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

Brittany Farr

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]

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 after Walker-Thomas took out a writ of replevin on the items, a US marshal seized everything Williams had purchased from the store.[2] 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 contracts case *Williams v. Walker-Thomas Furniture, Co.*[3] 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.[4] And by 1989—just under twenty-five years after being decided—*Williams v. Walker-Thomas* was being described in legal scholarship as canonical.[5]

---

[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] As historian Anne Fleming explained in her history of the case, at the time Williams's goods were seized "D.C. law permitted a creditor to repossess goods without a preseizure hearing through the Court of General Sessions. To obtain a writ of replevin, a creditor had to file a verified complain and enter it into an undertaking." Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 Geo. L. J. 1383, 1397 n.67 (2014). As described in the D.C. code, it is a marshal (rather than a sheriff, as is the case in most jurisdictions) who takes possession of the "goods and chattels sued for." D.C. Code §16-3708.

[3] 350 F.2d 445 (1965).

[4] Seven general 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).

[5] 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.").

See, e.g. Duncan Kennedy, *The Bitter Ironies of* Williams v. Walker-Thomas Furniture Co. *in the First Year Law School Curriculum*, 71 Buff. L. Rev. 225, 231 n.14 (2023) ("Of eleven contracts casebooks which either have been used at Harvard Law School in the last decade or are currently available from major casebook publishers, all but one used *Williams* as a main case.); Macaulay, id. at 579; Muriel Morisey Spence, *Teaching* Williams v. Walker-

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.[6] To be sure, *Williams* is not the only contracts case for which this might be true. *Hawkins v. McGee* (otherwise known as the "hairy hand" case), *Raffles v. Wichelhaus* (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*.[7]

What distinguishes *Williams v. Walker-Thomas* from other canonical contract cases, however, is that *Williams* is the only one that scholars have identified as being "about" race.[8] The *Williams* opinion paints a picture of Ora Lee Williams that is brimming with racial connotations. Williams was living in Washington, D.C., 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.[9] 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.[10]

Thomas Furniture Co., 3 Temp. Pol. & Civ. Rts. L. Rev. 89, 90 (1993) (writing that *Williams "*appears in most of the contracts casebooks currently available from the major law casebook publishers.").

[6] 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

[7] Hawkins v. McGee, 146 A. 641 (S.Ct. N.H., 1929); Raffles v. Wichelhaus, 159 Eng.Rep. 375 (Ex. 1864); Sherwoood 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.").

[8] See., e.g, Kennedy, *supra* note 5 at 225; Blake Morant, *The Relevance of Race and Disparity in Discussions of Contract Law* 31 New Eng. L. Rev. 889 (1997); Spence, *supra* note 5, at 89; Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value* 3 COLUM J. RACE & L. 23, 24 (2013).

[9] 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.

[10] 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); [10] 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-

What's more, many of the supplementary notes and readings that accompany *Williams* in casebooks reinforce the case's association with racialized subjects such as welfare,[11] inner-cities,[12] and economic exploitation.[13] 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.[14]

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.[15] 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.

The Article begins by tackling the second of these two questions, interrogating what it means to say that race is relevant to *Williams v. Walker-Thomas*. Given the absence of explicit racial identification in the courts' opinions, and the frequency with which white racial identity is unmarked in US culture, one might readily imagine that Ora Lee Williams was white. Yet, even if this had been true, race would have undoubtedly mattered to the *Williams'* disposition. Part I unpacks this potential puzzle by detailing the many different ways that race shaped *Williams v. Walker-Thomas,* from the circumstances that gave rise to the dispute, to the litigation and the DC Circuit Court's decision. A range of elements—including the business practices of Walker-Thomas Furniture Company, the neighborhood in which Ora Lee Williams lived, the national conversations about urban poverty and consumer exploitation, and the legal profession's interest in a nascent "law of the poor,"— worked separately and together to create the undeniably racialized setting of the *Williams* dispute and disposition.[16]

The racial milieu described in Part I would not necessarily guarantee, however, that subsequent readers of Wright's *Williams* opinion would think race relevant to the case, especially given the absence of race-specific language in the opinion itself. Part II consequently turns to the

---

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).

[11] 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.").

[12] 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.)

[13] 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).

[14] Also with gender and poverty – see Part III infra.

[15] 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." Morant, *supra* note 8, at 926 n. 208.

[16] Anne Fleming.

racial context that followed Wright's 1965 opinion, illustrating why race has in fact only become more salient in *Williams* as the years have passed. More specifically, I explore the resonances between the Moynihan Report and *Williams v. Walker-Thomas*, offering the first scholarly account of the kinship between these two influential racial texts.[17] Written by then-Assistant Secretary for Labor Daniel Patrick Moynihan, *The Negro Family: The Case for National Action* (subsequently known as 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.[18] 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, thus entrenching the mythic image of the bad Black mother in US public sphere.[19] The racial grammar that the report entrenched continues to shape race's legibility in *Williams*.[20]

This is not to say that *Williams* is exclusively about race, of course. Indeed, the racialized imagery that the case invokes—of welfare queens and of bad Black mothers—is also gendered and classed as well. For this reason, in the third Part of the Article, I home in on the intersections of race, gender, and poverty in the *Williams* story by offering an alternative version of the opinion that is rooted in the path not taken on appeal. On its first appeal the *Williams* case was consolidated with another, *Thorne v. Walker-Thomas Furniture Co.*, a case whose primary appellant (William Thorne) was a married, employed (and possibly white) man.[21] Given these differences, imagining this other *Walker-Thomas* helps puts the role of gender and poverty in the *Williams* case into sharper relief. After providing readers with a glimpse of what this "other *Walker Thomas*" opinion might have looked like, Part III explores the ways that the case's subsequent racialization likely would and would not have differed. These possible scenarios suggest that race's relevance to *Walker-Thomas* owes less to Ora Lee Williams's actual racial identity than it does to the following: 1) the ways that race structured the world in which Williams lived in 1965, and 2) the racialized imagery available to those of us reading *Williams* in the present.

I conclude by offering some thoughts on the place of race in contract law generally.

I. Is Race Relevant?

This part charts the myriad ways that race mattered in *Williams*. As you can see from the the headings below, I plan to divide the context provided in this section temporally, focusing on:

---

[17] Of course, many scholars have written about stereotypes generally and the welfare queen trope specifically in relation to *Williams*. None of these articles, however, explicitly engage with the Moynihan Report. Similarly, none of the scholarship that takes the Moynihan Report as its focus addresses its relationship to *Williams v. Walker-Thomas Furniture.*

[18] 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).

[19] For more on Moynihan's use of sociological studies, see RODERICK FERGUSON, ABERRATIONS IN BLACK, *supra* note x.

[20] Hortense Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*.

[21] As will be discussed in Part III, there is conflicting evidence about the race of William and Ruth Thorne (both of whom were named appellants in the case). The only Ruth and William Thorne found in the relevant census records were white, but some of the demographic details listed on these records (most notably, William Thorne's education) do not align with the facts described in the attorney's briefs. Nevertheless, when searching DC area phone books during the years the Thornes had Walker-Thomas contracts, I could find no record of a Ruth or William Thorne living at either of the addresses provided on the contracts themselves.

A. A Racialized World: Describing Ora Lee Williams's social and economic world in late 1950's and early 1960s Washington DC, as well as Walker-Thomas Furniture Company's well-documented (and exploitative) business practices.
B. From Dispute to Disposition: The case's legal filings and the racialized language used therein. In addition, I intend to touch on the DC Circuit Court's approach to the *Williams* opinion-as documented in Anne Fleming's history of the case. In particular, I want to highlight Skelly Wright's explicit concern with urban poverty and developing a "law of the poor."
C. Afterlife in Law and Culture: The case's immediate impact post decision. As Fleming and others have documented, the *Williams* decision was quickly taken up by lawyers and legislators concerned with consumer protection. I want to situate this concern within in the broader national conversation that was taking place about riots, urban Black poverty, and the absence of economic opportunity in "inner cities."

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

[Eloquent and engaging introduction to come]

A. A "Tangle of Pathology"

"The United States is approaching a new crisis in race relations."[22]

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."[23]

Black women are central to Moynihan's diagnosis of the "fundamental problem" with Blackness.[24]According to the report: 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 that Moynihan tells about Black women before he even names Black matriarchy as the root of the tangle of pathology. By the time the report gets to its chapter on "The Tangle of Pathology," wherein Moynihan infamously discusses Black matriarchy, Black women have been established as a site and source of dysfunction in Black communities. At every turn, Black women are the hypervisible indices of Black family pathology.[25]

---

[22] Daniel Patrick Moynihan, The Negro Family: The Case for National Action (1965).
[23] Id. at 29.
[24] Moynihan, *supra* note x, at ii.
[25] Omnibus footnote re: hypervisibility: Patricia Hill Collins, bell hooks, Daphne Brooks, Jayna Brown, Simone Browne, Nicole Fleetwood, Imani Perry, Dorothy Roberts, Cheryl Harris, Wahneema Lubiano, Hortense Spillers, etc.

Moynihan uses a range of sociological and statistical evidence to establish Black women and girls as the problem. Quotations from, and citations to, sociological studies of Black families are included alongside analyses of demographic data, presented in a wide range of eye-catching percentages, tables, and graphs.[26] The statistics he uses include rates of "broken homes," "illegitimacy" ratios, unemployment numbers, fertility rates and family size, percentage of female-headed households, welfare support rates, and numbers of boys enrolled in school.[27] These metrics have persisted as touchstones for the kinds of evidence that matters for understanding Black communities.[28]

Importantly, three of these metrics—fertility, "broken" or female-led households, and welfare—find close parallels in the facts and framing of the *Williams* case. They also re-emerge and are re-constituted in subsequent incarnations of the bad Black mother mythos. Indeed, they are constitutive elements of the archetype. For that reason, in the section that follows, I provide detailed examples of what the "data" for these three characteristics looked like in the context of the report.[29]

1. "Broken" Families and Welfare Dependency

From its very first pages, the report establishes family structure as "the fundamental problem" in the "Negro American community."[30] According to Moynihan, "the evidence—not final, but powerfully persuasive is that the Negro family in the urban ghettoes is crumbling." And without a strong family structure the Black community will be trapped in a "cycle of poverty and disadvantage."[31] Moynihan describes this cycle of poverty and disadvantage as being characterized by high unemployment rates for Black men, lower rates of education for Black boys, high rates of delinquency and crime in Black communities, lower IQ scores for Black children, and—importantly, for any discussion of *Williams*—a "startling increase in welfare dependency" among single Black mothers.[32]

Thus, much of the report is dedicated to walking readers through the data that Moynihan considers to be "powerfully persuasive" evidence of a crumbling Black family structure. The first of which addresses Black Americans' failure to adhere to the norms of white heterosexual marriage.[33] For Moynihan, this failure has two different indices: 1) the dissolution of Black

---

[26] It is important to note, however, that many of Moynihan's qualitative sources, such as E Franklin Frazier and Margaret Mead, for example do not actually make this claim about matriarchal family structure.

[27] Moynihan.

[28] See I.B *infra*.

[29] Moynihan, *supra* note x, at 4. (There is no very satisfactory way, at present, to measure the social health or social pathology within an ethnic, or religious, or geographical community. Data are few and uncertain, and conclusions drawn from the, including the conclusions that follow, are subject to the grossest error. Nonetheless, the opportunities, no less than the dangers, of the present moment, demand that an assessment be made.").

[30] Id.

[31] Id.

[32] Moynihan at 12.

[33] Moynihan is quite explicit about using white families as the benchmark against which he is measuring Black families. In the section on marriage—as well as throughout the report—Black or "nonwhite" rates are compared to those of the white population. His belief in a white benchmark is not merely an implication of the demographic categories that Moynihan uses for his analysis, he explicitly states it in the body of the report as well. For example, in the introduction to the first chapter Moynihan writes that "the white family has achieved a high degree of stability. By contrast, the family structure of lower-class Negroes is highly unstable, and in many urban centers, is approaching complete breakdown." Id., at 5. Throughout the rest of the chapter, white family stability is the ideal against which Black families are compared, even though Moynihan himself acknowledges that some ethnic groups

marriages, and 2) numbers of Black children born outside of marital couples, aka "illegitimacy ratios."[34] Using data from the 1960 Census on white and non-white marriages, Moynihan deduces that "nearly a quarter" of Black urban marriages are "dissolved."[35] Moynihan's concern about the number of ever-married Black women who are "divorced, separated, or are living apart from their husbands"[36] has clear implications for the *Williams* case. Ora Lee Williams would have fallen into this category of concern, given that she was "separated from her husband" and living in the "urban frontier" where Moynihan believed Black families were crumbling fastest.[37]

The report goes on to underscore the seriousness of this "high rate of divorce, separation, and desertion," by explaining that it is the direct cause of the "large percent" of female-led Black households.[38] Within the language and logic of the report, female-led households are synonymous with "fatherless families," and "broken homes." For Moynihan, children living in female-led households are by definition growing up in broken homes and without a lifelong paternal influence. In this way, Moynihan couples marital dissolution and fatherlessness and defines both phenomena as familial breakdowns. Again, Ora Lee Williams's family fits the bill here. She was living apart from her husband *and* raising their children without his assistance—a fact that both of the published *Williams* opinions note. In addition, and consistent with Moynihan's concerns about families like hers, Williams was receiving assistance from AFDC.

Williams's receipt of government support matters, of course, because "welfare dependency" is the final link in the chain of this particular argument about Black family instability.[39] Moynihan states quite directly—and in a section heading, no less—that "the breakdown of the Negro family has led to a startling increase in welfare dependency."[40] Side-by-side graphs—pictured below—visually reinforce Moynihan's point by illustrating two correlated trends: 1) the increase in nonwhite female led households, and 2) the increase of children on AFDC with absent fathers.

[images of graphs]

Many scholars have pointed out the flaws in Moynihan's reasoning here, most significantly his mistaking of correlation for causation.[41] As historian Susan Greenbaum and others have explained, the "startling" rise in welfare enrollment that Moynihan describes, coincided with the loosening of eligibility requirements for AFDC, which increased the number of people able to receive support in the first place.[42] Nevertheless, Moynihan interpreted the "steady expansion" of AFDC and other forms of public assistance as a "measure of the steady disintegration of the Negro family structure."[43] In so doing, Moynihan tethered the idea of households led by single Black mothers to concerns about welfare use and government welfare spending. And as I discuss in the sections

---

as well as middle-class Black Americans might put an even "higher premium on family stability and the conserving of family resources than does the white middle-class family." 6. Nevertheless, at no point does Moynihan suggest that these non-white families should be the standard.

[34] Id.

[35] Id.

[36] Id. at 6.

[37] "urban frontier" – Id. at 8.

[38] This "large" number is twenty-one percent in 1960, up from eighteen percent ten years prior.

[39] Id. at 12.

[40] Id. at 12.

[41] Greenbaum, Geary, Ferguson, Hancock.

[42] Greenbaum supra note x, at 33.

[43] Moynihan at 14.

that follow, this linkage of single Black mothers to welfare has become one of the most familiar and well-documented legacies of the Moynihan Report.

2. A Growing Problem

There is one other way that the report implicates Black women in the "tangle of pathology" that I want to foreground here, which is its claim that Black women's fertility is contributing to the challenges facing the Black community. In his chapter on the "roots of the problem," Moynihan argues that the "problems" are both growing and "compounded" by the "extraordinary growth" in the Black population.[44] For Moynihan, this population growth is owing to Black women's greater fertility as compared to white women. As he explains, "Negro women not only have more children, but have them earlier"[45] Of particular concern for Moynihan is that "those Negro families with the least financial resources" are the ones having children most "rapidly."[46] Given his anxieties about Black women's fertility, it is easy to imagine that Moynihan would have disapproved of the fact that Ora Lee Williams had seven children.

Readers familiar with African American history will certainly recognize the ways that these claims about Black women's fertility echo longstanding and pernicious discourses about Black women's sexuality and mothering. That enslaved Black women were hypersexual and hyperfertile was an oft-told lie during slavery, one that had clear benefits for those who stood to proft from Black women's reproductive labor.[47] After slavery's end, when Black women's supposed hyper-fertility was no-longer profitable, it instead became the source of much hand-wringing. One can find many nineteenth and early twentieth-century news articles assuaging white readers' fears that the Black population might soon overtake the white population. In these articles, as in the Moynihan Report, it is Black women's fertility relative to white women that is cause for concern.[48]

Much like these early articles, the Moynihan Report stresses the comparative fertility rates between Black and white women. Where it differs, is in its focus on the harms that higher fertility rates have on Black communities. The report makes it clear that having kids early and having more than the (white) average of 3.5, traps both Black parents and their children in a cycle of low-education, low-income levels, and poverty. As Moynihan writes, having "too many children too early make it most difficult for the parents to finish school."[49] And though he uses the gender-neutral term "parent," the statistics he references to support this claim make it clear that he is talking about mothers, not fathers.[50] By this logic, Williams's eighth-grade education—referenced in the DC Court of Appeals' opinion—could very likely have been due to her status as a parent.

To be clear, Moynihan did not invent the report's image of a broken Black family and pathological Black communities whole cloth. Rather, like a patchwork quilt, he pieced it together from cultural narratives borne of slavery,[51] from early sociological studies that sought to quantify

---

[44] Moynihan at 25.
[45] Id. at 25.
[46] Id. at 27.
[47] Long slavery/reproductive labor footnote.
[48] One such example is a 1903 *Washington Post* article that speculates as to whether "the colored population of the United States is increasing out of proportion to the increase in number of whites." *Race Suicide Problem*, Washington Post, 1903 p.E7. Its speculation bears a striking resemblance to Moynihan's claim that "the Negro fertility rate overall is now 1.4 times the white," and that in just seven years "1 American in 8 will be nonwhite."
[49] Id. at 27.
[50] Id. at 27. ("In February, 1963, 38 percent of the white girls who dropped out of school did so because of marriage or pregnancy, as against 49 percent of non-white girls. An Urban League study in New York reported that 44 percent of girl dropouts left school because of pregnancy.").
[51] See, e.g., Hazel Carby, Patricia Hill Collins, Dorothy Roberts, Sabrina Strings.

and consequently contain the "race problem,"[52] and from culture of poverty theses that were gaining popularity in the 1960s.[53] Simply, Moynihan was hardly the first person to make any of the claims presented in his report. Be that as it may, the Moynihan Report remains, however, one of the most influential texts to pathologize Blackness in general, and Black women in particular in US culture.

B. Welfare Queens and Bad Black Mothers

In this section I plan to sketch two cultural flash points that have amplified the racial scripts nascent in *Williams*. These rhetorical symbols—the welfare queen, and the "crack mothers" of the 1990s—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 have made race increasingly salient in the text of *Williams.* To be sure, these are not the only representations that would have impacted race's salience in the *Williams* opinion. An exhaustive accounting of the changing discourses surrounding Blackness, single motherhood, and poverty is well beyond the scope of this Article. Rather, I focus on these two images in particular due to the wealth of existing feminist scholarship about bad Black mothers, welfare queens, and "crack moms." Much of this feminist scholarship highlights the ways that this imagery dovetails with discourse about personal choice and government spending, themes that find parallels in the classroom conversations about *Williams* that have been documented in the pedagogical literature.

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?"[54] 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. Therefore, using facts found in 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.*[55] 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.

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:

---

[52] See, e.g., Roderick Ferguson, Gibran Muhammed.

[53] See sources cited at note x and accompanying text, *supra*. (Part I.A.)

[54] 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.).

[55] 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).

- 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.[56] 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.'"[57] 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."[58]

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

This section will include the rewritten opinions, as well as additional information about Ruth and William Thorne.

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.[59] These included *a bedspread, curtains, rugs, tables, lamps, a freezer, a used refrigerator, an antenna and a television.*[60] 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.

---

[56] See, e.g., Nyong'o *Unburdening Representation*; Nash, Review of *Wayward Lives* 125 Am. Historical Rev., 595 (2020).
[57] Saidiya Hartman, *Venus in Two Acts,* 26 SMALL AXE, 1, 11(2008).
[58] Id.
[59] 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.
[60] Dostert, 1184.

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

[TK]

Conclusion: Race, Contracts, and Pedagogy

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. *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).[61] 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.[62] 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 been rendered absent in the official version of modern art history."[63] 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."[64] 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.

This seems especially true for contracts. 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

---

[61] See, for example, DAPHNE BROOKS, BODIES IN DISSENT: 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).

[62] 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").

[63] Mercer, at 62.

[64] Mercer, at 62.

of "the role of African Americans and race in the development of modern contract law."[65] 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.[66] Against this historical backdrop, the dearth of race-focused cases and conversations in the first-year contracts course should hardly come as a surprise.

When combined with legal pedagogy's norm of "perspectivelessness," introducing race into a race-less contracts classroom becomes a significant challenge.[67] 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."[68] As Crenshaw, and many others since, have observed, it is not possible to truly teach law free from any perspective.[69] 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 in the classroom.[70] 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

---

[65] Dylan Penningroth, Race in Contract Law, 1202.

[66] Id.

[67] 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.").

[68] Crenshaw, *Foreword*, 2.

[69] 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."); Zalesne, *supra* note 8, at 24 ("[S]tudents who assume neutrality and objectivity accept a flawed analytical structure.").

[70] 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.

economic paradigm of transactional law, disregarding critical legal theory."[71] Similar observations have been made about property and business law courses as well.[72]

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.[73] 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. 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."[74] In simple terms, this means that contract law "is not and should not be concerned with the distribution of wealth in society."[75] 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.[76] 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.

---

[71] 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.

[72] 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. 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.

[73] 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).

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

[75] Davis & Pergendler, 1492.

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

But race, as a subject of historical and critical attention, encompasses more than analyses of inequality and discussions of distributive justice.[77] There is a rich world of critical theories of race that take the concept of race itself as their starting point.[78] 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" upon which liberal thought is based.[79] Consequently, 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?[80] Is the concept of "legal capacity" inherently racialized, and how might this impact the way capacity does or should function within contract law?[81] 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?[82] 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.

---

[77] 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).

[78] 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.

[79] 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.

[80] 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").

[81] 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).

[82] 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 a life of enslavement—with her owner).