⁸ This is particularly true for private law areas like contracts and property. As contracts professor and scholar Deborah Zalesne has written “most law school contracts classes feature the dominant economic paradigm of transactional law, disregarding critical legal theory.”¹⁹ Similar observations have been made about property and business law courses as well.²⁰

¹⁵ Crenshaw, *Foreword*, supra note x at 2. See also, PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 83 (1991); Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 Cal. L. Rev. 1511, 1515 (1991) (“Our basic core curriculum stands astoundingly unchanged and unexamined compared to that of the rest of the academy.”); Lani Guinier, *Of Gentleman and Role Models* 6 BERKELEY WOMEN’S L.J. 93, 93 (1990) (“If we were not already, law school would certainly teach us how to be *gentleman*. *Gentleman* of the barn maintain distance from their clients, are capable of arguing both sides of any issue, and, while situated in a white male perspective, are ignorant to differences of culture, gender and race.”).

¹⁶ Crenshaw, *Foreword*, 2.

¹⁷ See, e.g., WILLIAMS, supra note x, at 84, (explaining how editors’ “application of principles of neutrality” to an article about a racist encounter she had at a Benetton store “through the device of omission [of William’s racial identity], acted either to make me look crazy or to make the reader participate in old habits of cultural bias.”); Taunya Lovell Banks, *Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts* 57 MO. L. REV. 443, 445 (1992); Crenshaw, *id.*; Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation and Disability into Law School Teaching*, 32 Williamette L. Rev. 541 (1996) (describing an example that “illustrates how the assumption that legal concepts are neutral, objective, and treated the same by everyone, regardless of culture and history, can lead to an unjust result.”); Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value* 3 COLUM. J. RACE & L. 23, 24 (2013) (“[S]tudents who assume neutrality and objectivity accept a flawed analytical structure.”).

¹⁸ See, e.g., Vinay Harpalani, *Teaching Torts with a Focus on Race and Racism*, L. Professors Blog Network: Race & L. Prof Blog (Feb. 13, 2020) (“Casebooks now sometimes touch on issues of race and racism in torts and include some cases that raise issues of race. But there is much more to do.”), <https://lawprofessors.typepad.com/racelawprof/2020/02/teaching-torts-with-a-focus-on-race-and-racism-by-professor-jennifer-wriggins-sumner-t-bernstein-pro.html>; Kennedy, *Bitter Ironies*, 232 (writing of *Williams v. Walker-Thomas Furniture* that “[i]t doesn’t seem an exaggeration to say it does important work in the construction of the race/class ideology of the legal profession”).

For example, in 2020, Duke Law School held a year-long series of lectures titled “Race and the 1L Curriculum” in order to combat the marginalization of race within the first-year curriculum. *Yearlong Series Examines Race in the Context of Subjects Foundational to First-Year Curriculum*, Duke Law (Nov. 20, 2020), <https://law.duke.edu/news/yearlong-series-examines-race-context-subjects-foundational-first-year-curriculum>; Several other law school introduced similar programs in the way of 2020’s protests. See, e.g. (USC, [BU](#), Northeastern); I acknowledge that these are important first steps toward incorporating race more wholistically in legal education. Nevertheless, a lecture series or race-focused classes are not the same as integrating critical theories of race into foundational legal classes.

¹⁹ Zalesne, *Racial Inequality in Contracting*, supra note x, at 26; Deborah Zalesne, *The (In)visibility of Race in Contracts: Thoughts for Teachers*, CONTRACTSPROF BLOG (July 8, 2020), https://lawprofessors.typepad.com/contractsprof_blog/2020/07/deborah-zalesne-the-invisibility-of-race-in-contracts-thoughts-for-teachers.html.

²⁰ See, e.g., Dorothy Brown, *Fighting Racism in the Twenty-First Century* 61 Wash. & Lee L. Rev. 1485, 1493 (2004) (writing that “the bulk of CRT literature addresses constitutional law concerns, to the exclusion of business law issues. . . . CRT therefore needs to turn a critical eye toward economic issues.”); Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C.

To put it differently (if not somewhat tautologically), if race is not a part of the curriculum, it becomes harder to make race part of the curriculum—both because of a lack of race-focused teaching resources, and because of a sense that race does not “belong” in courses in which it is not already discussed.²¹ This resistance to incorporating race can come from both faculty and students. For example, when teaching contracts from a “critical race feminist Contracts casebook,” legal historian Ariela Gross discovered that her students “hated it. They hated that it was different. They hated that it appeared to have a perspective. And they hated every time our class appeared to depart from ‘black letter’ law.” Gross’s students were not necessarily wrong, either, to suggest that a critical race feminist perspective was a departure from black letter law either. As contracts scholars Kevin Davis and Mariana Pargendler have recently written, there is a “scholarly consensus that U.S. common law of contracts is overwhelmingly orthodox.”²² In simple terms, this means that contract law “is not and should not be concerned with the distribution of wealth in society.”²³ Given the close connection between race and class in the United States, distributive conversations will necessarily also be race conversations. And if distributive concerns are beyond the bounds of classical contracts, then one might readily assume that race concerns are outside the scope of contracts as well.²⁴ To reiterate, when one considers the imbrication of racial and economic inequality alongside contract doctrine’s general indifference toward questions of wealth distribution, it would be easy to think that race questions are similarly beyond the bounds of contract orthodoxy.

But race, as a subject of historical and critical attention, encompasses more than analyses of inequality and discussions of distributive justice.²⁵ There is a rich world of critical theories of race that take the concept of race itself as their starting point.²⁶ Scholars such as Charles Mills, Hortense Spillers, and Sylvia Wynter, for example, have interrogated the ways in which race is woven into the pillars of Western liberalism, and acts as a foundational “grammar” or “contract”

L. REV. 635 (2008) (writing that race is not a “major theme” in courses such as contracts, property, or torts); Kim Forde-Mazrui, *Learning Law Through the Lens of Race* 21 J.L. & Pol. 1, 21 (2005) (describing students’ experience of not discussing race in classes such as “Property, Contracts, or Environmental Law”); K-Sue Park, *History Wars and Property Law* 1133 (“This marginalization of race [in the property law curriculum] reflects a broader tendency in the legal academy to relegate the study of race to an optional elective rather than a central subject and a necessary element of the study of law.”); Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses* 77 ST. JOHN’S L. REV. 901, 902 (2003) (describing the challenges of addressing race in business law courses, stating that “in past years, I suspect that some of my students felt ambushed when I discussed race in both the basic corporations course and in the Corporate Accountability seminar.”).

Patricia Williams has suggested that simply being a person of color who teaches and writes about commercial law (separate and apart from discussing race in the classroom) is anomalous, writing that “to speak as a black [sic], female, and commercial lawyer has rendered me simultaneously universal, trendy, and marginal.” WILLIAMS, *supra* note xx, at 6-7.

²¹ K-Sue Park, *This Land is Not Our Land* 87 U. CHI. L. REV. 1977, 2000 (2020) (explaining how both availability of and familiarity with more race-focused teaching materials impacts the incorporation of these materials into classrooms).

²² Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality* 107 IOWA L. REV. 1485, 1492 (2022).

²³ Davis & Pargendler, 1492.

²⁴ As Part XX will illustrate, however, distributive justice is not the only vector for thinking about race’s relevance to contract law.

²⁵ This is not to say that a lot of work has not been done in this area. For a few examples that are well-known across disciplines, see, for example, W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (1935); ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* (1981); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

²⁶ I use the term “critical theories of race” deliberately here to refer to race scholarship borne of a different intellectual genealogy than critical race theory as it is known in the legal academy.

upon which liberal thought is based.²⁷ Thus, even if one is convinced that contract law and contract teaching should remain orthodox with respect to questions of distribution, there remains plenty of race talk left to be had, many other race-inflected questions to be asked. Questions such as: What can race’s role in private contracts and contract doctrine tell us about race’s place in the broader social contract?²⁸ Is the concept of “legal capacity” inherently racialized, and how might this impact the way capacity does or should function within contract law?²⁹ And, if we were to systematically examine instances of people contracting themselves into slavery—as sometimes occurred in the United States—what might such an analysis teach us about the nature of contract itself?³⁰ Scholars of race and/or contracts have already seeded these questions. They have yet to be explored in-depth within the race or contracts literature, however. Given the dearth of scholarship in this area, it is also unlikely that any of these topics are regularly featured in contracts classrooms either.

B. Classroom Conversations

Of course, to the extent that race *has* been recognized and discussed in contracts classrooms, it has most often taken place in the context of *Williams v. Walker Thomas*.³¹ As a result, *Williams* the case, and Williams the woman, has become the loci of conversations about race in the contracts classroom. The literature on teaching *Williams* indicates that in general, these conversations tend to be challenging ones.

Contracts professors have identified two specific and interrelated challenges associated with discussing *Williams*: 1) the specter and/or use of racial stereotypes, and 2) the lure of race-based reasoning. I discuss both in more detail, and with examples, below.

[TK]

These examples illustrate how discussing race and *Williams* make students and teachers feel as though they are caught in a double bind—damned if they do and damned if they don’t. This double bind can feel all the more acute for students and faculty of color. Multiple commentators have identified the additional challenges that many people of color face when discussing race in

²⁷ Hortense Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book* 17 DIACRITICS 64, 68 (1987) (referring to the symbolic order that she is addressing in her essay as an “American grammar”); CHARLES MILLS, *THE RACIAL CONTRACT* 4 (1997) (introducing the concept of the “Racial Contract” in order to bridge mainstream political philosophy and scholarship on race); Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Toward the Human, After Man, Its Overrepresentation—An Argument* 3 THE NEW CENTENNIAL REV. 257, 260 (describing the race-based origins of the “Western bourgeois conception of the human”).

For other scholars in this tradition, see also, FRANTZ FANON, *BLACK SKIN, WHITE MASKS*; EDOUARD GLISSANT, *POETICS OF RELATION*; FRED MOTEN, *IN THE BREAK*; CHRISTINA SHARPE, *IN THE WAKE*.

²⁸ WILLIAMS, *supra* note xx, at 15 (describing writing a lecture that will “use the model of private contract to illustrate the problematics of social contract”).

²⁹ Jasmine E. Harris, *Reckoning with Race and Disability* 130 YALE L. J. FORUM 916, 940 (2021) (addressing the connection between Blackness, disability, and capacity); Jasmine Harris, *Legal Capacity at a Crossroad: Mental Disability and Family Law* 57 FAM. COURT. REV. 14 (2019) (using an intersectional lens to interrogate the notion of capacity in the context of family law).

³⁰ This historically focused research question engages directly with the well-worn philosophical question of voluntary slavery. For an example of what such an approach might look like, see, e.g. Sora Han, *Slavery as Contract: Betty’s Case and the Question of Freedom* 27 LAW & LIT. 395 (2015) (discussing *Betty’s Case*, wherein a recently emancipated woman chose to return to Tennessee—and thus a life of enslavement—with her owner).

³¹ It is quite likely that Ora Lee Williams is one of the most well-known Black litigants in the first-year curriculum. Duncan Kennedy, *The Bitter Ironies*.

law school classrooms. In his recent piece about the *Williams* case, Duncan Kennedy explains that “given their several vulnerabilities in the classroom situation, only the occasional very bold student of color is likely to protest” the way that race is discussed in relation to *Williams*.³² Similarly, Blake Morant describes how casebooks’ failure to mention *Williams*’ race also “unnecessarily burdens” those teaching the case.³³ “When the teacher *sui sponte* raises the issue of race . . . students may surmise that the professor, particularly if he or she is a person of color, detects race in most problems or over-emphasizes its relevance.”³⁴ Participants in these discussions are left to walk a tightrope, the snares of racial stereotypes and raced reasoning on one side and the erasure of race’s screaming relevance to the *Williams* case on the other.

C. The Double Bind

As the only (or one of the only) race-cases in an otherwise colorblind classroom, *Williams* cannot help but collapse under the weight of its own representational burden. Race is represented—meaning portrayed—in *Williams*. And also, *Williams* becomes representative of—in the senses of speaking for and typifying—the scope of race’s relevance to contract law.

To put it differently, *Williams* is the only case where race is legible, *and at the same time* (and as a direct result) the case has become the primary space where ideas, theories, and beliefs about race’s relationship to contract law are articulated. The problem, however, is that no individual case could adequately address all the topics relevant to a specific subject. This is all the more true for a subject as expansive and significant as race. The consequence? *Williams* is set up to fail to fruitfully introduce students to the intersection of race and contracts. This is an unsurprising consequence for a case that bears such an enormous burden of representation.

Scholars of race have utilized the concept of “burden of representation,” to describe the costs that accrue when the different senses of “representation” get collapsed—meaning, when texts or images (i.e., representations) created by those who are racially marginalized must also bear the mantle of representativeness (of the racially marginalized group said creator belongs to).³⁵ While the phrase itself can be traced as far back as James Baldwin, it was a 1990 essay by Black studies scholar Kobena Mercer that more fully integrated the concept into race scholarship.³⁶ In the essay, Mercer theorized the “burden of representation” in the context of Black artists, highlighting how an exhibition dedicated to Black art bore the “impossible burden” of “making present what had

³² Kennedy, *Bitter Ironies*, at 237-8.

³³ Morant, at 928.

³⁴ Morant, at 928. Kupenda, “Minority faculty member after minority faculty member have cautioned that any emphasis on race and gender by minority faculty in traditional type classes may at best indeed make a minority professor unpopular with students.” 984. See, e.g., Wililams, 95; Haney Lopez.

³⁵ See, for example, DAPHNE BROOKS, *BODIES IN DISSIDENT: SPECTACULAR PERFORMANCES OF RACE AND FREEDOM, 1850-1910*, at 7 (2006); NICOLE FLEETWOOD, *TROUBLING VISION: PERFORMANCE, VISUALITY, AND BLACKNESS*, 105 (2010); HERMAN GRAY, *WATCHING RACE: TELEVISION AND THE STRUGGLE FOR BLACKNESS*, 50 (2004); LORI KIDO LOPEZ, *MICRO MEDIA INDUSTRIES: HMONG AMERICAN MEDIA INNOVATION IN THE DIASPORA*, 18 (2021); MELANI MCALISTER, *EPIC ENCOUNTERS: CULTURE, MEDIA, AND U.S. INTERESTS IN THE MIDDLE EAST SINCE 1945*, at 9 (2005); NADINE NABER, *ARAB AMERICA: GENDER, POLITICS, AND ACTIVISM*, 139 (2012); SASHA TORRES, *BLACK WHITE AND IN COLOR: TELEVISION AND BLACK CIVIL RIGHTS*, 13 (2018); Tavia Nyong’o, *Unburdening Representation* 44 *THE BLACK SCHOLAR* 70, 70 (2014).

³⁶ Kobena Mercer, *Black Art and the Burden of Representation* 4 *THIRD TEXT* 61, 61 (1990); Eithne Quinn, *Black British Cultural Studies and the Rap on Gangsta* 20 *BLACK MUSIC RESEARCH JOURNAL* 195, 198 (2000) (explaining that Baldwin “first used the actual term *burden of representation* in a 1968 press article about black Hollywood superstar Sidney Poitier”).

been rendered absent in the official version of modern art history.”³⁷ As Mercer explains, this kind of “corrective inclusion” is inherently fraught, tending to result in artists and curators “try[ing] to say everything there is to be said, all in one mouthful.”³⁸ Corrective inclusion, especially first efforts at it, cannot escape the pressure to get it right, make it count, or right all the wrongs. And while Mercer may be describing this dilemma as it exists in the art world, similar tensions can be found in any arena grappling with histories of exclusion. The mantle of inclusivity is woven with the weight of erasure.

Those who have interrogated how best to teach *Williams* in a race-conscious manner have identified comparable challenges. There is an impulse to address the question of race and contracts—or even of race and law generally—“all in one mouthful.” For example, in her discussion of addressing race and racism in *Williams*, Kris Franklin poses the following questions:

Do we talk about that [racial stereotypes] in class? If we do, where and when is it relevant?
Should we research and critically scrutinize the races of all the actors in our cases?

Franklin asks these questions as a way of pointing out the challenges associated with teaching *Williams*. Similarly, another professor described the experience of trying to make her contracts course more inclusive as feeling as though she “tried to crash all the barriers forcefully, quickly, and at once.”³⁹ This problem is not unique to contracts either. Encumbered representations can also be found in the property law curriculum.⁴⁰ As K-Sue Park has documented in her work on the erasure of slavery and conquest in property law classrooms, *Johnson v. M’Intosh* resembles *Williams* with respect to their relationship to the historical exclusion of race in the property and contracts curricula.⁴¹

That representational burdens are a common problem does not mean, however, that they are inevitable. How then do we unwind these burdens?⁴² How do we confront histories of exclusion, obfuscation, and outright erasure without (re)committing to the same representational logics that encouraged these gaps in the first place? We should start by recognizing that introducing more of the right kinds of representation (whatever that might mean) will not necessarily solve the problem of not thinking about race.⁴³ Racial representations are so often overdetermined, especially in a legal context. There are too many meanings available, too many years of exclusion and obfuscation. Unwinding the burden of representation requires reckoning with this morass of meaning. Part of this process is making deliberate moves toward contextual knowledge.⁴⁴ Using

³⁷ Mercer, at 62.

³⁸ Mercer, at 62.

³⁹ Kupenda, *supra* note x, at 975.

⁴⁰ For more on encumbrance and its role in racialized and gendered hierarchies, see, for example, WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY*, 155-56 (1995); SAIDIYA HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA*, 117 (1997).

⁴¹ Park, *History Wars*, *supra* note x, at 1079.

For more on the burden of representation that *Johnson* bears, see Kennedy, *Bitter Ironies*, *supra* note xx, at 237, fn.26 (writing that “the inclusion of a slavery case or two and *Johnson v. M’Intosh* at the beginning of a Property casebook and *Shelley v. Kramer*, later on only make the ideological skew worse by suggesting that the Emancipation Proclamation levelled the private law playing field except for attempts at de jure segregation struck down by the 14th Amendment.”)

⁴² Nyong’o, *Unburdening Representation*.

⁴³ Herman Gray, *Subjected to Recognition* 65 AM. QUART. 771, 784 (2013) (explaining how the “proliferation of representations made possible by new media technologies” has become a technique of power that “instigates a yearning for representation as an end in itself.”)

⁴⁴ For more on contextual knowledge as feminist method, see, e.g., Anne M. Choike, Usha R. Rodrigues, and Alces Williams, *Introduction to the Feminist Judgments: Corporate Law Rewritten Project* 3-32 in ANNE M. CHOIKE, USHA R. RODRIGUES, AND ALCES WILLIAMS (EDS.), *FEMINIST JUDGMENTS: CORPORATE LAW REWRITTEN* (2022).

Williams v. Walker-Thomas Furniture as my central example, I model this debriding of overdetermined meaning in the sections that follow.

II. *Walker-Thomas Then and Now: The Layering of Racial Meaning*

In August of 1965—just days before the final *Williams* opinion was published—a seventy-eight-page government report titled *The Negro Family: The Case for National Action* was released to the American public.⁴⁵ Authored by Assistant Secretary of Labor Daniel Patrick Moynihan, the report identified a “tangle of pathology” at the heart of the Black community. According to Moynihan, this “tangle” would prevent civil rights legislation from ensuring African Americans’ equality in the United States. In the decades after its publication, *The Negro Family*—most often referred to as the Moynihan Report—would become a “crucial text in American political culture.”⁴⁶

As numerous scholars have demonstrated, the Moynihan Report has profoundly shaped discourse about Black families, Black women, and racial inequality in the United States. Indeed, it began doing so even before its public release in August 1965.⁴⁷ In the immediate wake of its release, the report sparked a firestorm of media coverage and debate. By November 1965, it had been disavowed by the administration responsible for it.

Yet, as I detail in the sections that follow, this was hardly the end of the report’s political life. Its influence could be felt when, in 1976, then-presidential-hopeful Ronald Reagan invoked the “welfare queen” on his campaign trail.⁴⁸ The reports’ assertions and imagery haunted debates over welfare reform in the 1990s.⁴⁹ Even some Obama-era policy initiatives, such as My Brother’s Keeper, contained resonances with the 1965 report.⁵⁰ To be sure, across the decades of its influence, the Moynihan Report has been critiqued for the ways in which it pathologizes Blackness, frames racial inequality in individual rather than structural terms, and identifies Black women as the root cause of the Black community’s struggles.⁵¹ Nevertheless, the Moynihan Report has had its champions over the years and remained influential—scholars and policymakers both, who have argued for the continued value of Moynihan’s report.⁵²

⁴⁵ *New Crisis: The Negro Family* NEWSWEEK, Aug. 9, 1965, at 32.

⁴⁶ DANIEL GEARY, *BEYOND CIVIL RIGHTS: THE MOYNIHAN REPORT AND ITS LEGACY*, 6 (2015).

⁴⁷ The report had been quietly circulating among government officials for months prior to its leak, since its completion in March of that year. *Id.* See *a Crisis Stage in Negro City Life*, DAILY NEWS, New York, Aug. 14, 1965, at 5. In addition, Moynihan’s findings were the foundation of a successful speech that President Johnson gave at Howard University in June 1965 after the passage of the Civil Rights Act. See, e.g., Mary McGrory, *A Realistic Look at Negro Problems*, The Atlanta Constitution, July 14, 1965, at 4 (describing President Johnson’s “historic Howard University speech on June 4”).

⁴⁸ Wahneema Lubiano, *Black Ladies, Welfare Queens and State Minstrels: Ideological War by Narrative Means* 323-363 in TONI MORRISON (ED.), *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS AND THE CONSTRUCTION OF SOCIAL IDENTITY* (1992).

⁴⁹ Ange-Marie Hancock, *Contemporary Welfare Reform and the Public Identity of the “Welfare Queen,”* 10 *Race, Gender & Class* 31, 34 (2003).

⁵⁰ See, e.g., Kimberle Williams Crenshaw, *The Girls Obama Forgot*, NY TIMES, July 29, 2014, <https://www.nytimes.com/2014/07/30/opinion/Kimberl-Williams-Crenshaw-My-Brothers-Keeper-Ignores-Young-Black-Women.html>.

⁵¹ See, e.g., SUSAN G. GREENBAUM, *BLAMING THE POOR: THE LONG SHADOW OF THE MOYNIHAN REPORT ON CRUEL IMAGES ABOUT POVERTY* (2015); Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration* THE ATLANTIC, Oct. 2015, <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246>; and sources cited at note 8, *supra*.

⁵² See, e.g., James T. Patterson, *The Moynihan Future* NY TIMES, May 28, 2010, <https://www.nytimes.com/2010/05/29/opinion/29Patterson.html>.

The vacillating response to the Moynihan Report—swinging between embrace and disavowal—points toward its position as a kind of ideological Rorschach test, revealing as much about an interpreter’s politics as any proposed interpretation might. In this way, the report occupies a similar position in national political discourse as *Williams* does in the canon of legal pedagogy. Both are complex, contradictory, and at times, ambiguous documents, which enable readers to project a wide range of viewpoints onto them.⁵³

Importantly, however, *Williams*’ pedagogical role is heavily inflected by the Moynihan Report’s long life. Even though both texts were publicly released at nearly the same moment, the Moynihan Report has had a far broader cultural reach. For this reason, in order to understand the layers of racial meaning that have sedimented on the *Williams* opinion, one must first be familiar with the racial grammar that the Moynihan Report has helped to create.⁵⁴ With that in mind, the following sections 1) walk through the report’s overall argument, 2) highlight the key pieces of evidence that this argument relies upon, and 3) gloss the report’s primary cultural legacies. At each stage, I underscore the resonance with the text of *Williams v. Walker-Thomas* and the meta-discourse that surrounds it.

A. A Tangle of Pathology

“The United States is approaching a new crisis in race relations.”⁵⁵

So begins Moynihan’s report, *The Negro Family: The Case for National Action*. The tone of this introductory sentence—ominous and urgent—persists throughout the five chapters that follow. Across these five chapters, Moynihan presents a narrative of the “Negro American’s” place in the United States. In this narrative, the civil rights movement—or the Black American “revolution” as he terms it—is nearing its conclusion and is balancing on the precipice of failure. Should this failure come to pass, it will be due to the “tangle of pathology” caused by the Black community’s “matriarchal structure.”⁵⁶

With these arguments, the Moynihan Report helped establish some of the key terms of national conversations about race and inequality in America. To be sure, pathologizing narratives and representations of Black motherhood in the US can be dated as far back as the antebellum era.⁵⁷ Nevertheless, it was the Moynihan report, with its imprimatur of governmental authority and numerous citations to sociological research and statistical data, that etched the association between Black mothers and pathology into the national psyche and entrenched the mythic image of the bad Black mother in US public sphere.⁵⁸

⁵³ I agree with historian Daniel Geary who writes in *Beyond Civil Rights* that “the report’s ambiguity helped it become a crucial text in American political culture, functioning like what cultural critic Raymond Williams termed a ‘keyword,’ a familiar term that articulates social ideals but is open to diverse and conflicting interpretations. GEARY, *supra* note x, at 6.

⁵⁴ Hortense Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*.

⁵⁵ Daniel Patrick Moynihan, *The Negro Family: The Case for National Action* (1965).

⁵⁶ *Id.* at 29.

⁵⁷ See, e.g., THAVOLIA GLYMPH, *OUT OF THE HOUSE OF BONDAGE: THE TRANSFORMATION OF THE PLANTATION HOUSEHOLD*; DEBORAH GRAY WHITE, *AR’N’T I A WOMAN: FEMALE SLAVES IN THE PLANTATION SOUTH* (1999); MARIE JENKINS SCHWARTZ, *BIRTHING A SLAVE: MOTHERHOOD AND MEDICINE IN THE ANTEBELLUM SOUTH* (2010).

⁵⁸ For more on Moynihan’s use of sociological studies, see RODERICK FERGUSON, *ABERRATIONS IN BLACK*, *supra* note x.

The metrics that Moynihan relied on in *The Negro Family* have persisted as touchstones for understanding what kind of evidence matters for understanding the Black community. There are three that I want to focus on here, because of the ways they resonate with the facts of the *Williams* case: 1) fertility, 2) “broken” or female-led households, and 3) welfare.

Quotes from the Moynihan Report to be included in this section:

On fertility

- “The dimensions of the problems of Negro Americans are compounded by the present extraordinary growth in Negro population” (p. 25).
- “Negro women not only have more children, but have them earlier” (p. 25).

On female-led households

- “The promise of the city has so far been denied the majority of Negro migrants and most particularly the Negro family” because black families in the cities more often have female headed households than those in the country (p. 17). For Moynihan, not only are black mothers indicators of familial brokenness, they also thwart the promise of urban migration.
- Bar graph entitled “One Third of Nonwhite Children Live in Broken Homes.” (p.17). The graph was created using Census data on the “percent of white and nonwhite children under 18 not living with both parents” (p. 65).

On welfare

- Because Moynihan uses Black women as the index of whether or not a family is broken, when he writes “the breakdown of the Negro family has led to a startling increase in welfare dependency,” Black women are clearly implicated as the cause of African Americans’ reliance on welfare (p. 12).
- Moynihan misreads the correlation between the number of children with no father present in the home and the number of children on welfare as proof that growing “family disintegration” is causing more Black families to rely on welfare (p. 12). As Susan Greenbaum points out in *Blaming the Poor*, however, this rise welfare enrollment occurred at the same time that welfare reforms loosened eligibility requirements (2015, p. 33).
- Scholars frequently point out the distortions in Moynihan’s descriptions of Black life and his presumption of causation due to correlation. The most frequently discussed example is Moynihan’s claim that the increase in female-led households *causes* broken families and welfare dependency. Known in the scholarly literature as “Moynihan’s Scissors” these statistics and its attendant claim “does not meet the standards of empirical evidence and does not confirm the elaborate theoretical explanation he offered or justify the emphasis given it in the media.”⁵⁹

Black women have more children and at a younger age, they lead broken homes, they thwart Black urban migrants from benefitting from the promise of the city, and they are welfare dependent regardless of Black male unemployment rates. This is the story Moynihan tells about Black women before he even names Black matriarchy as the root of the tangle of pathology. At every turn, Black

⁵⁹ GREENBAUM, *BLAMING THE POOR*, supra note x, at 34; see also, Geary.

women are they hypervisible indices of Black family pathology. By the time the report gets to “The Tangle of Pathology,” wherein Moynihan infamously discusses Black matriarchy, Black women have been clearly established as a site and source of dysfunction in the African American community.

B. Myth-Making

“Appellant, a person of limited education separated from her husband, is maintaining herself and her seven children by means of public assistance.”⁶⁰

This is the opening sentence of the DC Court of Appeals’ opinion in the *Williams* case—decided a year before the Moynihan report became public. It likely read very differently one year later, after Moynihan’s *Negro Family* exploded onto the national stage. So too, just over ten years after that when audiences across the country heard presidential hopeful Ronald Reagan invoke the “welfare queen” in his campaign speeches.

In this section I sketch some of the cultural flash points—such as the emergence of “the welfare queen”—that have amplified the racial scripts nascent in *Williams*. These rhetorical symbols, be they Reagan’s welfare queen, or the “crack mothers” of the 1990s that Dorothy Roberts has written about, undoubtedly changed the legibility of race in *Williams* over time. The goal of this section is to demonstrate how, in the decades after the Moynihan Report’s publication, these mythic images of bad Black mothers made race increasingly salient in the text of *Williams*. In addition to highlighting the resonances between the *Williams* opinion and these Moynihan Report-inflected-representations of Black motherhood, I connect elements of these representations—such as the emphasis on their irresponsible choices and reliance on welfare—to the conversations that contracts professors have documented taking place in their classroom discussions of *Williams*.

C. Frames within a Frame

This section will address how the framing provided by contracts casebooks further informs the reading of race in the *Williams* opinion.

[TK]

III. An Alternate History

In this Part I bring together methods from critical legal scholarship and Black feminist historical practice in order to I rewrite the *Williams v. Walker-Thomas* opinion and ask “what if?”⁶¹ What if the Thornes—the defendants in the case that was consolidated with *Williams* had been the named litigants in the case, not Ora Lee Williams?

Like Williams, the Thornes lived in a predominantly Black neighborhood in Washington, D.C., but unlike Williams, the Thornes’ racial identity has never been confirmed. Not only that, but there is reason to believe that Ruth and William Thorne were white. Thus, using facts found in

⁶⁰ *Williams*, 198 A.2d 914 (D.C. 1964).

⁶¹ Bennett Capers, *Introduction*, 4 in BENNETT CAPERS ET AL. (EDS.), *CRITICAL RACE JUDGMENTS*, 1-24 (2022). (At the heart of *Critical Race Judgments* is a “what if?” question.)

the *Williams* archival case file, and in conjunction with the details unearthed by historian Anne Fleming in her authoritative history of *Williams v. Walker-Thomas*, I offer rewritten excerpts from both of the case’s opinions, as well as the dissent in what I shall refer to as *Thorne v. Walker-Thomas Furniture Co.*⁶²

From there, the rest of this Part asks how these changes to the source text may or may not have changed the legacy of the *Walker-Thomas* decision. Principally, would *Thorne* have become as canonical as *Williams*?⁶³ And if so, would the *Thorne* case also occupy the dubious position of being contracts’ foremost race case?

A. Rewriting as Method

This thought experiment is indebted to two distinct scholarly traditions. First is critical legal scholarship that reimagines and rewrites historical opinions.

See, for example:

- Jack Balkin (ed.), *What Brown v. Board of Education Should Have Said* (2002)
- Rosemary Hunter, Clare McGlynn & Erika Rackley, *Feminist Judgments: From Theory to Practice* (2010)
- Bennett Capers et al. (eds.), *Critical Race Judgments* (2022)
- Anne M. Choike, Usha R. Rodrigues, & Alces Williams, *Feminist Judgments: Corporate Law Rewritten* (2022)
- Jack Balkin (ed.), *What Roe v. Wade Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Most Controversial Decision* (2023)

Second is the concept of “critical fabulation,” which was first introduced by Black feminist theorist and historian Saidiya Hartman. The concept has since been taken up by scholars in a range of disciplines who, by virtue of their research questions, are forced to confront the exclusions and violence of the archive.⁶⁴ As described by Hartman, critical fabulation is a way of reckoning with the “constitutive limits of the archive.” It is a way of thinking about what the archive contains, as well as a kind of writing that attempts “to tell an impossible story and to amplify the impossibility of its telling,” and engages deliberately with “the conditional temporality of ‘what could have been.’”⁶⁵ Critical fabulation is less about recovering what has been lost and more about “playing with and rearranging the basic elements of the story,” so that one might “displace the received or authorized account.”⁶⁶

⁶² This is similar to Justin Driver’s proposal in “Recognizing Race,” that judges contemplate “racial inversion” when writing opinions. Driver writes, “it may be helpful for courts to consider *racial inversion*, whereby judges consider whether substituting a hypothetical white person in the place of a person of color (or vice versa) would lead to a different result.” Justin Driver, *Recognizing Race* 112 COLUMB. L. REV. 404, 446 (2012).

⁶³ If as Jack Balkin asserts in *What Roe v. Wade Should Have Said*, “the exact language of a decision may matter much less than most people and most legal scholars think,” then perhaps *Thorne*’s legacy would have been nearly the same as *Williams*. JACK BALKIN (ED.), *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION* (2023)

⁶⁴ See, e.g., Nyong’o *Unburdening Representation*; Nash, Review of *Wayward Lives* 125 Am. Historical Rev., 595 (2020).

⁶⁵ Saidiya Hartman, *Venus in Two Acts*, 26 SMALL AXE, 1, 11(2008).

⁶⁶ *Id.*

B. *Thorne v. Walker-Thomas Furniture Co.*

Sections that have been replaced with details about the Thornes are italicized. All other text has been left as it was written in the original opinions.

1. *Excerpt of Thorne v. Walker Thomas Furniture Co.* 198 A.2d 914 (D.C. 1964)

Appellants, and in particular petitioner *William Thorne*, a person with a third-grade education who could read only with great difficulty, is maintaining himself and his family on a nominal income. During the period 1958–1962 he had a continuous course of dealings with appellee from which he purchased many household articles on the installment plan.⁶⁷ These included a bedspread, curtains, rugs, tables, lamps, a freezer, a used refrigerator, an antenna and a television.⁶⁸ In 1963 appellee filed a complaint in replevin for possession of all the items purchased by appellant, alleging that his payments were in default and that it retained title to the goods according to the sales contracts. *By the writ of replevin appellee obtained a refrigerator, freezer, sofa, and the television and antenna.* After hearing testimony and examining the contracts, the trial court entered judgment for appellee.

2. *Thorne v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)

J. SKELLY WRIGHT, Circuit Judge:

On May 12, 1962, appellant Thorne purchased an item described as a Daveno, three tables, and two lamps, having total stated value of \$391.10. Shortly thereafter, he defaulted on his monthly payments and appellee sought to replevy all the items purchased since the first transaction in 1958. Similarly, on April 17, 1962, appellant Williams bought a stereo set of stated value of \$514.95. She too defaulted shortly thereafter, and appellee sought to replevy all the items purchased since December, 1957. The Court of General Sessions granted judgment for appellee. The District of Columbia Court of Appeals affirmed, and we granted appellants' motion for leave to appeal to this court.

Appellants' principal contention, rejected by both the trial and the appellate courts below, is that these contracts, or at least some of them, are unconscionable and, hence, not enforceable. In its opinion in *Thorne v. Walker-Thomas Furniture Company*, 198 A.2d 914, 916 (1964), the District of Columbia Court of Appeals explained its rejection of this contention as follows:

‘Appellant's second argument presents a more serious question. *The record reveals that prior to the last purchase appellant had reduced the balance in his account to \$42.10.*⁶⁹ The last purchase, a couch, three tables, and two lamps, raised the balance due to \$433. Significantly, at the time of this and the preceding purchases, appellee was aware of

⁶⁷ Even though both William and Ruth Thorne are named litigants, only William's signature is on the Walker-Thomas contracts. In addition, only William testified at trial, and his accounts of his dealings with Walker-Thomas suggest that Ruth was not involved.

⁶⁸ Dostert, 1184.

⁶⁹ This number was calculated by subtracting the value of the Thornes' last purchase (\$391.10) from the total unpaid balance remaining on the Thorne's account on August 29, 1962, the date of default. (\$433.1). Respondent's Brief in Opposition to Petition for Allowance of Appeal at 2, *Williams* 350 F.2d. 445 (No. 18,605) (stating that “a balance of \$433.13 remained due and owing as of August 29, 1962” the date of delinquency).

appellant's financial position. *Appellants transacted with appellee for five years before they became delinquent, during which appellant William Thorne was the household's sole provider, working as a supermarket porter and earning a nominal income.*⁷⁰ Nevertheless, with full knowledge that appellant had to feed, clothe, and support both *himself and his wife*, (and three children??) appellee sold *him six separate pieces of furniture*. . . .

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Because the trial court and the appellate court did not feel that enforcement could be refused, no findings were made on the possible unconscionability of the contracts in these cases. Since the record is not sufficient for our deciding the issue as a matter of law, the cases must be remanded to the trial court for further proceedings.

So ordered.

DANAHER, Circuit Judge (dissenting):

The District of Columbia Court of Appeals obviously was as unhappy about the situation here presented as any of us can possibly be. Its opinion in the *Thorne* case, quoted in the majority text, concludes: 'We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar.'

My view is thus summed up by an able court which made no finding that there had actually been sharp practice. Rather the appellant seems to have known precisely where he stood.

There are many aspects of public policy here involved. What is a luxury to some may seem an outright necessity to others. A washing machine, e.g., *in the hands of a poor client* might become a fruitful source of income. Many *poor clients* may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will

⁷⁰ Brief of Petitioners in Support of Petition for Allowance of Appeal at 3, *Williams* 350 F.2d. 445 (No. 18,605) (describing William Thorne as a person with a "nominal income"); Pierre E. Dostert, *Appellate Restatement of Unconscionability: Civil Legal Aid at Work*, 54 ABA JOURNAL 1183, 1184 (1968)(stating that Mr. Thorne "was employed as a porter in a supermarket").

afford a degree of protection commensurate with the risk. Perhaps a remedy when necessary will be found within the provisions of the ‘Loan Shark’ law.

I mention such matters only to emphasize the desirability of a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts. I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate as to the effect the decision in these cases will have.

I join the District of Columbia Court of Appeals in its disposition of the issues.

C. *Thorne* Then and Now: The Layering of Racial Meaning

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IV. Conclusion

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