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## The Rise and Fall of Unconscionability as the 'Law of the Poor'

Anne Fleming


*Georgetown University Law Center*, [acf80@law.georgetown.edu](mailto:acf80@law.georgetown.edu)

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# The Rise and Fall of Unconscionability as the “Law of the Poor”

ANNE FLEMING\*

*What happened to unconscionability? Here’s one version of the story: The doctrine of unconscionability experienced a brief resurgence in the mid-1960s at the hands of naive, left-liberal, activist judges, who used it to rewrite private consumer contracts according to their own sense of justice. These folks meant well, no doubt, much like present-day consumer protection crusaders who seek to ensure the “fairness” of financial products and services. But courts’ refusal to enforce terms they deemed “unconscionable” served only to increase the cost of doing business with low-income households. Judges ended up hurting the very people they were trying to help. In the face of incisive criticism, judicial enthusiasm for the doctrine of unconscionability quickly faded. A new consensus emerged in favor of legislation requiring better disclosure of consumer contract terms ex ante, rather than ex post judicial review.*

*This Article presents a different narrative, one that is informed by extensive research in previously untapped archival sources. In this story, the wise legislature does not overrule the misguided courts. On the contrary, it reveals that lawmakers laid the groundwork for the judicial revival of unconscionability, and then rewrote statutory rules to codify the ensuing court decisions. In the District of Columbia, home to the famous Williams v. Walker-Thomas Furniture Co. litigation, the legislature revived unconscionability through the enactment of the Uniform Commercial Code (U.C.C.), which reintroduced the once-archaic doctrine into the legal vernacular. Just as the U.C.C. drafters intended, unconscionability review allowed courts to do openly what they had been doing covertly for years—refuse to enforce harsh, one-sided bargains as written. In 1965, the D.C. Circuit seized the opportunity unconscionability offered to prevent the loss of a poor woman’s furniture. But the Williams litigation also did something more. It drew public attention to the controversy before the court*

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\* Climenko Fellow and Lecturer on Law, Harvard Law School; Associate Professor of Law Designate, Georgetown University Law Center. © 2014, Anne Fleming. For valuable comments and questions, I thank the participants at the 2013 American Society for Legal History annual meeting, the Hurst Institute, the Boston College Legal History Roundtable, and the Climenko ad hoc workshop. I am also grateful to each of the law school faculty members who discussed these ideas with me, during interviews and workshop presentations over the fall and winter of 2013–14. Greg Ablavsky, Douglas Baird, Tomiko Brown-Nagin, Akiba Covitz, Christine Desan, Jacob Gersen, Sarah Barringer Gordon, Michael Katz, Duncan Kennedy, Michael Klarman, Adriaan Lanni, Sophia Lee, Adam Levitin, Walter Licht, Ken Mack, Stewart Macaulay, Bruce Mann, Serena Mayeri, Justin Simard, Joseph Singer, Tom Sugrue, Susannah Barton Tobin, William Whitford, and Tess Wilkinson-Ryan each provided wise suggestions and helpful criticism on early drafts. My thanks also to the editors of *The Georgetown Law Journal*, and to the staff and librarians of the Library of Congress, the National Archives and Records Administration, the Ford Foundation, the Archives of the Biddle Law Library, and the Clerk’s Office of the D.C. Court of Appeals.

and alerted D.C. lawmakers to a recurring problem in need of a legislative fix. In response, local leaders set to work drafting consumer credit reform legislation. Lawmakers eventually adopted a firm set of rules to govern “installment” sales contracts in the District of Columbia, including a ban on the objectionable contract term at issue in *Williams*.

In this narrative, judges and legislators did not advance competing regulatory visions. They agreed on the need for substantive limits on installment sales to poor borrowers. Moreover, contrary to what some scholars might predict, litigation did not divert scarce resources down a dead-end path. Rather, it catalyzed the process of legislative change, raising public consciousness of problems in the low-income marketplace and fueling the drive for substantive reforms on the local level.

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## INTRODUCTION

In July 1967, Judge Skelly Wright was hopeful about the future of unconscionability.<sup>1</sup> President Lyndon B. Johnson's War on Poverty was well underway, and battalions of lawyers had been deployed across the country to provide free legal assistance to low-income Americans. Wright predicted that the doctrine of unconscionability would prove "very helpful" in their work.<sup>2</sup> Two years earlier, he had authored the majority opinion in *Williams v. Walker-Thomas Furniture Co.*, one of the first decisions in the country on unconscionability.<sup>3</sup> The opinion declared that courts in the District of Columbia could refuse to enforce a sales contract if the bargain was "unconscionable"—meaning that there was "an absence of meaningful choice" for one party along with "terms which are unreasonably favorable to the other party."<sup>4</sup> *Williams*, a single mother of seven on public assistance, had bought some household goods on credit from a local furniture store.<sup>5</sup> When she defaulted, after paying off most of the debt, the store claimed the right to repossess everything *Williams* had purchased during the previous five years.<sup>6</sup> Wright found that the store's contract was potentially "unconscionable" and therefore unenforceable.<sup>7</sup>

Wright described the *Williams* decision, and unconscionability more generally, as part of a "growing area of the law—the law of the poor."<sup>8</sup> His use of this phrase in 1967—the "law of the poor"—was no doubt deliberate. Two years before, legal scholar and disability rights advocate Jacobus tenBroek had defined the "law of the poor" as "a body of laws governing the poor, regarded as a distinct class in society."<sup>9</sup> The rules that governed and defined the "legal status" of the poor were not of "general application," tenBroek observed.<sup>10</sup> The field cut cross across a range of substantive areas, including landlord–tenant, family, and social welfare law.<sup>11</sup> Wright understood *Williams* in tenBroek's terms, as

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1. Letter from Hon. J. Skelly Wright to William E. Shipley, The Lawyers Cooperative Publ'n Co. (July 12, 1967) (J. Skelly Wright Papers, 1962–1987, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress). The Lawyers Cooperative Publishing Company is now part of Thompson West. *Williams* was included in the American Law Reports entry on "'Unconscionability' as ground for refusing enforcement of contract for sale of goods or agreement collateral thereto." Letter from William E. Shipley, The Lawyers Cooperative Publ'n Co., to Hon. J. Skelly Wright (July 7, 1967) (J. Skelly Wright Papers, 1962–1987, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress). The entry first appeared in 1968. See V. Woerner, Annotation, "*Unconscionability*" as Grounds for Refusing Enforcement of Contract for Sale of Goods or Agreement Collateral Thereto, 18 A.L.R.3d 1305 (1968).

2. Letter from Hon. J. Skelly Wright to William E. Shipley, *supra* note 1.

3. 350 F.2d 445 (D.C. Cir. 1965).

4. *Id.* at 449.

5. *Id.* at 448.

6. *Id.* at 447.

7. *Id.* at 450.

8. Letter from Hon. J. Skelly Wright to William E. Shipley, *supra* note 1.

9. Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part III*, 17 STAN. L. REV. 614, 614 (1965).

10. *Id.*

11. Michael E. Tigar, *Symposium: Introduction*, 54 CALIF. L. REV. 322, 323–24 (1966).

part of a body of decisions that defined the relationship between poor families and the government officials, landlords, and merchants who served them.<sup>12</sup> He hoped that *Williams* marked a turning point in the “law of the poor,” offering litigants a way around the old rules that had “cooperated” in creating and perpetuating “the injustice involved in the way many of the poor were required to live in the nation’s capital.”<sup>13</sup>

At first blush, it would seem that the case fell far short of Wright’s expectations. By the dawn of the twenty-first century, unconscionability had lost much of its initial promise as a tool for protecting poor consumers. Looking back, it is clear that the doctrine reached the height of its influence within the decade following *Williams*.<sup>14</sup> Today, it is rarely invoked to protect low-income borrowers.<sup>15</sup> Lawyers most often raise the defense to invalidate arbitration provisions in consumer contracts, as in the recent Supreme Court case of *AT&T Mobility LLC v. Concepcion*.<sup>16</sup>

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12. See J. Skelly Wright, *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425, 426–30 (describing the poor’s relationship with the law, focusing on the small claims courts, police courts, and landlord–tenant courts where “the poor get short shrift”).

13. In a 1982 letter, Wright explained that he thought law could be used as a tool to combat injustices against the poor. Letter from Hon. J. Skelly Wright to Professor Edward H. Rabin, Univ. of Cal., Davis Sch. of Law (Oct. 14, 1982), in Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984). Of his decisions in landlord–tenant cases, he wrote:

I didn’t like what I saw, and I did what I could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation’s capital.

I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust.

*Id.* Wright also understood that poverty was disproportionately concentrated among urban minorities. Wright, *supra* note 12, at 426; J. Skelly Wright, *The Courts Have Failed the Poor*, N.Y. TIMES, Mar. 9, 1969, § 6 (Magazine), at 26 (noting that “particularly in the inner city, a vastly disproportionate number of the poor are Negroes”).

14. See Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV. 1, 39 (2005) (noting that “courts have historically been extremely reluctant to label loans unconscionable” and that today “unconscionability standards provide more of a facade of fairness, rather than an effective instrument of consumer protection”).

15. *But see* State *ex rel.* King v. Fastbucks Holding Corp., No. D0101-CV-2009-01917, slip op. at 5–6 (N.M. 1st Jud. Dist. Sept. 26, 2012), available at <http://www.creditslips.org/files/fastbucks-decision-1.pdf> (finding payday lender’s practices “unconscionable” and requiring payment of restitution).

16. 131 S. Ct. 1740 (2011). Unconscionability has become a favored defense against arbitration because it is one of the few state law defenses not preempted by the Federal Arbitration Act. See Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 48 (2006) (reviewing all unconscionability cases decided by the California Courts of Appeal from August 27, 1982, to January 26, 2006, and finding 114 cases challenging arbitration agreements (with 53% success rate) and 46 cases challenging ordinary contracts (with 11% success rate)); Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1097 (2006) (analyzing a sample of 148 reported federal court decisions from 1968–1980 and 1991–2003 and finding that only 30% of cases involved a sale of goods); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004) (finding that 68.5% of all unconscionability cases from 2002–2003—235 total—challenged arbitration agreements rather than ordinary contracts and that arbitration cases had a

*Williams* has had far greater influence and staying power in the classroom than in the courtroom. It remains a darling of contracts scholars and a staple of the first-year law school curriculum. The vast majority of contracts casebooks include the opinion.<sup>17</sup> Few would dispute that *Williams* is “still the most famous unconscionability case of all.”<sup>18</sup> At last count, over seven hundred law review articles cited the decision.<sup>19</sup> Many use the *Williams* fact pattern to raise normative questions about what the law should be or apply the methods of law and economics to weigh the costs of the ruling as a matter of public policy.<sup>20</sup> Others cite the case as a shared point of reference, a starting point for spinning out a hypothetical scenario that bears little resemblance to the underlying dispute.<sup>21</sup> A few raise pedagogical questions about how to teach the case without reinforcing “raced tropes linking poverty, lack of education, single parenthood, and lack of capacity with black women.”<sup>22</sup> In short, *Williams* has proved a far more “helpful” precedent—to use Wright’s words—for legal academics than for poverty lawyers.

What happened? Here’s one version of the story: The doctrine of unconscionability experienced a brief resurgence in the mid-1960s at the hands of naive, left-liberal, activist judges, who used it to rewrite private consumer contracts according to their own sense of justice. These folks meant well, no doubt, much like present-day consumer protection crusaders who seek to ensure the “fairness” of financial products and services. But courts’ refusal to enforce terms they deemed “unconscionable” served only to increase the cost of doing business with low-income households. Judges ended up hurting the very people they were trying to help. In the face of incisive criticism, judicial enthusiasm for the

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higher success rate—50.3% compared to 25.6%); Paul Thomas, *Conscionable Judging: A Case Study of California Courts’ Grapple with Challenges to Mandatory Arbitration Agreements*, 62 HASTINGS L.J. 1065, 1083 tbl.1 (2011) (finding that the vast majority of unconscionability cases decided between 2005 and 2008 by the California Courts of Appeal—89 out of 119—challenged arbitration agreements).

17. One recent survey of twenty contracts casebooks found that the *Williams* decision appears in all but two. Russell Korobkin, *A “Traditional” and “Behavioral” Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441, 441, 442 n.12 (2004). Another survey from 1994 found the case in almost all casebooks. Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 90 & n.5 (1994).

18. 1 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 659 (3d ed. 2010).

19. A Westlaw KeyCite search performed on August 7, 2012, for all law review articles citing *Williams* returned 743 results. A LEXIS search on the same date found 643 articles.

20. See, e.g., ROBERT COOPER & THOMAS ULEN, *LAW & ECONOMICS* 304–07 (5th ed. 2008); Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 738–40 (2005) (using the *Williams* fact pattern to illustrate how to apply “credibility analysis”); Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1431–33 (2004) (using the *Williams* fact pattern to show the application of the author’s “underestimation theory”); Korobkin, *supra* note 17, at 441 (not analyzing Wright’s decision in *Williams*, but rather considering whether the lower court on remand should have found the *Williams* contract at issue unconscionable, applying both “traditional” and “behavioral” economic analysis).

21. See, e.g., Scott R. Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. REV. 676, 681–82 (2012) (suggesting that if the *Williams* transaction were replicated today, the borrower might have comparison shopped with an iPhone).

22. Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 306 (1994); Spence, *supra* note 17, at 95.

doctrine of unconscionability quickly faded. A new consensus emerged in favor of legislation requiring better disclosure of contract terms *ex ante*, rather than *ex post* judicial review.<sup>23</sup>

This Article presents a different narrative, one that is informed by extensive research in previously untapped archival sources.<sup>24</sup> In this story, the wise legislature does not overrule the misguided courts. On the contrary, it reveals that lawmakers laid the groundwork for the judicial revival of unconscionability and then rewrote statutory rules to codify the results of the ensuing litigation. Judges and legislators did not advance competing regulatory visions. They agreed on the need for substantive limits on installment sales to poor borrowers. Moreover, contrary to what some scholars might predict, litigation did not divert scarce resources down a dead-end path.<sup>25</sup> Rather, it catalyzed a process of legislative change, raising public consciousness of problems in the low-income

23. This account is drawn from: Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 307, 315 (1975) (arguing that add-on clauses “make good sense in the cases to which they apply” and that substantive unconscionability review “serves only to undercut the private right of contract in a manner that is apt to do more social harm than good”); 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, 580 (1989) (“Casebook notes and questions, and a few articles suggest that *Williams* now plays a very different role in the drama of this era. Writers see the case as an expression of knee-jerk liberalism.” (footnote omitted)); Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 875–80 (2003) (describing federal preemption of state substantive lending regulation and the creation of a federal disclosure-based regime in the 1960s and 1970s); Dee Pridgen, *Putting Some Teeth in TILA: From Disclosure to Substantive Regulation in the Mortgage Reform and Anti-Predatory Lending Act of 2010*, 24 LOY. CONSUMER L. REV. 615, 619 (2012) (describing disclosure as “a preferred approach to problems in consumer credit”); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 535–36 (1988) (noting that the “landmark decisions declining enforcement of written provisions,” such as *Williams*, “are beginning to stand out in the casebooks as curiosities”); Eben Colby, Comment, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625, 657–58 (2002) (arguing that “truth-in-lending” legislation had a greater influence than unconscionability on lenders to the poor).

24. Out of the many law review articles about *Williams*, only one comment explores the history of the case. It examines the effect of the *Williams* decision on Walker-Thomas Furniture’s subsequent business practices. See Colby, *supra* note 23, at 646–60. Colby concludes that *Williams* had little impact on Walker-Thomas Furniture’s lending practices, based on published decisions, articles, and a 2001 telephone interview with an unidentified “attorney who has represented the Walker-Thomas Furniture Company.” *Id.* at 649 n.183, 660. Some contracts casebooks also present the *Williams* opinion in historical context, alongside excerpts from 1960s and 1970s law review articles on unconscionability or empirical studies of lending. See E. ALLAN FARNSWORTH ET AL., *CONTRACTS* 497–503 (7th ed. 2008); 1 MACAULAY ET AL., *supra* note 18, at 658–718.

25. On the choice between markets, litigation, and legislation in dealing with “boilerplate” contract terms, see, e.g., William C. Whitford, *Contract Law and the Control of Standardised Terms in Consumer Contracts: An American Report*, 3 EUR. REV. PRIVATE L. 193, 194 (1995). For skepticism that litigation can lead to social change, see, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 3 (Benjamin I. Page ed., 1991); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 151 (1974) (“We have surmised that court-produced substantive rule-change is unlikely in itself to be a determinative element in producing tangle redistribution of benefits.”).

marketplace and fueling the drive for substantive reforms on the local level.<sup>26</sup>

This Article argues that *Williams* captures a moment of transition in the law of the poor, but the arc of the narrative does not follow the trajectory Wright envisioned. *Williams* did not launch a poor people's consumer rights movement.<sup>27</sup> There was no *Williams* analog to the tenants' rights revolution sparked by Wright's decision in *Javins v. First National Realty Corp.*, which recognized an implied warranty of habitability.<sup>28</sup> Instead, the *Williams* litigation served a different function. It triggered the enactment of statutory reforms.<sup>29</sup> Within a decade of the *Williams* decision, Congress passed a new set of bright-line rules to govern transactions between poor consumers in the District of Columbia and merchants like Walker-Thomas Furniture.

The case came before the court at a critical juncture, when the simmering discontent of poor consumers was about to boil over in the urban riots of the mid-1960s. In response to this rising pressure from below, the decision opened a temporary "safety valve."<sup>30</sup> It prevented an undesirable result in the case before the court, while at the same time alerting D.C. lawmakers to a recurring problem in need of a legislative fix. D.C. leaders got the message. They set to work drafting consumer credit reform legislation. References to *Williams* and "the Ora Lee Williams situation" recur throughout the ensuing congressional debates.<sup>31</sup> Lawmakers eventually settled on a firm set of rules to govern "installment" sales contracts.<sup>32</sup> They explicitly banned the contract term that

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26. Other scholars have also observed the salience-raising effect of high-profile court cases. *See, e.g.*, Patrick J. Egan et al., *Gay Rights*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 234, 256 (Nathaniel Persily et al. eds., 2008) (arguing that gay-marriage litigation raised the salience of the issue and created a short-term backlash against gay rights); Michael J. Klarman, *Brown and Lawrence* (and Goodridge), 104 *MICH. L. REV.* 431, 453 (2005) (arguing that *Brown* "dramatically raised the salience of the segregation issue").

27. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 *CALIF. L. REV.* 389, 391 n.3 (2011) ("The difficulties that aborted the nascent low-income consumers' revolution [after *Williams*] parallel closely those of the tenants' rights revolution . . .").

28. 428 F.2d 1071, 1082 (D.C. Cir. 1970). For a detailed history of the *Javins* litigation, see Richard H. Chused, Saunders (*a.k.a.* Javins) v. First National Realty Corporation, 11 *GEO. J. ON POVERTY L. & POL'Y* 191 (2004).

29. This is not to suggest that *Javins* had no impact on statutory law. Two years after *Javins*, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Residential Landlord and Tenant Act, later adopted in many states. Anthony J. Fejfar, *Permissive Waste and the Warranty of Habitability in Residential Tenancies*, 31 *CUMB. L. REV.* 1, 12 (2000). The Uniform Act attempts to define what a landlord must do to maintain a habitable dwelling. *Id.* at 14 (observing that "the Act arguably provides a more stringent standard than the common law implied warranty of habitability"). I thank Joseph Singer for alerting me to this parallel.

30. Contracts scholar Charles Knapp has theorized that unconscionability acts as a "safety valve." Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 *SAN DIEGO L. REV.* 609, 609 (2009).

31. *See, e.g.*, *Consumer Protection Legislation for the District of Columbia: Hearings on S. 316, S. 2589, S. 2590, and S. 2592 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 90th Cong. 119 (1968) (statement of Stephen M. Nassau, representing the Consumer Protection Committee of the Greater Washington Chapter of Americans for Democratic Action).

32. *See* District of Columbia Consumer Credit Protection Act of 1971, Pub. L. No. 92-200, sec. 4, 85 Stat. 665, 670 (codified as amended at D.C. CODE § 28-3805 (2012)).



gave rise to the “situation in the *Williams* case,” to ensure that a future Mrs. Williams would not need to rely on unconscionability alone for protection.<sup>33</sup>

Charting the rise and fall of unconscionability as the “law of the poor,” this Article situates the *Williams* opinion as the pivot point in a five-part narrative. Part I sets the stage for the *Williams* litigation. It shows how legal developments intersected with political, social, and economic change in the postwar period to create the two-tiered consumer credit market in which Ora Lee Williams borrowed. It describes how Williams came to do business with Walker-Thomas Furniture, her contracts and ongoing relationship with the store, and the repossession of her purchases. Although Judge Wright would later characterize Williams’s bargain as particularly harsh, the terms and tactics that Walker-Thomas Furniture employed in her case were quite common.

Part II explains how D.C. courts adjudicated disputes over poor people’s contracts before *Williams* and the rise of unconscionability. As historian Allen Kamp has shown, unconscionability was an “obscure” doctrine in American contract law before World War II, “noted only in footnotes or marginal sections of legal texts.”<sup>34</sup> It originated in seventeenth-century English Court of Chancery decisions involving the disposition of family property.<sup>35</sup> Unconscionability was reborn in the 1940s, when it appeared in early drafts of the new Uniform Commercial Code article on sales.<sup>36</sup> Before the District of Columbia adopted the Code in 1963, unconscionability was not recognized as a valid defense in contract disputes.<sup>37</sup> Instead, D.C. lawyers and judges employed other, round-about methods to justify decisions not to enforce harsh, one-sided bargains as written. They might stretch the limits of traditional defenses, or else interpret contract terms in bizarre ways.<sup>38</sup>

Part III reconstructs the full history of the *Williams* litigation. Drawing on archival research from a variety of sources, this research reveals that the case took a surprising and quite fortuitous turn at the eleventh hour of the litigation, when Williams’s appeal reached the D.C. Circuit. Although *Williams* is now famous as a case about unconscionability, the parties almost failed to brief the defense. Williams did not raise unconscionability at trial or during her initial appeal. It arose for the first time when Williams petitioned for review to the D.C. Circuit.<sup>39</sup> In response, the court issued an unusual order, granting review and appointing a local lawyer as amicus curiae. The amicus brief ended up focusing almost entirely on unconscionability. As a result of this unlikely chain

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33. Benny L. Kass, Letter to the Editor, *More Than Case Law Needed*, 55 A.B.A. J. 289, 316 (1969).

34. Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940–49*, 51 SMU L. REV. 275, 312 (1998).

35. *Id.* at 310.

36. *See infra* section II.B.

37. *See* Act of Dec. 30, 1963, Pub. L. No. 88-243, § 28:2-302, 77 Stat. 630, 645 (enacting the Uniform Commercial Code for the District of Columbia). The Code took effect on January 1, 1965.

38. *See infra* section II.C.

39. *See infra* section III.B.

of events, unconscionability became the major issue in *Williams*. Indeed, Judge Wright relied solely on the doctrine to justify the court's decision to reverse the judgment below for Walker-Thomas Furniture and remand the case to the trial court.

Yet, Wright's final published decision contains only traces of his original thinking. As early drafts of the opinion reflect, Wright was particularly worried by Walker-Thomas Furniture's methods of doing business with poor borrowers. Repossession of used merchandise seemed to be part of the Walker-Thomas Furniture business model, rather than an unintended consequence of selling goods on credit to low-income buyers. Wright suspected that the company made a practice of selling unaffordable, high-priced items to its customers when their debts were nearly paid off, with the knowledge that they would likely default. The company could then repossess and resell the items to the next buyer. However, Wright decided not to raise these concerns in the opinion. Instead, after consulting with his colleagues, he shifted the focus of the decision away from the company's pattern and practice of dealing to highlight the unique problems in the transactions before the court.<sup>40</sup> The final opinion portrayed Walker-Thomas Furniture's actions in the two cases as unusually exploitative and the defendants as particularly vulnerable, while understating the novelty of the legal holding.

Part IV describes the wave of federal and local consumer credit regulation that Congress enacted in the wake of *Williams* and the urban uprisings of the mid-1960s. Here, the real impact of *Williams* is apparent. The *Williams* litigation drew attention to abuses in the low-income marketplace and helped bring about the passage of retail installment sales legislation in the District of Columbia. Reformers agreed that judicial policing through the doctrine of unconscionability did not offer a permanent solution to the "*Williams* situation." They sought to preserve unconscionability as a defense for poor borrowers but also pushed for statutory protections that would create bright-line boundaries for installment sellers and buyers, including an outright ban on the "pro rata" allocation of customer payments. They hoped that these rights and regulations would inject some measure of equality and fairness into the consumer contracting process. Thus, in the end, *Williams* played a role in creating a "law of the poor" consumer in the District of Columbia, but not the role that Wright had envisioned.

Part V investigates what happened to *Williams* and Walker-Thomas Furniture after the D.C. Circuit remanded the case to the trial court. Walker-Thomas Furniture eventually went out of business, but modern rent-to-own stores serve a similar clientele. These stores offer a slightly different product, however. They "lease" household goods, rather than selling on the installment plan. As a result,

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40. See Memorandum from Hon. David L. Bazelon to Hon. J. Skelly Wright (July 15, 1965) (J. Skelly Wright Papers, 1962-1987, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress).

rent-to-own transactions generally do not fall within the scope of installment sales regulations. Indeed, in the District of Columbia, rent-to-own stores operate beyond the bounds of the retail installment sales legislation enacted in the wake of *Williams*. Part V concludes with a reflection on the fate of “the law of the poor,” as a conceptual category, and the reasons for its decline in the late twentieth century.

### I. BUYING ON CREDIT IN “THE OTHER AMERICA”

Ora Lee Williams’s case against Walker-Thomas Furniture ended differently than most, but it began in a familiar way. Williams followed a well-worn path out of the South to the urban North, settling in the Northeast section of the District of Columbia by the late 1950s. Educated in southern schools, she completed the eighth grade but did not attend high school. She had married and separated by the time her case against Walker-Thomas Furniture came to trial in 1963.<sup>41</sup> Between 1957 and 1962, Williams supported herself and her seven children on no more than \$218 per month in public assistance. The family lived in the 5500 block of Foote Street in the Northeast quadrant of the District of Columbia. Williams’s neighbors were almost all African-American and over a quarter also lived in poverty.<sup>42</sup>

Walker-Thomas Furniture employed a team of door-to-door salesmen who came to Williams’s neighborhood hawking their wares, part of the “peddler economy” serving low-income consumers in cities across the nation. Agents traveled door-to-door offering a range of household goods on credit.<sup>43</sup> The furniture store’s salesmen doubled as collection agents, picking up monthly or biweekly payments while soliciting new sales.<sup>44</sup> Williams signed sixteen sepa-

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41. Transcript of Record at 44–45, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389). At trial, Williams testified that she had reached the eighth grade. In a later article about the case, her lawyer explained that Williams “had a sixth grade education in a southern school and was just barely literate.” Pierre E. Dostert, *Case Studies in Consumer Fraud*, 25 *BUS. LAW.* 153, 153 (1969).

42. In the late 1950s, Williams received \$179 per month; by the time her case came to trial, she had begun working and her relief payments had been reduced to \$129 per month. Transcript of Record at 45, 54, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389). At the time of her last purchase, she received \$218 per month in relief. *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964). In 1960, Williams’s census tract was 99.8% African-American and 25% of families earned less than \$3,000 per year. Data for D.C. Census Tract 786 (1960), *SOCIAL EXPLORER*, <http://www.socialexplorer.com> (last visited Nov. 25, 2013). In this period, before the release of official federal poverty guidelines, President Johnson’s Council of Economic Advisors set the poverty line at \$3,000 in 1962 dollars for all families, regardless of size. *COUNCIL OF ECON. ADVISORS, 1964 ANNUAL REPORT 58*, available at [http://fraser.stlouisfed.org/publications/erp/issue/1208/download/5639/ERP\\_ARCEA\\_1964.pdf](http://fraser.stlouisfed.org/publications/erp/issue/1208/download/5639/ERP_ARCEA_1964.pdf). Williams’s race does not appear in the court record, but another scholar confirms that Williams was African-American. Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 *NEW ENG. L. REV.* 889, 926 n.208 (1997).

43. *Consumer Credit Labeling Bill: Hearings on S. 2755 Before the Subcomm. on Prod. & Stabilization of the S. Comm. on Banking & Currency*, 86th Cong. 101 (1960) (statement of William Kirk, Union Settlement Association).

44. David I. Greenberg, *Easy Terms, Hard Times: Complaint Handling in the Ghetto*, in *NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM* 379, 381–82 (Laura Nader ed., 1980).

rate contracts with Walker-Thomas Furniture, nearly all in response to a salesman's home visit. She traveled to the company's store only once to make a purchase.<sup>45</sup> The Walker-Thomas Furniture store was located almost six miles from Williams's apartment, at 1031 Seventh Street in Northwest Washington. Merchants serving low-income consumers clustered in a row on Seventh Street, known as an "easy credit" corridor.<sup>46</sup> The Walker-Thomas Furniture store had occupied the same three-story retail space on Seventh Street since 1938, when it moved from its prior location down the block.<sup>47</sup> The storefront was easily recognizable from a distance. A two-story-tall neon sign placed in the center of the yellow brick building advertised the store's name in vertically arranged characters spelling out "Walker-Thomas."<sup>48</sup> From 1940 onwards, the neighborhood around the store was predominantly African-American. By 1960, over ninety percent of the residents were black and over forty percent of families lived in poverty.<sup>49</sup>

Like other major American cities, the District of Columbia underwent signifi-

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Information concerning Walker-Thomas Furniture's sales and collection practices is drawn in part from Greenberg's 1975 field research on the furniture store. The practices he observed are in keeping with those described in the *Williams* records.

45. Transcript of Record at 47, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389).

46. SENATOR WARREN G. MAGNUSON & JEAN CARPER, *THE DARK SIDE OF THE MARKETPLACE: THE PLIGHT OF THE AMERICAN CONSUMER* 36–38 (1968); see also *Tashof v. FTC*, 437 F.2d 707, 709 (D.C. Cir. 1970) (affirming FTC order against merchant for bait-and-switch advertising and failure to disclose credit terms, issued against jewelry retailer in Seventh Street corridor that sold 85% of its goods on credit).

47. In the early twentieth century, William G. Thomas and William T. Walker owned the business, which was then called the W.T. Walker Furniture Company. The store was located at 1510 Seventh Street. BOYD'S DIRECTORY OF THE DISTRICT OF COLUMBIA 1216 (1908). It later moved to 1013–1015 Seventh Street. Nat'l Parks Serv., National Register of Historic Places—Nomination Form, East Side of the 1000 Block of Seventh Street, N.W., Record No. 84000861, at 14 (1984), available at <http://pdfhost.focus.nps.gov/docs/NRHP/Text/84000861.pdf>. Court and newspaper records describe only three of the debt collection cases filed by the store in the early twentieth century. All three involved black customers who bought furniture on credit. See, e.g., *W.T. Walker Furniture Co. v. Dyson*, 32 App. D.C. 90, 91 (1908) (debtor William H. Dyson); *Charged with Violating Contract*, WASH. POST, Feb. 3, 1905, at 3 (reporting that "a negro" was "arraigned in Police Court yesterday charged with concealing personal property held under an uncompleted contract of sale" with W.T. Walker Furniture Co.); *Jailed for Contract Debt*, WASH. POST, July 17, 1908, at 9 (reporting that "colored" defendant was sentenced to jail after being unable to pay a fine for defaulting on a contract with W.T. Walker Furniture Co.). Census records identify two men named William H. Dyson living in the District of Columbia in 1900. Both were black. 1900 U.S. Federal Census (Population Schedule), District of Columbia, ED 140, Sheet 2S, Dwelling 429, Family 513, Dyson household, ANCESTRY.COM, <http://www.ancestry.com> (last visited Nov. 2013); 1900 U.S. Federal Census (Population Schedule), District of Columbia, ED 131, Sheet 4, Dwelling 68, Family 72, Dyson household, ANCESTRY.COM, <http://www.ancestry.com> (last visited Nov. 2013). I thank Victor Goldberg for drawing my attention to the *Dyson* case.

48. Nat'l Parks Serv., National Register of Historic Places—Nomination Form, East Side of the 1000 Block of Seventh Street, N.W., Record No. 84000861, at 8 (1984), available at <http://pdfhost.focus.nps.gov/docs/NRHP/Text/84000861.pdf>.

49. Walker-Thomas Furniture sits on the border of two census tracts. In 1940, the tracts were 69% and 96.7% African-American; 83.7% and 98.2% in 1950; 94.4% and 99.5% in 1960; and 92.4% and 99.8% in 1970. Families earning less than \$3,000 per year made up 40.7% of one tract and 45.9% of the adjacent tract. Data for District Census Tracts 48 and 49 (1940–1970), SOCIAL EXPLORER, <http://www.socialexplorer.com> (last visited Nov. 25, 2013).

cant demographic changes in the postwar period. By 1957, it was the first major city in the nation with a majority black population.<sup>50</sup> Between 1940 and 1960, the population of the city overall grew by fifteen percent, but the black population more than doubled. In the same period, the white population fell by over a quarter.<sup>51</sup> Wealth clustered in particular quarters of the city, while others were marked by high rates of poverty. In 1959, the median family income in the District of Columbia was \$6,000.<sup>52</sup> But fifteen census tracts in the upper northwest had median incomes over \$10,000, while sixteen tracts had median incomes under \$4,000.<sup>53</sup> Poverty was disproportionately concentrated among the city's black population. The overall poverty rate in the District of Columbia was ten percent—approximately half of the national average—yet nearly one in four nonwhite families lived in poverty.<sup>54</sup> Black and white, rich and poor lived and shopped in different places and spaces. One study of urban unrest in this period concluded that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal.”<sup>55</sup> Nowhere was this more apparent than in the nation's capital.

Williams shopped and borrowed in a consumer landscape strikingly different from that of her white, middle-class, suburban counterparts. Poor consumers continued to finance new purchases through installment credit, which required regular payments at scheduled intervals. In contrast, many retailers to the middle-class offered their customers “revolving” credit, loans for goods purchased that were repayable in irregular amounts over time with no set payment schedule or end date. Revolving borrowers paid interest on their outstanding debt but had greater flexibility in deciding when and how much to pay each month, and their purchases were not subject to repossession by the seller. Some retailers to the middle-class did offer installment credit, but most of these stores were able to sell their customers' debts to banks or finance companies, removing them from their books. This relieved them of the risk that customers would

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50. HOWARD GILLETTE, JR., *BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C.* 153–54 (1995).

51. The overall population of the District of Columbia rose from 663,091 to 763,956. *Id.* The black population rose from 187,266 to 411,737. *Id.* The white population fell from 474,326 to 345,263. *Id.* at 153.

52. FED. TRADE COMM'N, *ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS* (1968), reprinted in *Consumer Protection Legislation for the District of Columbia: Hearing on S. 316, S. 2589, S. 2590, and S. 2592 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 90th Cong. 257 (1968).

53. *Id.*

54. Nationwide, approximately 20% of households were poor, while the District of Columbia rate was 10.5%. Frank Porter, *District Poverty Rate Lower than Average of Other City Areas*, WASH. POST, Mar. 4, 1964, at E1. Only 6% of white families in the District of Columbia lived below the poverty line of \$3,000 per year. *Id.* A quarter of the District of Columbia's households were nonwhite, but these households accounted for more than one half of those earning less than \$3,000 per year in 1960. United Planning Org., *An Attack on Poverty in the National Capital Metropolitan Area* 16 (Sept. 22, 1964) (unpublished first draft) (Microfilm Reel 2250, Grant PA64–183, Ford Foundation Archives).

55. U.S. KERNER COMM'N, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 1 (1968).

fail to pay and of the administrative burdens of tracking account balances.<sup>56</sup> Many urban merchants, however, could not sell their consumer debts to a finance company and so, like Walker-Thomas Furniture, they assumed the risk of defaulting debtors and the cost of servicing consumers' accounts. As one historian observed, "[e]ven as poor Americans evinced consumer desires of the 1960s, their credit experiences remained more akin to the world of the 1920s."<sup>57</sup> In the two-tiered credit economy, Williams and her neighbors were trapped at the bottom.

Walker-Thomas Furniture arrived on Ora Lee Williams's doorstep in the form of agent "# 15," Mr. Wolfson.<sup>58</sup> Williams made her first purchase from Wolfson on December 17, 1957. She bought a wallet, two pairs of solid-colored drapes, an apron set, a potholder set, and a set of throw rugs. As Williams later testified, at the time she signed this and several subsequent contracts, "[t]here was no price, or anything filled in." Although the form contract was short—approximately six inches long—the salesman would fold over the contract before presenting it to Williams with the signature line visible and tell her, "[j]ust sign your name down here." Williams explained that "[s]ometimes the salesman would say that he did not know the exact price of the merchandise, and that they would have to add their Sales Tax, and such as that." The salesmen would then explain that "he could not fill it in because he wasn't sure" and that "they would do that later at the store." In other words, the key term of the agreement—price—was missing when Williams executed the contract. Williams later learned that she owed Walker-Thomas Furniture \$45.65, payable in \$3.00 installments every other Saturday. Walker-Thomas Furniture collected the tax on the purchase (90¢) from Williams the following Saturday, when the goods were delivered.<sup>59</sup>

Over the course of the next five years, Williams signed at least thirteen

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56. A 1968 Federal Trade Commission study found that D.C. retailers that appealed primarily to "low-income" customers used installment credit in 93% of sales. "General market retailers" used installment credit in only 27% of sales. FED. TRADE COMM'N, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS (1968), reprinted in *Consumer Protection Legislation for the District of Columbia: Hearing on S. 316, S. 2589, S. 2590, and S. 2592 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 90th Cong. 251 (1968). On retailers and finance companies, see Louis Hyman, *Ending Discrimination, Legitimizing Debt: The Political Economy of Race, Gender, and Credit Access in the 1960s and 1970s*, 12 ENTERPRISE & SOC'Y 200, 208–09 (2011).

57. Hyman, *supra* note 56, at 201. On the World War II origins of revolving credit, see LOUIS HYMAN, *DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK* 98–131 (2011).

58. See Transcript of Record at 114, 116–21, 123–24, 126–28, 133, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389). Williams testified that she signed all but one of the contracts at home. The contract executed at the store appears to be from December 24, 1960, when Williams bought a bath mat set and a shower curtain. The contract was signed by "Bob" (likely Walker-Thomas Furniture partner Robert W. Thomas), rather than Mr. Wolfson. *Id.* at 122.

59. Transcript of Record at 47–50, 128, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389). Perhaps as a signing bonus, Williams also received a set of canisters valued at two dollars with her first purchase as a "free gift." *Id.* at 128. See *infra* App. A for the full text of the form contract, transcribed from *id.* at 122.

additional contracts to buy various household goods.<sup>60</sup> She paid Walker-Thomas Furniture approximately \$1,056 over the course of five years, out of \$1,500 charged.<sup>61</sup> Williams never received a copy of the contracts she signed. Even if she had, the significance of the terms would not have been immediately apparent. Buried in the middle of twenty-two lines of extremely fine print on the pre-printed form, the agreement stated that Williams's payments would be credited "pro rata" on all outstanding accounts. Walker-Thomas Furniture interpreted this provision, also known as an "add-on" clause, to mean that Williams's payments would be applied to all outstanding balances in proportion to the amount still owed on the purchases, rather than to retiring the oldest debts first or even pro rata in proportion to the original purchase price. In effect, Williams would never pay off any individual item until she paid off the entire debt owed to Walker-Thomas Furniture. In the event that she defaulted, Walker-Thomas Furniture would retain the right to seize all of the items that Williams had purchased since 1957. The agreement further provided that the transaction was a "lease," rather than an outright sale; Williams agreed to "hire" the goods from Walker-Thomas Furniture. Williams would take actual possession of the items, but the company would retain title to the goods until Williams had paid off the total value of all the items she received and presented receipts to Walker-Thomas Furniture showing full payment.<sup>62</sup>

The balance owed on the items purchased in December 1957 decreased quickly at first, but was never extinguished, thanks to the obscure pro rata clause in Walker-Thomas Furniture's form agreement. According to Walker-Thomas Furniture's accounting scheme, by November 1962 Williams owed only 25¢ on the original purchase of \$45.65. She also owed \$2.34 on a folding

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60. Only fourteen contracts were admitted in evidence. Two contracts (for \$53.81 and \$132.55) were not presented at trial, but they appear in Walker-Thomas Furniture's record of Williams's charges and payments as contracts five and eight. Walker-Thomas Furniture's records show sixteen contracts, including one for a washing machine repair. In addition to the December 1957 purchases, Williams bought another pair of drapes, a folding bed and mattress, a chest of drawers, a rug, four pairs of curtains, four sheets, a portable fan, a portable typewriter, two (presumably toy) guns and holster sets, a metal bed, an inner spring mattress, four kitchen chairs, a bath mat set, shower curtains, a washing machine, and a stereo. Transcript of Record at 107, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389) (Writ of Replevin). A law review article that cites the records from the appeals court agrees that there were sixteen, rather than fourteen, contracts. Robert H. Skilton & Orrin L. Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1476 (1967).

61. Wright's opinion misstated the amount charged and paid as \$1,800 and \$1,400, respectively. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447 n.1 (D.C. Cir. 1965). These were closer to the amounts charged and paid by the Thornes, defendants in a related case. The exhibits submitted at trial and attached to the appellate briefs show that Williams purchased \$1,499.88 worth of goods and services (misstated as \$1,500.43 in one exhibit because the stereo price was misstated as \$515.50 rather than \$514.95) and paid \$1,056.03, owing approximately \$444.40 at the time of her default. Brief for Appellee at Exhibit B, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (No. 18604) (court record available at Records of U.S. Courts of Appeals, Record Group 276; National Archives Building, Washington, D.C.).

62. *E.g.*, Transcript of Record at 114, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389).

bed and chest of drawers, both purchased in August 1958 for \$127.40, 3¢ on another 1957 purchase of \$13.21, and amounts ranging from 96¢ to \$10.32 on other sales from 1958 through 1960.<sup>63</sup> None of these debts would be fully paid until Williams paid off every item purchased. Most of her payments were applied towards the outstanding balances on her more recent purchases. Each payment made was spread over the balances owed on all her contracts, in proportion to the amount still owed on each.

By late 1962, Williams teetered on the edge of default. Her payments had increased from \$6.00 to \$36.00 per month. She paid regularly from May through August of 1962.<sup>64</sup> Then she faltered, paying \$102 total from September through November. Walker-Thomas Furniture stopped accepting her payments when she could not pay the full monthly amount due. The furniture company then filed a lawsuit against Williams, demanding that the U.S. Marshal seize all the items that Williams had purchased since 1957.<sup>65</sup> On the same day the lawsuit was filed, the clerk of the court signed off on Walker-Thomas Furniture's demand and ordered the U.S. Marshals to seize the twenty-two items listed in the complaint.<sup>66</sup> The Marshals took a bed and chest purchased in 1958, along with a more recently acquired washing machine and stereo.<sup>67</sup> The remaining goods were not recovered, either because the Marshals could not locate

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63. The amounts owed on other sales from 1958 through 1960 were 96¢, \$1.70, \$2.86, \$1.08, \$7.21, \$1.53, \$2.38, \$5.66, \$10.32, and \$1.61. Brief for Appellee at Exhibit B, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (No. 18604).

64. One commentator has argued, based on the reported decision, that Williams paid approximately 10% of her monthly income to Walker-Thomas Furniture for five years in uninterrupted installments. Spence, *supra* note 17, at 95–96 (discussing the assumptions that students make about Williams based on the reported decision, including that Williams was fiscally irresponsible, and arguing that Williams was responsible because she made regular payments of 10% of her income on her debt for many years). This would be true if Williams regularly made payments of a similar amount each month and paid \$1,400 over five years. In fact, Williams's initial payments were far less than 10% of her income. She paid 90¢ in 1957; \$83.36 in 1958; \$140.12 in 1959; \$221.97 in 1960; \$359.68 in 1961 through April 1962; and \$250 from May through November 1962. Brief for Appellee at Exhibit B, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (No. 18604). Her income in this period ranged from \$179 to \$218 per month. The court records also suggest that these payments were not regular. The payment receipts in evidence are for large lump sum amounts (for example, \$61.00 paid on August 9, 1962) submitted at irregular intervals, suggesting that Williams fell behind and then caught up for missed payments. Transcript of Record at 129, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389).

65. Walker-Thomas Furniture filed the complaint on March 5, 1963. Transcript of Record at 104, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389).

66. *Id.* at 107.

67. *Id.* at 106. At that time, D.C. law permitted a creditor to repossess goods without a pre-seizure hearing through the Court of General Sessions. To obtain a writ of replevin, a creditor had to file a verified complaint and enter into an undertaking. D.C. CODE § 11-725 (1961) (later revised and codified at D.C. CODE §§ 16-3732, 16-3733 (1967)). These provisions were eliminated with the reorganization of the D.C. court system in 1970, but creditors could still seek a writ of replevin through the newly-created D.C. Superior Court under D.C. CODE § 16-3701. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, sec. 145(o), 84 Stat. 473, 564. The current D.C. Superior Court Rules of Civil Procedure require a judicial hearing before a seizure. D.C. SUP. CT. R. CIV. P. 64-II(a)–(b).



them or because they declined to seize them.<sup>68</sup> At that time, Williams owed \$444.40 in total, less than the cost of her last purchase, an Admiral stereo. Without the fine print in the Walker-Thomas Furniture contract, only the stereo could have been repossessed.<sup>69</sup> After seizing the property, the U.S. Marshals appraised the items taken. They deemed the washing machine to be worthless and valued the remaining items at \$91.50.<sup>70</sup>

## II. BEFORE UNCONSCIONABILITY

By the time that Williams's goods were seized, the problems of those on the economic margins of American society were just beginning to garner national attention. Poverty had never disappeared, but it had receded from the view of those reaping the benefits of postwar prosperity. Historians often describe the 1960s as a moment when poverty was "rediscovered."<sup>71</sup> Through popular works like Michael Harrington's *The Other America* (1962) and David Caplovitz's *The Poor Pay More* (1963), middle-class readers learned of the pockets of poverty

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68. In its brief before the D.C. Circuit, Walker-Thomas Furniture stated that the other goods were "eloigned." Brief for Appellee at 6, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605). However, the writ of replevin given to the U.S. Marshals shows check marks next to several other items, including a fan and a typewriter. This suggests that the Marshals may have found these items but declined to seize them. Transcript of Record at 107, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389) (Writ of Replevin).

69. Transcript of Record at 53–54, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389). The pro rata clause allowed Walker-Thomas Furniture to retain title to all the goods Williams had previously purchased, rather than just the last-purchased stereo. Without the fine print, only the stereo could have been repossessed. In addition, as Douglas Baird has noted, if Walker-Thomas Furniture had not retained a security interest in the goods and sought a money judgment against Williams instead, most of the items Williams purchased would have been exempt from seizure to satisfy the judgment. DOUGLAS G. BAIRD, *RECONSTRUCTING CONTRACTS* 137–40 (2013). At that time, D.C. law exempted most personal property from seizure, including all "beds, bedding, household furniture and furnishings, sewing machines, radios, stoves, cooking utensils, not exceeding \$300 in value." D.C. CODE § 15-401 (1961) (now codified at D.C. CODE § 15-501 (2014)). The stereo would not have been protected.

70. Transcript of Record at 106, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389). The washing machine was worth nothing, the stereo \$75.00, the bed and mattress \$7.50 and the chest \$9.00. *Id.*

71. The "discovery" or "rediscovery" of poverty in the 1960s is a recurring theme in the historiography of the period. *See, e.g.*, JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY IN THE TWENTIETH CENTURY* 97–111 (4th ed. 2003). Scholars in the 1960s also used this language. *See, e.g.*, David Caplovitz, *Consumer Credit in the Affluent Society*, 33 *LAW & CONTEMP. PROBS.* 641, 647 (1968) ("Until quite recently, it was rather fashionable for social scientists to point to the increasing homogeneity of American society, the blurring of class lines, as more and more people in all strata had access to the so-called standard consumer package of appliances and automobiles. The rediscovery of the poor and the war on poverty have served as a corrective to this picture of American society, reminding us that inequality is still very much with us."). In his influential 1962 study of poverty, Michael Harrington attributed the "invisibility" of postwar poverty in part to the transformation of the American city and suburbanization. MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 4 (Penguin Books 1981) (1962). On the "Columbus complex" and the cyclical "rediscovery" of poverty by social scientists like Jacob Riis and Harrington, see David Matza, *The Disreputable Poor*, in *SOCIAL STRUCTURE AND MOBILITY IN ECONOMIC DEVELOPMENT* 310, 310–11 (Neil J. Smelser & Seymour Martin Lipset eds., 1966).

lurking in rural West Virginia and the ghettos of inner cities. Bypassed by the new highways to suburban prosperity, poor urban households lived in what Harrington called “The Other America.” As Caplovitz described, the poor also shopped in a world apart. They were “forced to live in a world of inflation that more well-to-do citizens [were] able to escape,” paying high rates of interest for consumer goods bought on the installment plan.<sup>72</sup> “Installment credit” was “the door through which the poor . . . entered the mass consumption society.”<sup>73</sup>

Americans had been buying and selling goods for hundreds of years. But never before had national policymakers been so unified in their support for measures aimed at boosting the purchasing power and consumption of middle-class households. From World War II to the mid-1970s—the heyday of Keynesian capitalism—the federal government pursued policies to boost consumer purchasing power (and thereby economic growth) through government spending, tax policy, welfare provision, and brokering industrial peace.<sup>74</sup> Many federal programs nurtured the growth of a mostly-white, suburban middle class. These included the Interstate Highway Act, FHA lending policies, and the G.I. Bill.<sup>75</sup> For more and more households, ownership of consumer goods seemed akin to a right of citizenship, a marker of full and equal status in the affluent society.<sup>76</sup> One historian has accordingly described postwar America as a “Consumers’ Republic.”<sup>77</sup>

Household consumption and use of consumer credit grew exponentially in the postwar period.<sup>78</sup> Along with the mass production and purchase of consumer goods came the “mass production of bargains,” in the words of commercial law

72. DAVID CAPLOVITZ, *THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES*, at xv–xvii (1967).

73. *Id.*

74. See LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 112–65 (2003). In the postwar period, the G.I. Bill provided veterans with low-interest home loans and educational benefits, and the FHA and VA provided mortgage insurance to reduce the cost of homeownership. The Wagner Act and other labor legislation also supported unionization and workers’ collective bargaining. The modern welfare state emerged in the New Deal, with the passage of the Social Security Act, creating old-age insurance, unemployment insurance, and aid to poor families with children. Subsequent legislation extended coverage to dependents and survivors of Social Security beneficiaries and to categories of employment previously excluded.

75. See generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005).

76. For arguments by welfare recipients that full citizenship required access to consumer goods, see FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* 39–42, 114–36 (2007). On the relationship between consumerism and citizenship generally, see COHEN, *supra* note 74.

77. Historian Lizabeth Cohen coined this phrase to encapsulate the new American political economic “strategy that emerged after the Second World War” that revolved around “promoting the expansion of mass consumption.” COHEN, *supra* note 74, at 11. See generally MEG JACOBS, *POCKETBOOK POLITICS: ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2005) (arguing that the New Deal and postwar liberal coalitions were bound together by a shared interest in boosting consumer purchasing power).

78. GEOFFREY H. MOORE & PHILIP A. KLEIN, *THE QUALITY OF CONSUMER INSTALMENT CREDIT* 4 (1967) (“Since 1945, consumer credit has expanded spectacularly. . . . By the end of 1965, total consumer debt

scholar Karl Llewellyn.<sup>79</sup> Llewellyn, a law professor at Columbia, understood the benefits of standardized form agreements, including reduction of administrative costs and, ultimately, savings for consumers. But these benefits also came at a cost.

#### A. THE PROBLEM OF FORM AGREEMENTS AND UNEQUAL BARGAINING

The problem, Llewellyn argued, was that standardized or “form” contracts did not conform to the general assumptions of contract law, including the presumption that a contract clause “represents the parties’ joint judgment as to what they want.”<sup>80</sup> Rather, the terms might favor the drafter—the party with greater bargaining power and expertise. Llewellyn argued that some one-sided agreements amounted to “the exercise of unofficial government of some by others, via private law.”<sup>81</sup>

Other scholars raised similar concerns.<sup>82</sup> In a seminal article on the subject of form agreements, Yale law professor Friedrich Kessler drew attention to the problems posed by take-it-or-leave-it standardized agreements, dubbed “contracts of adhesion.”<sup>83</sup> Kessler described adhesion contracts in the language of authoritarian politics. He argued that adhesion contracts enabled dominant parties to “legislate by contract” in an “authoritarian manner.”<sup>84</sup> They threatened to empower a new “feudal order” of “powerful industrial and commercial overlords.”<sup>85</sup> Like political power, concentrated economic power posed a real threat to freedom.

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outstanding was 16 per cent of annual personal income, whereas it was 7 per cent in 1948 and 8 per cent in 1929.”).

79. K. N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 700 (1939).

80. *Id.*

81. Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 731 (1931).

82. In 1926, University of Pennsylvania law professor Austin Tappan Wright complained that courts continued to apply outdated rules of contract to situations where they no longer applied. Rules suited to agreements between parties of equal bargaining power did not fit situations where bargaining power was not equal. He noted that some have called such contracts “unilateral codes” that permit the dominant party to legislate for the “servient” party. Austin Tappan Wright, *Opposition of the Law to Business Usages*, 26 COLUM. L. REV. 917, 931 (1926). City University of New York professor Morris R. Cohen advocated regulation of contract as necessary to protect “real liberty.” Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 587 (1933). Like Wright and Llewellyn, Cohen argued that contract law opened the door to stronger private parties imposing their will on weaker ones in the manner of an authoritarian regime. *Id.* Contract law “confers sovereignty on one party over another” by providing access to the state’s coercive power. *Id.* The danger is that this power might be used “for unconscionable purposes, such as helping those who exploit the dire need or weaknesses of their fellows.” *Id.*

83. Kessler was not the first to use this term, but he did bring it into wider usage. According to Kessler, Edwin Patterson introduced the term to American scholars in an article on insurance policies several decades before. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 n.11 (1943) (citing Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919)). Kessler taught at Yale from 1934 until 1938, at the University of Chicago from 1938 to 1947, and then resumed his position at Yale until 1970.

84. Kessler, *supra* note 83, at 640.

85. *Id.*

Kessler's writings exemplify how far legal thinking about freedom of contract had traveled from its roots in turn-of-the-century classical legal thought.<sup>86</sup> In the first decades of twentieth century, the greatest threat to this freedom seemed to come from government intrusion on private agreements. Judges struck down laws that they found unconstitutionally interfered with a person's "right" to contract, most often when the law infringed on a worker's right to sell his labor.<sup>87</sup> This jurisprudence fell within a constellation of rules that relied upon the distinction between the public and private spheres. Private economic rights could not be infringed except when necessary for the health, welfare, or safety of the public. Courts had to set the boundary between that which could be regulated (the public) and that which could not (the private). But these formalist distinctions began to come apart under the scrutiny of the next generation of legal thinkers.<sup>88</sup>

Llewellyn and Kessler both entered the academy in the 1920s and 1930s, the heyday of American Legal Realism.<sup>89</sup> Realists like Llewellyn and Kessler cared about what judges and litigants actually did, in addition to the legal concepts deployed to justify their actions. Real-world practice, rather than pure theory, mattered.<sup>90</sup> The Realists advanced the critique of "freedom of contract" begun by Progressive-era thinkers like Roscoe Pound.<sup>91</sup> Robert Hale, Llewellyn's Realist colleague at Columbia, argued that freedom of contract was always limited because coercion was widespread. Private coercive power posed as great a threat to individual liberty as state power. Llewellyn, too, had little use for theoretical defenses of freedom of contract.<sup>92</sup> He observed a "law . . . built in the ideology of Adam Smith . . . meshed into the new order of mass-production,

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86. On "classical legal thought," see generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 9–32 (1992); DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* (2006); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* (1998).

87. See, e.g., *Lochner v. New York*, 198 U.S. 45, 56 (1905). Although *Lochner* and its progeny loom large in the minds of lawyers and legal historians, the *Lochner*-era Court did not strike down all—or even most—protective legislation on "freedom of contract" grounds. See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011). Five years into the New Deal, the Court changed course and adopted a friendlier approach to economic regulation. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–400 (1937).

88. HORWITZ, *supra* note 86, at 206; KENNEDY, *supra* note 86, at xix.

89. Beginning in 1924, Llewellyn taught at Columbia for over two decades before he moved to the University of Chicago, where he remained until his death in 1962. Kessler began teaching at Yale in 1934.

90. As legal historian Morton Horwitz explains, "Legal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence." HORWITZ, *supra* note 86, at 169. Despite the variation with the Realist camp, Horwitz argues that "[a]ll Realists shared one basic premise—that the law had come to be out of touch with reality." *Id.* at 187.

91. *Id.* at 33–64; AMERICAN LEGAL REALISM, at xiii (William W. Fisher III et al. eds., 1993). For Pound's critique, see generally Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

92. To Hale, it made little sense to impose limits on state power but none on private power. He wrote:

Absolute freedom in economic matters is of course out of the question. The most we can attain is a relative degree of freedom, with the restrictions on each person's liberty as tolerable

mass-relationships.”<sup>93</sup>

The result was doctrinal confusion. Courts continued to be bound by the “elementary rules” of contract law, yet were unwilling to enforce adhesive bargains as written when the outcome seemed overly harsh. So they employed roundabout methods to avoid inequitable outcomes, such as construing terms in ways clearly not intended by the parties or deploying the requirements of mutuality and consideration to the benefit of the weaker party. In other words, judges paid lip service to the common law rules before reaching an equitable result by covert means.<sup>94</sup> In Llewellyn’s view, these tactics created “unnecessary confusion and unpredictability.”<sup>95</sup>

Kessler likewise labeled the resulting opinions “highly contradictory and confusing.”<sup>96</sup> The real issue, he argued, was whether “the unity of the law of contracts can be maintained in the face of the increasing use” of adhesion contracts.<sup>97</sup> Kessler thought not. Rather than cling to the fictional unity of contract law, courts should develop different standards for contracts of adhesion, determining the legitimate expectations of the weaker party and rewriting the contract if necessary.<sup>98</sup> Freedom of contract, he wrote, “must mean different things for different types of contracts.”<sup>99</sup> In the modern economy dominated by powerful industrial interests, courts’ blind adherence to freedom of contract worked an injustice to those with little bargaining power. New contracts operating within the new economic landscape demanded new rules.

#### B. NEW RULES FOR THE NEW CONTRACTS

The Uniform Commercial Code project offered an opportunity to promulgate a new legal framework for form agreements. Like Kessler, the Code drafters believed that commercial law had not kept pace with developments in industry and society. Llewellyn served as Chief Reporter for the Code, a model set of

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as we can make them. It would be impossible for everyone to have unrestricted freedom to make use of any material goods of which there are not enough to go round.

Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 626 (1943).

93. Llewellyn, *supra* note 81, at 751.

94. Llewellyn, *supra* note 79, at 702–03.

95. *Id.* at 703. Llewellyn made a similar complaint in another article. See Llewellyn, *supra* note 81, at 744 (arguing that “the result has been (as so often during case-law growth) confusion in doctrine and uncertainty in outcome”).

96. Kessler, *supra* note 83, at 633.

97. *Id.* at 636.

98. *Id.* at 637. A 1950 student note in the *Harvard Law Review* proposed a similar solution. The author suggested that courts remedy inequality of bargaining power between parties to a form agreement by taking into consideration the nature of the inequality involved and exercising “veto power over all unreasonable terms.” Note, *Contract Clauses in Fine Print*, 63 HARV. L. REV. 494, 504 (1950).

99. Kessler, *supra* note 83, at 642. In the same issue of the *Columbia Law Review*, legal scholar Robert Hale reached the same conclusion concerning the freedom-enhancing potential of regulation. Hale, *supra* note 92, at 628 (“[B]y judicious legal limitation on the bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have—freedom to resist more effectively the bargaining power of the strong, and to obtain better terms.”).

state laws governing commercial transactions.<sup>100</sup> Nicknamed “Karl’s Kode” and the “Lex Llewellyn” after the Chief Reporter, the Code attempted to “simplify, clarify and modernize [commercial] law” and to create consistent national standards for resolving disputes while also allowing business practices to evolve through “custom, usage and agreement of the parties.”<sup>101</sup> It set forth standards more often than bright-line rules, anticipating that judges applying the Code would resolve disputes in accordance with commercial practice.<sup>102</sup>

Code historian Allen Kamp describes the drafting process as a battle between the two groups based in New York City: “Uptown” academic reformers like Llewellyn and “Downtown” commercial bankers and merchants.<sup>103</sup> The academic drafters were particularly concerned with inequality of bargaining power and form agreements. As one draftsman explained, they had “a tendency to see problems in terms of the strong against the weak.”<sup>104</sup> The commercial interests did not share the academics’ enthusiasm for reconfiguring power relations through the Code.

The Code provision on unconscionability, section 2-302,<sup>105</sup> was among the many controversial reforms that the “Uptown” academics proposed.<sup>106</sup> Unlike many of their proposals, the unconscionability section of the Code survived the contentious drafting process, albeit in weakened form.<sup>107</sup> Section 2-302 allowed judges to refuse to enforce “unconscionable” terms in sales contracts. The

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100. Llewellyn was the Chief Reporter from 1942 until 1962. Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 541 (2000). The Code was prepared under the auspices of two sponsor organizations: the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 326.

101. Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 628 (1975) (quoting U.C.C. § 1-102(2) (1962)).

102. See Maggs, *supra* note 100, at 543 (discussing the ways in which the Code incorporated Llewellyn’s jurisprudential philosophy). On the difference between rules and standards, see, for example, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685–87 (1976); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23 (2000).

103. See Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949–1954*, 49 BUFF. L. REV. 359, 371 (2001); Kamp, *supra* note 34, at 276–77.

104. Kripke, *supra* note 100, at 323. The 1949 draft of the Code also included additional consumer protection provisions for secured transactions. Kamp, *Downtown Code*, *supra* note 103, at 403, 443–47. In response to pressure from business interests, these provisions were dropped from later drafts. *Id.*

105. Llewellyn was especially involved in drafting Article II. Danzig, *supra* note 101, at 621 n.3 (“Article II was Llewellyn’s main area of interest. His wife and disciple was its second most influential author. Both retained substantial influence over the document through the period of the 1962 official text . . .”). Llewellyn may have drawn on his knowledge of the German Civil Code in his work on the U.C.C., including the provision on unconscionability. James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT’L L. 109, 116 (2003) (observing that many scholars “believe that Llewellyn drew his inspiration for section 2-302 from the practice of controlling standard terms in Germany under the general clauses of the German Civil Code”). One of the other drafters suggested use of the word “unconscionable” at a meeting in 1942. Kamp, *supra* note 34, at 306–08. The provision was later codified at U.C.C. § 2-302 (1962).

106. Kamp, *supra* note 34, at 313.

107. Kamp, *Downtown Code*, *supra* note 103, at 415–17.

Code did not define “unconscionable.” Rather, it directed judges to evaluate the objectionable clause in light of the “general commercial background” and the “needs of the particular trade or case.”<sup>108</sup>

The academic drafters plainly had at least one concrete issue in mind: the problem of form agreements.<sup>109</sup> An early draft of section 2-302, proposed in 1944 as section 23 of the Uniform Revised Sales Act, was directed only at standardized form contracts.<sup>110</sup> A 1949 draft of the “Official Comment” for section 2-302 explained that it “intended to apply . . . the equity courts’ ancient policy of policing contracts for unconscionability or unreasonableness.”<sup>111</sup> It also specified that “form” contracts might contain unconscionable clauses.<sup>112</sup>

These initial drafts of section 2-302 were mainly the work of the “Uptown” academic drafters. The “Downtown” banking and business interests made their mark on later versions. Their influence is apparent in the 1950 revised comment, which narrowed the scope of section 2-302 by omitting references to “unreasonableness.”<sup>113</sup> Instead, it read:

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.<sup>114</sup>

The draft thus acknowledged the problem that Kessler and Llewellyn had earlier identified of courts policing contracts through covert tactics. However, it omitted reference to two of their major concerns: unequal bargaining power and form agreements. Indeed, the provision’s stated purpose was to prevent “unfair

108. U.C.C. § 2-302, cmt. n.1 (1962).

109. Kripke, *supra* note 100, at 323 (“Some part of the [UCC drafting] staff’s suggestions came from a tendency to see problems in terms of the strong against the weak. In particular, they were concerned about protecting the rights of consumers.”); Comment, *Policing Contracts Under the Proposed Commercial Code*, 18 U. CHI. L. REV. 146, 146 (1950) (“At present the commissioners appear primarily concerned with the difficulties resulting from an application of existing rules of assent to form contracts.”).

110. J.H.A., Note, *Unconscionable Contracts Under the Uniform Commercial Code*, 109 U. PA. L. REV. 401, 402–03 (1961). The section was titled “Form Clauses, Conscionable and Unconscionable” and pertained only to a sales contract that included “one or more form clauses.” 2 UNIFORM COMMERCIAL CODE: DRAFTS 24 (Elizabeth Slusser Kelly ed., 1984). The 1948 draft removed this express limitation. Kamp, *supra* note 34, at 334.

111. 6 UNIFORM COMMERCIAL CODE: DRAFTS 83 (Elizabeth Slusser Kelly ed., 1984).

112. *Id.*

113. Kamp, *Downtown Code*, *supra* note 103, at 416.

114. 10 UNIFORM COMMERCIAL CODE: DRAFTS 117 (Elizabeth Slusser Kelly ed., 1984). Subsequent drafts retained this portion of the Comment with miniscule changes, up through 1962. 20 UNIFORM COMMERCIAL CODE: DRAFTS 365 (Elizabeth Slusser Kelly ed., 1984).

surprises,” not to disturb the “allocation of risks because of superior bargaining power.”<sup>115</sup>

Initial reactions to section 2-302 were mixed. In the words of one commentator, the section appeared to be “in conflict with the maxim that courts will not make contracts for the parties.”<sup>116</sup> Others, however, praised the provision as a more straightforward way of dealing with one-sided bargains. Rather than forcing judges to resort to tortured constructions of contract terms or distortions of other general contract rules, section 2-302 allowed them to address the problem directly.<sup>117</sup> Proponents reasoned that “[a]bsolute freedom of contract is no more than a nineteenth century ideal; one which has never existed in our law.”<sup>118</sup> Aside from a smattering of discontented rumblings, unconscionability did not come under heavy attack until after the *Williams* litigation concluded.<sup>119</sup>

### C. POLICING DISTRICT OF COLUMBIA CONTRACTS BEFORE THE CODE

Before the District of Columbia adopted the U.C.C. in 1963, D.C. courts adjudicated disputes over consumer credit transactions as Kessler and Llewellyn might have predicted. Pre-Code reported decisions from D.C. courts make no mention of unconscionability. Indeed, before widespread adoption of the Code in the 1960s, only a handful of courts in other jurisdictions applied the doctrine.<sup>120</sup> In cases where D.C. courts refused to enforce one-sided credit agreements, they grounded their decisions in traditional contract defenses, such as fraud, mistake, lack of mutual assent, or violation of public policy.<sup>121</sup> Otherwise, courts enforced credit contracts as written, as in the 1949 case of *Universal Jewelry Co. v. McIver*.<sup>122</sup>

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115. Kamp, *Downtown Code*, *supra* note 103, 416–17 (quoting 10 UNIFORM COMMERCIAL CODE: DRAFTS, *supra* note 114, at 117).

116. Ralph H. King, *Suggested Changes in the Uniform Commercial Code—Sales*, 33 OR. L. REV. 113, 115 (1954).

117. H.C.C., Jr., Note, *Unconscionable Sales Contracts and the Uniform Commercial Code, Section 2-302*, 45 VA. L. REV. 583, 588 (1959); J.H.A., *supra* note 110, at 403.

118. H.C.C., Jr., *supra* note 117, at 592.

119. Yale law professor Arthur Leff was among the most vocal critics of section 2-302. He launched the assault in Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).

120. See, for example, the cases cited in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448 n.2 (D.C. Cir. 1965) (including *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948) and *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960)). The authors of these decisions were likely aware of the doctrine because of the U.C.C. Judge Goodrich, the author of *Wentz*, was on the Editorial Board of the U.C.C. and likely became familiar with the concept of unconscionability through his work on the Code. See John M. Breen, *The Lost Volume Seller and Lost Profits Under U.C.C. § 2-708(2): A Conceptual and Linguistic Critique*, 50 U. MIAMI L. REV. 779, 809 (1996). The New Jersey Supreme Court decided *Henningsen* after neighboring Pennsylvania had adopted the Code and shortly before New Jersey followed suit in 1961. 1961 N.J. LAWS 722.

121. Note, *An Ounce of Discretion for a Pound of Flesh: A Suggested Reform for Usury Laws*, 65 YALE L.J. 105, 108 & nn.19–20 (1955) (citing cases in which courts have granted relief to a “victimized party” by invoking fraud, lack of mutuality, etc., rather than labeling the contract unconscionable); H.C.C., Jr., *supra* note 117, at 584 n.4 (same).

122. 68 A.2d 226, 227–28 (D.C. 1949).



In *McIver*, the D.C. Court of Appeals upheld a contract for the sale of a pair of shoes to a sixty-five-year-old coal hustler, a first-time credit buyer earning \$18 per week. With poor eyesight and only the ability “to read and write a little,” the buyer signed the “paper entitled ‘conditional contract of sale’” with a cross mark.<sup>123</sup> The borrower agreed to pay \$3 down and \$1 per week.<sup>124</sup> After ruling out the traditional defenses of fraud, misrepresentation, duress, and lack of assent, the court overturned the trial verdict for the borrower and reluctantly found in favor of the lender. It added that “[d]istressing cases of apparent overcharges and overselling are often encountered, but we know of no remedy under existing law except that of education of the buying public.”<sup>125</sup> The borrower had no counsel at trial or on appeal.

A few years later, a local D.C. court again reluctantly found in favor of the lender, Walker-Thomas Furniture, in a case involving an installment sales contract.<sup>126</sup> The furniture company sold various items on credit to pro se defendant Elizabeth Coates between 1949 and 1952.<sup>127</sup> Coates paid \$1,482 out of \$1,687.56 charged before she defaulted.<sup>128</sup> Citing the pro rata provision of the conditional sales contract, Walker-Thomas Furniture demanded seizure of all the items Coates had purchased since 1949.<sup>129</sup> “[U]nable to satisfactorily ascertain any legal way in which the law could be of aid in solving the inequities of this situation,” the court found for Walker-Thomas Furniture.<sup>130</sup> It suggested that the problem required legislative intervention.<sup>131</sup>

District of Columbia borrowers won when they could raise other contract defenses and, perhaps more importantly, had the benefit of legal representation. For example, in a 1963 case, the D.C. Court of Appeals refused to enforce a sales contract on the grounds of fraud and lack of mutual assent.<sup>132</sup> The borrower bought a television set on credit for the quoted price of \$189 from Hollywood Credit Clothing Company, located just down the Seventh Street

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123. *Id.* at 227.

124. *Id.* at 226–27.

125. *Id.* at 228.

126. This decision is unpublished, but it is attached to Walker-Thomas Furniture’s brief in the *Thorne* case. Coates did not have a lawyer; Harry Protas represented Walker-Thomas Furniture. Transcript of Record at 11, *Thorne v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3412) (Trial Brief of Plaintiff). A 1960 case from New Jersey held that an automobile manufacturer’s attempted disclaimer of an implied warranty of merchantability was “so inimical to the public good as to compel an adjudication of its invalidity.” *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 95 (N.J. 1960) (citing proposed U.C.C. § 202 (1958)). The case appears not to have swayed the D.C. courts.

127. Transcript of Record at 9, *Thorne v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3412) (Trial Brief of Plaintiff).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 9–10.

132. *Hollywood Credit Clothing Co. v. Gibson*, 188 A.2d 348, 349–50 (D.C. 1963).

shopping corridor from Walker-Thomas Furniture.<sup>133</sup> When the buyer returned home, he noticed that the contract he had signed stated the price as \$289, plus carrying charges; he owed \$345.35 in all.<sup>134</sup> Evidence admitted at trial showed that the suggested retail price of the set was \$169.95.<sup>135</sup> The borrower returned the television immediately and the store sued for recovery of the contract price.<sup>136</sup> Pierre Dostert of the Bar Association's Legal Assistance Office, who would later take up Williams's case, represented the borrower. The trial and appellate court ruled in favor of the defendant, finding that there was no meeting of the minds as to the contract terms and that the borrowers' agreement was obtained by fraud or misrepresentation.<sup>137</sup> In another case from 1963, the buyer prevailed on a procedural defense.<sup>138</sup>

Of course, most cases involving credit sales to poor consumers did not end up before an appellate court, or even reach trial. Absent the intervention of the Legal Assistance Office of The Bar Association of the District of Columbia, Ora Lee Williams's case might have ended with the loss of her furniture.<sup>139</sup> Repossession through court action was a standard business practice for Walker-Thomas Furniture. In the years leading up to Williams's case, the company rarely filed fewer than one hundred seizure requests (called "writs of replevin") per year in the local court.<sup>140</sup> Most cases did not go to trial; those that did usually resulted in a verdict for the furniture company.<sup>141</sup>

Walker-Thomas Furniture's methods were common among retailers to the poor. A mid-1960s Federal Trade Commission study of District of Columbia retailers found that eleven "low-income market retailers" similar to Walker-Thomas Furniture obtained 2690 judgments against delinquent customers in one year alone.<sup>142</sup> In contrast, the mainstream retailers studied reported only 70

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133. Hollywood Credit Clothing Company was located at 703 7th Street, N.W., Washington, D.C. Hollywood Credit Clothing Co., 77 F.T.C. 1594, 1595 (1970).

134. *Gibson*, 188 A.2d at 349.

135. *Id.*

136. *Id.*

137. *Id.* at 349–50.

138. *Becton v. Walker-Thomas Furniture Co.*, 192 A.2d 125, 126 (D.C. 1963). In *Becton*, Walker-Thomas Furniture obtained a writ of replevin against the buyer to repossess the goods she purchased. The trial court awarded Walker-Thomas Furniture judgment for possession of the goods or the amount the buyer still owed Walker-Thomas Furniture. The D.C. Court of Appeals vacated the judgment on the ground that the correct measure of damages in a replevin action is the value of the goods, not the amount of the outstanding debt. *Id.* The case was later dismissed for failure to prosecute. *Walker-Thomas Furniture Co. v. Becton*, 200 A.2d 190, 191 (D.C. 1964). Attorney Catherine U. Welch represented Becton. *Id.* at 190.

139. See Pierre E. Dostert, *Appellate Restatement of Unconscionability: Civil Legal Aid at Work*, 54 A.B.A. J. 1183, 1183 (1968).

140. *Id.* at 1184.

141. *Id.*

142. FED. TRADE COMM'N, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS (March 1968), reprinted in *Consumer Protection Legislation for the District of Columbia: Hearing on S. 316, S. 2589, S. 2590, and S. 2592 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 90th Cong. 255, 278 (1968).

judgments.<sup>143</sup> Low-income market retailers averaged one lawsuit for every \$2,599 in net sales; mainstream retailers averaged one for every \$232,299 in net sales.<sup>144</sup> These figures suggest that low-income retailers employed “a marketing technique which includes actions against default as a normal matter of business rather than as a matter of last resort.”<sup>145</sup> Most cases ended in judgment for the merchant because the buyer never appeared, in some cases because he or she never received notice of the lawsuit.<sup>146</sup> Perhaps unwittingly, courts had become collection agents for low-income retailers.<sup>147</sup>

### III. A JUDICIAL SOLUTION

Williams’s case was unusual in that it came to trial and then proceeded through multiple appeals. After Walker-Thomas Furniture seized her belongings in March 1963, Williams found her way to the D.C. Bar Association’s Legal Assistance Office housed in the D.C. trial court, then called the Court of General Sessions.<sup>148</sup> Federally funded legal services for the poor were not yet up and running in the District of Columbia.<sup>149</sup> The Legal Assistance Office had received other complaints against Walker-Thomas Furniture, but the borrowers were not poor enough to qualify for free legal assistance.<sup>150</sup> The office agreed to defend Williams against Walker-Thomas Furniture.

Williams’s attorneys also represented two married codefendants, William and Ruth Thorne, in a separate collection action filed by the furniture company. Like Williams, the Thornes fit the profile of most Walker-Thomas Furniture customers. They lived in a predominantly black neighborhood, where over a quarter of

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143. *Id.* at 278.

144. *Id.*

145. *Id.* at 255.

146. One study found that 97% of cases filed by Harlem merchants ended in default judgments. *Abuse of Process: Sewer Service*, 3 COLUM. J.L. & SOC. PROBS. 17, 18 (1967). Merchants sometimes used “sewer service,” meaning they employed a process server who falsely claimed to have served notice of the lawsuit on the borrower. *Id.* at 17–18. Other retailers avoided an adversarial proceeding by requiring borrowers to sign a “confession of judgment” as a condition of receiving credit. Upon default, they could move straight to a collection action. See Dostert, *supra* note 139, at 1184.

147. Wright, *The Courts Have Failed the Poor*, *supra* note 13.

148. Dostert, *supra* note 139, at 1183.

149. The Legal Assistance Office was established in 1937. REPORT OF THE COMMISSION ON LEGAL AID OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA 75 (1958). The first program in the District of Columbia, Neighborhood Legal Services, started under the auspices of the United Planning Organization. It began in 1964 with the aid of a grant from the Ford Foundation, later supplemented by federal funds allocated as part of President Johnson’s War on Poverty. On the history of the program, see Brian Gilmore, *Love You Madly: The Life and Times of the Neighborhood Legal Services Program of Washington, D.C.*, 10 UDC/DCSL L. REV. 69 (2007).

150. Dostert, *supra* note 139, at 1183. According to Williams’s lawyer, Williams was not a carefully selected test case. The Legal Assistance Office had declined to represent other Walker-Thomas Furniture customers because they were not financially eligible for help and could retain private counsel. The office decided to represent Williams because she qualified for free assistance and offered an opportunity to challenge Walker-Thomas Furniture’s business practices. *Id.*

families lived in poverty.<sup>151</sup> William Thorne, a supermarket porter, had a third grade education and could barely read. The Thornes defaulted on their debt to Walker-Thomas Furniture after paying approximately \$1,422 on \$1,855 owed. William Thorne fell ill for two weeks in the summer of 1962 and could not keep up with his regular payments on their purchases of household goods. After refusing partial payment, the store seized their television, refrigerator, freezer, sofa, and a few other items.<sup>152</sup>

The lawyer who would argue the case before Judge Wright, Pierre Dostert,<sup>153</sup> “decided to take the two cases as far as necessary to achieve a precedent which would afford some protection to the lesser members of the community.”<sup>154</sup> (The two cases were later consolidated on appeal.) Meeting that goal would end up requiring two appeals and 210 hours of legal work.<sup>155</sup> Paying for hundreds of hours of legal work would have been prohibitively expensive for Williams, a poor debtor who could not even afford to pay \$36 a month to stave off repossession of her belongings. Without free legal representation, Williams would surely have joined the hundreds of borrowers whose cases ended either in default or in a verdict for Walker-Thomas Furniture.

#### A. THE WILLIAMS TRIAL AND INITIAL APPEAL

Perhaps unsurprisingly, Williams failed to raise unconscionability as a defense at her trial on June 4, 1963.<sup>156</sup> Congress did not adopt the U.C.C. until December of that year, and no D.C. court had applied the doctrine as a principle of the common law.<sup>157</sup> Instead, Williams’s counsel argued that there was a lack of mutual assent to the contract, that the contract was vague and ambiguous,

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151. The Thornes moved between two census tracts during the time of these purchases, between 1958 and 1962. Their first apartment (in the 70 block of K St. NW) was in a tract that was 88.1% African-American and in which 43% of families earned less than \$3,000 per year in 1960. Their second apartment (in the 2100 block of 5th St. NW) was in a tract that was 98.5% black and in which 35.8% of families earned less than \$3,000 per year in 1960. Data for D.C. Census Tracts 34 and 47 (1960), SOCIAL EXPLORER, <http://www.socialexplorer.com> (last visited Nov. 25, 2013). For discussion of poverty line estimates for 1960, see *supra* note 42.

152. According to the agreed upon statement of proceedings on appeal, Thorne testified at trial that he “was unable to read and write in that his education was up through the third grade. He was able to write his name, and to read with difficulty by spelling out each individual word.” Transcript of Record at 37, *Thorne v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3412) (Settled Statement of Proceedings and Evidence). The parties disagreed on the exact amount owed and paid to Walker-Thomas Furniture. On Thorne’s occupation, see Dostert, *supra* note 139, at 1184.

153. Dostert was a 1959 graduate of Georgetown Law. Between 1960 and 1964, he split his time between private practice and part-time work at the Legal Assistance Office. Dostert, *supra* note 139, at 1185. Dostert was in practice with lawyer Samuel C. Borzilleri by the time the case reached the D.C. Court of Appeals in 1963. Dostert and Borzilleri appear as counsel on the brief. Transcript of Record at 12, *Thorne v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3412) (Trial Brief of Defendants).

154. Skilton & Helstad, *supra* note 60, at 1480 n.38.

155. *Id.*

156. See generally discussion *supra* Part II.

157. Section 2-302 concerned unconscionable contracts. In the congressional hearing on the proposed adoption of the U.C.C. for the District of Columbia, none of the witnesses mentioned this

that the ambiguous terms should be construed against the furniture company, and that the contract should be interpreted in light of the acts of the parties and their interpretations of the contract. Williams conceded that Walker-Thomas Furniture had a right to recoup the amounts still owed on the stereo purchase but argued that seizure of her property was illegal.<sup>158</sup> Ralph R. Curry, a volunteer with the Legal Assistance Office, represented Williams.<sup>159</sup> Harry Protas, a local lawyer who specialized in debt collection and creditors' rights, appeared on behalf of Walker-Thomas Furniture.<sup>160</sup>

Williams appeared as the only witness for the defense. On direct examination, her lawyer made sure to "bring out the fact" that Williams was "on relief" and supporting the household on her own.<sup>161</sup> Williams testified that she would not have bought the stereo if she had known she could lose her other purchases from Walker-Thomas Furniture, including a washing machine, if she failed to complete payments on the stereo.<sup>162</sup> At the time she fell behind, she thought that she had "paid all of the amount covering the washing machine, and some on the stereo."<sup>163</sup> She first became aware that the stereo and her prior purchases had not been paid off when she went to the Walker-Thomas Furniture store to talk to the credit manager "about two weeks before they came and took my furniture."<sup>164</sup> The record contains no explanation about why Williams decided to buy the stereo. (Counsel for Walker-Thomas Furniture objected when Williams's counsel posed the question.)

On cross-examination, the lawyer for Walker-Thomas Furniture repeatedly asked Williams about her understanding of the contract terms. Williams testified that she did not understand the meaning of the term *pro rata*, and that she never received a copy of the contracts she signed. Near the end of her testimony, she grew frustrated by opposing counsel's persistent inquiries about the contract language. She asked counsel for Walker-Thomas Furniture: "But how could I read things that I did not have[?] You are asking me about reading things that I

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section. *Hearing on H.R. 5338 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 88th Cong. (1963).

158. Transcript of Record at 73, 76, 81, 85, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389). The Thornes raised the same defenses as Williams at trial. They did not raise unconscionability. Transcript of Record at 12–19, *Thorne v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3412) (Trial Brief of Defendants).

159. Curry represented Williams at trial and filed the initial appeal. Transcript of Record at 1, 136, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389). Curry volunteered for the Legal Assistance Office. Dostert, *supra* note 139, at 1184.

160. The Protas firm continued to practice in this area. *Firm History*, PROTAS, SPIVOK, & COLLINS, LLC, [http://www.psclaw.net/Firm\\_History.html](http://www.psclaw.net/Firm_History.html) (last visited Feb. 1, 2014). Protas died in 1981. Social Security Administration, Social Security Death Index Entry for Number 579–52–3533, *available at* <http://search.ancestrylibrary.com> (last visited Nov. 22, 2013).

161. Transcript of Record at 45, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389).

162. *Id.* at 53.

163. *Id.* at 54.

164. *Id.* at 62.

never had to read.”<sup>165</sup>

In his closing remarks, counsel for Walker-Thomas Furniture argued that a verdict in favor of Williams would mean an end to “freedom of contract.”<sup>166</sup> Although Williams did not have a lawyer by her side when she signed the contracts, she had “every opportunity to acquaint herself with” the contract terms. Walker-Thomas Furniture could not be blamed for Williams’s failure to “find out what ‘pro rata’ meant.” That was “her own fault.” She was “careless or derelict insofar as signing the contract,” he argued.<sup>167</sup> Williams and the Thornes both lost, in separate trials before the D.C. Court of General Sessions, and immediately appealed.<sup>168</sup>

Before the D.C. Court of Appeals, Williams raised the same defenses as at trial, adding that the contracts were “against public policy.” Williams’s brief, submitted to the appellate court in late 1963, came close to making the claim that the pro rata provision was unconscionable, but the argument remained entangled with other defenses and couched in general policy terms. The brief mentioned unconscionable contracts in a section on fraud, arguing that “the facts indicate such a disregard of policy considerations as to be considered unconscionable.”<sup>169</sup> The contract, Williams claimed, was “similar to a contract of adhesion” to which “the usual contract rules based on the idea of ‘freedom of contract’ cannot be applied rationally.”<sup>170</sup> Neither side mentioned the U.C.C., which Congress had considered but not yet enacted for the District of Columbia.<sup>171</sup> The Thornes, likewise, did not raise unconscionability as a defense but noted that the court could use its “equitable powers” when presented with an

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165. *Id.* at 65.

166. *Id.* at 70.

167. *Id.* at 70–71.

168. *Id.* at 109–10 (Judgment without written opinion dated July 18, 1963, and Notice of Appeal); Transcript of Record at 21–22, *Thorne v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3412) (Judgment without written opinion dated July 26, 1963, and Notice of Appeal). The Thorne case came before Judge Reeves. Ora Marshino and Dostert appeared for the Thornes at trial. Reeves noted in the statement of proceedings on appeal that the court objected to Walker-Thomas Furniture’s practices but could find no way to rule in Thorne’s favor. Transcript of Record at 38, *Thorne v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3412) (Settled Statement of Proceedings and Evidence) (“Following argument of counsel, the Court stated that it felt that plaintiff was being very arbitrary in seizing the property under a writ of replevin after the defendant had maintained his payments for a number of years, and indicated that it would not permit this if such could be avoided.”).

169. Brief of Appellant at 6, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389). The brief also cited *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), an unconscionability decision involving the sale of a defective car and a form contract requiring the buyer to waive the implied warranty of merchantability.

170. Brief of Appellant at 11, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389).

171. In August 1963, Congress held hearings on whether to adopt the U.C.C. for the District of Columbia. *Hearing on H.R. 5338 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 88th Cong. (1963). It enacted the U.C.C. on December 30, 1963, effective January 1, 1965. Act of Dec. 30, 1963, Pub. L. No. 88-243, 77 Stat. 630.

“unconscionable case” to reach a “just result.”<sup>172</sup>

Williams’s brief also emphasized her helplessness and dependency, arguing that Williams, “being on public assistance[,] is in effect a *ward of the state* and as such is entitled to care, comfort and freedom from, deceitful, fraudulent practices.”<sup>173</sup> In addition, “[a] person in such a position is in that position because he is unable to do all the things for himself that others can do. He labors under a handicap of necessity and it is against public policy to allow the crafty to take unfair advantage of that necessity.”<sup>174</sup> In other words, Williams’s status as a welfare recipient made her purchases and credit arrangements a matter of public concern. In the Thorne brief, counsel similarly emphasized the defendant’s limited education.<sup>175</sup> The brief also attacked Walker-Thomas Furniture, likening the retailer to a “modern day Shylock[.]” who “may extract the historical pound of flesh, with the blessing of the judiciary in doing so.”<sup>176</sup>

But Walker-Thomas Furniture won again. The Court of Appeals threw up its hands, lamenting that there was no remedy under existing law. One of the judges on the three-member panel, Frank Myers, must have been particularly frustrated. Over a decade before, he had demanded that Congress enact corrective legislation in his opinion reluctantly finding in favor of Walker-Thomas Furniture in the *Coates* case. In *Williams*, the Court of Appeals acknowledged that Williams was a person of limited education but found no evidence of fraud or mutual misunderstanding. The court was no fan of Walker-Thomas Furniture’s “exploitive” contracts or its decision to sell a \$514 stereo set to a woman on relief who “had to feed, clothe and support both herself and seven children” on \$218 per month.<sup>177</sup> “We cannot condemn too strongly [Walker-Thomas Furniture’s] conduct,” the court wrote, emphasizing that “[i]t raises serious questions of sharp practice and irresponsible business dealings.”<sup>178</sup> Yet, there was “no ground upon which this court can declare the contracts in question contrary to public policy.”<sup>179</sup> The court affirmed the trial court’s judgment in favor of Walker-Thomas Furniture in both cases and again urged legislative

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172. Brief of Appellants at 4, *Thorne v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3412).

173. Brief of Appellant at 9, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389) (emphasis added).

174. *Id.* Some scholars have criticized Judge Wright because his opinion “leads readers to see Williams and other members of subordinated groups as defective and to ignore the fact of racism and other systems of social oppression.” Kastely, *supra* note 22, at 306. It is clear from the record that these assumptions did not originate with Wright, but with Williams’s lawyer.

175. Brief of Appellants at 3, *Thorne v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3412) (“Appellant in the case at bar, a person with a third grade education was limited in his ability to read.”).

176. *Id.* at 4.

177. *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964).

178. *Id.*

179. *Id.*

action to curtail future abuses.<sup>180</sup> Both Williams and the Thornes petitioned for review by the Court of Appeals for the D.C. Circuit.<sup>181</sup>

Although the D.C. Circuit rarely granted discretionary requests for review, a three-judge panel voted to hear both cases and consolidated them for purposes of briefing and argument.<sup>182</sup> They left no record of their reasoning. Perhaps, as Karl Llewellyn observed, the “battle ground” on which legal generalizations are tested “is and must always be the marginal and even pathological case.”<sup>183</sup> Or perhaps the first sentence of Williams’s statement of the case grabbed the judges’ attention: “Appellant, a person of limited education and separated from her husband, is maintaining herself and her seven children by means of public assistance.”<sup>184</sup>

Two of the three judges who granted review, Judge Skelly Wright and Chief Judge David Bazelon, were concerned about the plight of the poor.<sup>185</sup> Bazelon maintained a folder of clippings from the *Washington Post* and reports on the subject of poverty.<sup>186</sup> Judge Wright, who would author the decision in the *Williams* case, chaired the special committee of the Judicial Council that reviewed a grant proposal to the Ford Foundation seeking funding to establish a neighborhood legal services program for the poor.<sup>187</sup> Years later, he published a forceful 1969 editorial in *The New York Times* entitled *The Courts Have Failed*

180. *Id.* The case was argued before the D.C. Court of Appeals on February 3, 1964, and decided on March 30, 1964. *Id.* at 914.

181. At this time, the D.C. Court of Appeals was not the highest court in the District of Columbia. Before the Court Reorganization Act of 1970, the U.S. Court of Appeals for the D.C. Circuit had discretion to review judgments of the D.C. Court of Appeals. Theodore R. Newman, Jr., *The State of the District of Columbia Court of Appeals*, 27 *CATH. U. L. REV.* 453, 454 (1978).

182. On the frequency that the court granted requests for review, see Dostert, *supra* note 139, at 1185.

183. Llewellyn, *supra* note 81, at 750.

184. Brief for Petition for Allowance of an Appeal at 1, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (No. 18604). Thorne was similarly described as “a person with a third grade education” and “a nominal income.” Brief of Petitioners in Support of Petition for Allowance of Appeal at 3, *Thorne v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (No. 18605).

185. Each week, a three-judge panel would review motions to the court, including petitions for review. D.C. Circuit judges were assigned to a motions panel at random, and the panels rotated regularly. Separately-constituted three-judge panels were also assigned to hear and decide cases on appeal. It is a remarkable coincidence that Wright and Bazelon were both assigned to the motions panel that granted review in *Williams* and to the panel that decided the case. Interview with William Whitford, Professor, Univ. of Wis. Law Sch., in Madison, Wis. (June 13, 2013). The third member of the review panel was Judge Fahy. Order Granting Appeal (July 22, 1964), *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (No. 18604).

186. Bazelon’s papers include a folder entitled “Poverty Clippings” and three folders containing poverty reports from 1958–1962, 1963–1965, and 1966–1975. David L. Bazelon Papers, Biddle Law Library, University of Pennsylvania Law School (Subject Files Poverty Clippings Folder, Box 180; Subject Files Poverty Reports, 1958–1962, 1963–1965, 1966–1975, Boxes 179 and 180). The *Post* clippings include the following articles: Eve Edstrom, *Assault on Poverty by Education Urged*, *WASH. POST*, Dec. 14, 1963, at A1; Eve Edstrom, *One Out of 10 Americans Lives in ‘Abject Poverty,’ Study Reveals*, *WASH. POST*, Dec. 13, 1963, at A1; Sue Gronk, *Way Out of Poverty For a Man is a Job*, *WASH. POST*, Feb. 26, 1964, at D1.

187. EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* 28–29 (1974).



*the Poor*, critiquing the legal treatment of the low income.<sup>188</sup>

B. BEFORE THE D.C. CIRCUIT COURT OF APPEALS

Williams's attorneys fully briefed unconscionability as a defense only after Congress had adopted the Uniform Commercial Code, when the case was on appeal to the D.C. Circuit. There, Williams and the Thornes argued that Walker-Thomas Furniture's "conduct" was unconscionable. Specifically, they objected to the printing of the contracts in "microscopic type size" and failing to inform defendants about the lease and pro rata provisions of the contract.<sup>189</sup> The unconscionability section of the brief was short, taking up only two out of eighteen pages of argument.<sup>190</sup> Williams's counsel recognized that the U.C.C. was not effective when the contracts at issue were signed, but argued that the Code "is a restatement of law, founded upon the common law."<sup>191</sup> Walker-Thomas Furniture responded that the U.C.C. did not bar conditional sales agreements and that the express terms of the contract and course of dealing supported the trial court's ruling for Walker-Thomas Furniture. Further, Congress had not enacted any law regulating the use of particular type sizes or a "Retail Installment Sales Law" for the District of Columbia that would govern the terms of installment sales.<sup>192</sup>

Counsel for defendants also hammered home that Williams was a person of "limited educational achievement" and suggested that her "mental weakness" and below average intelligence were concerns. Williams's "ability to understand the instruments was limited by virtue of an eighth grade education."<sup>193</sup> Furthermore, Walker-Thomas Furniture took unfair advantage of Williams's circumstances. Its conduct "from the very outset is an outrage," Williams's counsel added, meaning "selling a stereo record player to a woman on relief with seven children and a monthly relief payment of \$218.00."<sup>194</sup> Counsel cautioned that failure to apply equitable principles to Walker-Thomas Furniture's enforcement action could have dramatic consequences. Foreshadowing the violence that broke out in cities across the nation in the mid-1960s, Williams's attorneys warned:

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188. Wright, *The Courts Have Failed the Poor*, *supra* note 13.

189. Brief for Appellants at 13, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605).

190. *Id.* at 12–13.

191. *Id.* at 12. Defendants also argued, for the first time on appeal, that the pro rata provision of the contract violated the spirit of the District of Columbia's exemption statute, D.C. CODE § 15-401 (1961) (now codified at D.C. CODE § 15-501), which barred creditors from seizing a debtor's household furniture and other personal property in order to satisfy a money judgment. *Id.* at 24–26.

192. Brief for Appellee at 19–23, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605).

193. Brief for Appellants at 3, 9, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605). The brief casts Williams as a victim in order to advance the defendants' legal arguments. It is difficult to gauge from the record how much Williams actually understood about the terms of the sale.

194. *Id.* at 5, 7, 9, 23.

Each time there is a substantial injustice in a court, there is in like degree a lessening of respect for the law, and the emotions of anger and hate directed towards those persons pursuing injustice, and general antipathy toward the community which permits a system of law capable of injustice to exist.<sup>195</sup>

In the order granting appellate review, the federal appeals court appointed union-side labor lawyer Gerhard P. Van Arkel to act as *amicus curiae*.<sup>196</sup> The order provided no reason for the appointment and Van Arkel suggested in his brief that the court had provided no guidance as to what he should discuss.<sup>197</sup> Either on his own initiative or in accordance with an unwritten directive from the court,<sup>198</sup> Van Arkel decided to focus on the impact of the newly enacted U.C.C. He wrote that the Code imposed a new “statutory framework for dealing with the ‘unconscionable’ agreement.”<sup>199</sup> Van Arkel endorsed the defendants’ position that the Code was “declaratory rather than amendatory of the common law.”<sup>200</sup> The brief also provided an overview of the relevant case law on unconscionability and criteria a court might use in evaluating an agreement under section 2-302. Van Arkel concluded that in these cases, “there is at least a *prima facie* showing of an unconscionable transaction; a series of dealings with disadvantaged persons, known to the merchant to be such, evidenced by highly legalized, fine print, documents, resulting in a forfeiture.”<sup>201</sup> He suggested that the court might direct a new trial because the record was devoid of findings related to unconscionability.<sup>202</sup>

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195. *Id.* at 11.

196. It is not clear why the court appointed Van Arkel or what stake he had in the outcome of the litigation. Van Arkel was a founding partner of Van Arkel & Kaiser, a union-side labor law firm. The firm later merged with another firm to become Bredhoff & Kaiser. Prior to entering private practice, Van Arkel served as General Counsel for the National Labor Relations Board under Truman. He resigned the post in protest after the passage of the Taft-Hartley Act. J.Y. Smith, *Gerhard P. Van Arkel*, 77, *Former Counsel of NLRB*, WASH. POST, Oct. 19, 1984, at D6. Then-Howard Law School professor Egon Guttman and Howard law student Bobby L. Hill provided assistance on the brief. Brief of Gerhard Van Arkel as *Amicus Curiae* at 17, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605).

197. Van Arkel emphasized the difficulty of his charge in the *amicus* brief. He wrote: “The filing of a brief *amicus* in cases such as these is not without its hazards, for counsel is required to make a judgment as to the issues which may, or should, interest the Court and may err in so doing.” Brief of Gerhard Van Arkel as *Amicus Curiae* at 1, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605).

198. Howard law student Bobby L. Hill, who provided assistance to Van Arkel on the brief, explained in a subsequent law review article that the court appointed an *amicus* to analyze “the perplexing contours of the problem of having the Uniform Commercial Code adopted but ineffective in the jurisdiction.” Bobby L. Hill, Note, *Commercial Law—Poor Education and Low Economic Status of a Party to an Installment Sales Contract Determinant of Whether Unconscionable Bargain Was Made*, 12 *HOW. L.J.* 164, 169 (1966). Hill died in 2000. *Controversial Civil Rights Activist Dies*, SAVANNAH MORNING NEWS, Dec. 3, 2000, <http://savannahnow.com/stories/120200/LOChilldeath.shtml>.

199. Brief of Gerhard Van Arkel as *Amicus Curiae* at 2, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605).

200. *Id.* at 2–3.

201. *Id.* at 15.

202. *Id.* at 16.

*Williams* and the companion case, *Thorne v. Walker-Thomas Furniture Co.*, came up for oral argument before the three-judge panel of Skelly Wright, David Bazelon, and John Danaher in April 1965.<sup>203</sup> The case was argued on a Friday morning.<sup>204</sup> By the following Monday, Wright had written a first draft of the opinion finding in favor of Williams and the Thornes.<sup>205</sup> It was styled “per curiam,” meaning that it would be attributed to the court as a whole, rather than to an individual judge.<sup>206</sup>

It was also short, less than twenty-five lines long not including five paragraphs excerpted directly from the D.C. Court of Appeals decision.<sup>207</sup> Because the U.C.C. was not in effect at the time of the transactions, the decision relied on the common law doctrine of unconscionability.<sup>208</sup> Tracking the language of the amicus brief, the court found that the U.C.C. provision on unconscionable contracts was “declaratory of the common law” and that unconscionability analysis should be applied on remand.<sup>209</sup> It would be up to the trial court to determine whether the contract was in fact unconscionable.<sup>210</sup>

### C. REMAKING THE “LAW OF THE POOR”

Wright quickly jettisoned this modest approach, however. In the first draft circulated to the panel, he included more detail about Walker-Thomas Furniture’s course of conduct and dropped the per curiam attribution. As his later writings make clear, Wright viewed Walker-Thomas Furniture’s general busi-

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203. Letter from Nathaniel J. Paulson, Clerk, U.S. Court of Appeals for the D.C. Circuit, to R. R. Curry & Pierre E. Dostert, Counsel for Appellants, Harry Protas, Counsel for Appellee, and Gerhard P. Van Arkel, Amicus Curiae (Mar. 18, 1965) (Case File 18604; U.S. Court of Appeals for the D.C. Circuit; Records of U.S. Courts of Appeals, Record Group 276, National Archives and Records Administration).

204. The case was argued at 10:30 a.m. on April 9, 1965. *Id.*

205. The first Wright draft of the opinion is dated April 12, 1965. Draft Opinion of Judge Skelly Wright, at 1 (Apr. 12, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress).

206. *See id.*

207. *See id.*

208. Although the *Williams* decision technically relied on the common law doctrine, rather than the U.C.C. provision, it did not suggest that the common law doctrine was in any way different from the U.C.C. provision. As one scholar remarked, *Williams* “clearly would have been decided on the basis of [U.C.C. §] 2-302 had the statute been in effect at the time of the relevant transaction, and in fact was decided as if the section were the law of the jurisdiction.” Leff, *supra* note 119, at 551.

209. Draft Opinion of Judge Skelly Wright, at 1 (Apr. 12, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress); *see also* Brief of Gerhard Van Arkel as Amicus Curiae at 2–3, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605) (asserting that the “Code is declaratory rather than amendatory of the common law”).

210. In the final opinion, Wright hedged on whether unconscionability was a new doctrine in the District of Columbia. He avoided the question, noting that, even if the doctrine were not already part of the common law, the court might adopt it “in the exercise of its powers to develop the common law for the District of Columbia.” *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

ness practices as the root of the problem. Courts, in his opinion, were complicit in sanctioning these practices. They “appl[ied] ancient legal doctrines which merely compound the plight of the poverty-stricken.”<sup>211</sup> Instead, they should strive to change social policy “to liberate the urban poor from their degradation.”<sup>212</sup> Judges “can and must participate in bringing about that change by changing the law,” Wright later wrote.<sup>213</sup>

Accordingly, in the first draft circulated to Bazelon, Danaher, and the rest of the court in June, Wright focused on Walker-Thomas Furniture’s conduct, rather than the defendants’ knowledge and understanding of the transactions. He noted:

In both the Williams and the Thorne cases, shortly before the furniture store sought repossession, a large purchase was made. It might be shown that at the time of these purchases [Walker-Thomas] knew, or obviously should have known, that, because of the purchaser’s circumstances, a default in monthly payments and, hence, repossession of all items purchased in the past three years would almost inevitably ensue. It might also appear that on resale of repossessed items [Walker-Thomas] usually realizes, by resale or otherwise, an amount greater than the debt secured by the items, and perhaps greater than the valuation given the items at the time of repossession.<sup>214</sup>

In a footnote, he further instructed the lower court that it should consider the relationship of the price charged to the value of the items sold to Williams and admit evidence “to show whether the stereo set sold the appellant Williams was new or repossessed and whether, new or repossessed, it had a market value anywhere near \$514.”<sup>215</sup>

Wright’s framing of the problem thus departed from the defendants’ focus on the individual quirks of the Williams and Thorne transactions. In their briefs, the lawyers for Williams and the Thornes presented the facts of their cases in terms resonant with a centuries-old discourse about the deserving poor.<sup>216</sup> Defendants appeared intellectually deficient, helpless, and in need of protection. They were people with “limited educational achievement” and “mental weak-

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211. Wright, *The Courts Have Failed the Poor*, *supra* note 13.

212. *Id.*

213. *Id.*

214. Draft Opinion of Judge Skelly Wright, at 6–7 (June 29, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress). This section was later deleted from the opinion, but reappeared in Wright’s 1969 *New York Times* article. There, Wright wrote: “Perhaps it was more than coincidence that Walker-Thomas sold Mrs. Williams a stereo just when she was nearing the final payment on all her previous purchases and would then own the goods outright.” Wright, *The Courts Have Failed the Poor*, *supra* note 13.

215. Draft Opinion of Judge Skelly Wright, at 8 n.10 (June 29, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress).

216. See, e.g., MICHAEL B. KATZ, *THE UNDESERVING POOR* 9–35 (1989).

ness,”<sup>217</sup> the “lowliest of our society.”<sup>218</sup> The description of Williams, in particular, evoked the worthy widow: a single mother who subsisted on “public relief payments from the Government.”<sup>219</sup> Counsel undoubtedly invoked these stereotypes strategically to obtain relief for their clients. Wright, however, took a more structural approach in his analysis.

In Wright’s view, the background and intelligence of the poor borrowers—Williams and the Thornes—were less important than the tyranny of the lender-seller or, as Wright later dubbed it, the “manufacturer-seller-financier complex.”<sup>220</sup> Wright’s theory of the transactions is clear in the original drafts. In his view, Walker-Thomas Furniture likely sold used goods as new, at prices well above their real market value.<sup>221</sup> The company made a practice of selling high-priced items to its customers with the knowledge that they would likely default and repossession of all of the items purchased would “inevitably ensue.”<sup>222</sup> The company could then resell the items to the next customer, perhaps recouping an “amount greater than the debt secured by the items” and “greater than the valuation given the items at the time of repossession.”<sup>223</sup> He concluded that if “this should prove to be the case, and as a matter of practice [Walker-Thomas] makes no attempt to remit this surplusage to the defaulting purchaser, the conscionability of the sales contracts which permit such a result might certainly be questioned.”<sup>224</sup>

Before the next round of drafts went out to the full court, Danaher advised Wright that he planned to dissent. He explained that, “[c]ases on the equity side seem to me not applicable as we review a decision of the District of Columbia Court of Appeals,” and that the “situation calls for congressional scrutiny.” In other words, “the remedy does not lie with this court.”<sup>225</sup> Danaher took issue with Wright’s characterization of Williams, asserting instead that she “seems to have known precisely where she stood.”<sup>226</sup> He suggested that the majority was treating Williams differently because she was on relief: “Is public oversight to be required of the expenditures of relief funds?” he asked the majority.<sup>227</sup> Danaher suggested instead that a remedy might be found within the District of

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217. Brief for Appellants at 9, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605).

218. *Id.* at 11.

219. *Id.* at 2.

220. Wright, *The Courts Have Failed the Poor*, *supra* note 13.

221. Draft Opinion of Judge Skelly Wright, at 8 n.10 (June 29, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress).

222. *Id.* at 6.

223. *Id.* at 6–7.

224. *Id.* at 7.

225. Memorandum from Hon. John Danaher to Hon. J. Skelly Wright and Hon. David L. Bazelon (July 22, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress).

226. Draft Dissent of Judge Danaher, at 1 (July 22, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress).

227. *Id.*

Columbia's "Loan Shark" law.<sup>228</sup> In his view, Wright's ruling threatened the validity of the "thousands upon thousands" of installment contracts signed every year in the District of Columbia.<sup>229</sup>

Danaher was right. Wright's initial approach was broad, perhaps dangerously so. Walker-Thomas Furniture's contracts with Williams and the Thornes were on pre-printed forms used in every credit sale the company made. Further, Wright's draft suggested that these contracts might be unconscionable because of these terms and an ongoing pattern of conduct by the seller, rather than isolated defects in individual transactions. Finally, Wright's legal pronouncement—that the common law of the District of Columbia authorized courts' refusal to enforce unconscionable contracts—was novel and potentially far-reaching.<sup>230</sup> Indeed, Wright later acknowledged that the "opinion in *Williams v. Walker-Thomas* was, shockingly, one of the first to hold that the courts had the power to refuse to enforce such unconscionable contracts."<sup>231</sup> As initially drafted, the *Williams* decision could have cast doubt on the enforceability of many thousands of installment sales contracts in the District of Columbia.<sup>232</sup>

After learning that Danaher planned to dissent and conferring with Bazelon, Wright reframed the facts to downplay the structural inequalities at play. He deleted the footnote about the value-price disparity.<sup>233</sup> He also omitted the section concerning Walker-Thomas Furniture's knowledge of defendants' likelihood of default. The final opinion portrayed Walker-Thomas Furniture's actions in the two cases as unusually exploitative and the defendants as particularly vulnerable, while understating the novelty of the legal holding. Wright circu-

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228. *Id.* The "Loan Shark" law appeared at D.C. CODE §§ 26-601, 26-611 (1961). It did not apply to retail credit sales. The District of Columbia's neighboring state of Maryland did have a law regulating such transactions that allowed the use of "add-on clauses" like the one in *Williams*, but required certain disclosures and prohibited the Walker-Thomas Furniture method of accounting for payments received. MD. ANN. CODE art. 83, § 137 (1957).

229. Draft Dissent of Judge Danaher, at 2 (July 22, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress).

230. U.C.C. § 2-302 applied only to sales contracts. Wright's holding that unconscionability was part of the common law included no such limitation.

231. Wright, *The Courts Have Failed the Poor*, *supra* note 13.

232. As of 1975, Walker-Thomas Furniture alone had 15,000 to 20,000 working accounts and average yearly sales of \$4 million. Greenberg, *supra* note 44, at 381. In his dissent, Judge Danaher warned that Wright's final published opinion posed a threat to the "thousands upon thousands of installment credit transactions" signed each year in the District of Columbia. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965) (Danaher, J., dissenting).

233. Memorandum from Hon. David L. Bazelon to Hon. J. Skelly Wright (July 15, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress). Bazelon wrote: "We recently talked about your proposed opinion in this case, and particularly about my difficulties with footnote 10 [on the value-price disparity]. You stated that you would reconsider this footnote. Have you any further thoughts?" *Id.* Based on this note, it seems likely that Wright removed the other statements speculating about Walker-Thomas Furniture's business at Bazelon's suggestion.

lated a revised opinion and Danaher's dissent to the full court a few days later. Bazelon concurred in the decision; three other judges (who were not on the panel) noted minor corrections and their agreement with the disposition.<sup>234</sup> With a few revisions, the text went off to the printer.

The final published opinions by Wright and Danaher reflect their opposing views about the relative competence of courts and legislatures, the limits of freedom of contract, and the best way to regulate private economic decision making in the postwar Consumer's Republic. Wright found an ex post judicial remedy within the common law of contract; Danaher suggested that either the D.C. "Loan Shark" law or future legislation could provide those like Williams with some degree of protection ex ante. Danaher characterized the majority as monitoring the expenditure of welfare funds. He implicitly rejected the argument by Williams's counsel that Walker-Thomas Furniture had no business selling an expensive stereo to a welfare recipient.<sup>235</sup> Danaher argued that "relief clients" should be allowed the same expansive contractual freedom as everyone else.<sup>236</sup> He noted that, historically, the law had allowed people "great latitude in making their own contracts" and cautioned against judicial interference with this freedom.<sup>237</sup>

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234. Memorandum from Hon. David L. Bazelon to Hon. J. Skelly Wright (July 23, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress); Memorandum from Hon. Henry Edgerton to Hon. J. Skelly Wright (July 28, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress); Memorandum from Hon. Charles Fahy to Hon. J. Skelly Wright (July 27, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress); Memorandum from Hon. Carl E. McGowan to Hon. J. Skelly Wright (July 26, 1965) (Wright Papers, Box 77, Folder 1965 September term, Manuscript Division, Library of Congress).

235. See *Williams*, 350 F.2d at 450 (Danaher, J., dissenting). Danaher focused on the washing machine purchase, rather than the stereo. The washing machine, however, would have been paid off and safe from seizure absent the pro rata provision in the contract.

236. *Id.* Following Danaher's lead, some contemporary commentators have likewise observed that Wright's decision is "arguably paternalistic" and "leads readers to see Williams and other members of subordinated groups as defective." See Spence, *supra* note 17, at 96; Kastely, *supra* note 22, at 306. Commentators have suggested that Wright's approach unfairly stereotypes black mothers on welfare, like Williams, as uneducated consumers not capable of full participation in the marketplace. They rest this argument in particular on Wright's assertion that courts must ask: "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?" *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). Wright, however, did not make any assumptions about Williams's education or knowledge of the contract terms; the facts were clearly stated in the record. Indeed, Williams's own counsel argued that her lack of formal education was relevant to whether the contracts were unconscionable, after eliciting testimony from Williams as to her level of education and understanding of the contract terms. Brief for Appellants at 3, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605). Further, Wright's opinion concerned not just Williams, but also William and Ruth Thorne. Counsel for William Thorne argued that Thorne, "having a third grade level education, could not read or write at a level which would have enabled him to understand the nature of these printed forms." *Id.* The obvious lack of education of Thorne, not Williams, may have prompted the inclusion of education as a factor for courts to weigh.

237. *Williams*, 350 F.2d at 450 (Danaher, J., dissenting).

Wright had less reverence for the sanctity of private bargains and greater faith in the competence of the judiciary to enact change. As a federal district court judge in Louisiana, he ordered the local school board to end segregation within New Orleans' schools.<sup>238</sup> A few years after deciding *Williams*, he explained that courts must sometimes act outside their areas of expertise to avoid injustice. "It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government," he wrote in a District of Columbia school desegregation case.<sup>239</sup> When problems defy legislative resolution, however, "the judiciary must bear a hand and accept its responsibility to assist in the solution."<sup>240</sup>

In the case of credit sales to poor, inner-city residents, Wright believed that courts and lawyers needed doctrinal tools to combat commercial abuses of the poor within the traditional framework of contract law. Unconscionability fit the bill. As set out in the U.C.C. and applied in *Williams*, unconscionability seemed to pull commercial law towards a more subjective analysis of bargains and equitable resolution of disputes. (Equity also reappeared in other corners of contract law around this time, most notably in the Supreme Court of Wisconsin's now-famous opinion in *Hoffman v. Red Owl Stores, Inc.*,<sup>241</sup> decided the same year as *Williams*.)

Yet, the doctrine had obvious limitations. Unconscionability did not suggest that the classic model of contract formation envisioned by the common law—an arms-length bargain between two parties of equal bargaining power—was defective.<sup>242</sup> Contrary to Friedrich Kessler's suggested remedy, it did not create new rules for adhesion contracts.<sup>243</sup> Indeed, unconscionability existed comfortably within the centuries-old framework of the common law of contracts. It merely allowed judges to void the most egregious one-sided bargains without throwing the entire system into chaos.<sup>244</sup> Reformers would eventually push for what they hoped would be a more permanent legislative solution: a separate regulatory regime for retail installment sales contracts.

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238. *Bush v. Orleans Parish Sch. Bd.*, 138 F. Supp. 337, 342 (1956).

239. *Hobson v. Hansen*, 269 F. Supp. 401, 517 (D.D.C. 1967). Note that Wright was sitting on the district court.

240. *Id.*

241. 133 N.W.2d 267, 275 (Wis. 1965) (relying on the doctrine of promissory estoppel to award reliance damages in the absence of a formal contract). For a history of the *Red Owl* case, see William C. Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. 801 (2010). For a different reading of this history, see Robert E. Scott, *Hoffman v. Red Owl Stores and the Limits of the Legal Method*, 61 HASTINGS L.J. 859 (2010).

242. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1192 (1983) (observing that Wright's decision was "deeply imbedded in the traditional approach" to adhesion contracts).

243. See discussion *supra* Part II.

244. See Kennedy, *supra* note 102, at 1777 ("There is a strong argument that the altruist judges who have created the modern law of unconscionability and promissory estoppel have diverted resources available for the reform of the overall substantive structure into a dead end.").



## IV. A LEGISLATIVE FIX

## A. UNCONSCIONABILITY COMES UNDER ATTACK

The *Williams* litigation concluded within a year of Wright's decision, but the debate over unconscionability was just beginning. *Williams* was the subject of several law review case notes.<sup>245</sup> It was cited as a "famous case" in congressional hearing testimony and one senator's book about consumer issues.<sup>246</sup> A *Michigan Law Review* article called it a "*cause celebre*."<sup>247</sup> Another article endorsed Wright's view that *Williams* marked the start of something big. It cited the decision as evidence that the judicial treatment of signed contracts as "sacrosanct" was "slowly beginning to change."<sup>248</sup>

More generally, scholars discussed the merits of section 2-302 in the wake of widespread adoption of the U.C.C.<sup>249</sup> Scholars debated whether unconscionability analysis, now mandated by the Code in almost all states, provided a useful framework for judges or businesses. The varied reactions to the doctrine of unconscionability among legal academics reflected opposing views on the proper role of judges and of the common law of contracts as a means of regulating consumer transactions.

Commercial law professor Arthur Leff delivered the most devastating critique of the Code provision on unconscionability.<sup>250</sup> Cataloging in painstaking detail the U.C.C. drafters' many missteps in preparing the text and commentary of section 2-302, Leff concluded that the provision suffered from "amorphous unintelligibility."<sup>251</sup> In Leff's view, the final draft invited judges to rely on their own "emotional state" to determine which terms were permissible.<sup>252</sup> By permitting judges to "police contracts on a clause-by-clause basis," the provision demanded they decide whether particular terms should be allowed as a matter of policy. The term "unconscionable"—a "highly abstract word"—provided no concrete guidelines to help resolve questions that were essentially

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245. See, e.g., Hill, *supra* note 198; Circuit Note, *Civil Law and Procedure: Contracts, Enforcement, Unconscionability*, 55 GEO. L.J. 115 (1966); Recent Case, *Contracts—Enforcement—Unconscionable Installment Sales Contract is Unenforceable—Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), 79 HARV. L. REV. 1299 (1966).

246. *Consumer Credit Protection Act: Hearing on H.R. 11601 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency*, 90th Cong. 499 (1967) (statement of Sidney Margolius, consumer writer); MAGNUSON & CARPER, *supra* note 46, at 113–14.

247. Skilton & Helstad, *supra* note 60, at 1477.

248. Caplovitz, *supra* note 71, at 651 & n.23 (citing *Williams* by name); see also CAPLOVITZ *supra* note 72, at xvii & n.4. In the 1967 preface to his book, Caplovitz does not reference the decision by name. However, no other decision fits his description of the case. *Id.*

249. Pennsylvania was the first state to enact the Code, effective in 1954. After New York objected to some provisions, the Code was revised in 1962. It was enacted in every state except Louisiana by 1967.

250. Leff, *supra* note 119. Leff was an assistant professor at Washington University Law School when this article was published. Within the year, Leff joined the faculty of Yale Law School. Ellen A. Peters, *Arthur Leff as a Scholar of Commercial and Contract Law*, 91 YALE L.J. 230, 230 (1981).

251. Leff, *supra* note 119, at 488.

252. *Id.* at 516.

“problems of social policy.”<sup>253</sup> It invited a court to be “nondisclosive about the basis of its decision even to itself.”<sup>254</sup> Finding little guidance in section 2-302 as drafted, Leff offered his own framework to help courts in analyzing unconscionability claims. Leff’s distinction—between procedural and substantive unconscionability—has dominated thinking about the issue ever since.<sup>255</sup>

In the case of *Williams*, Leff approved the outcome, but not the method of reaching it. He agreed that there was sufficient evidence of procedural unconscionability to merit remand. The nature of the substantive unconscionability was less apparent, however.<sup>256</sup> Most likely, the court viewed the whole transaction as substantively unfair, because Walker-Thomas Furniture knew at the time of the sale that Williams was on relief and could not afford the stereo. Leff did not object to the court treating welfare recipients as a special “class” for purposes of contract law. He argued that such distinctions were “exceedingly common in the law (not to mention life).”<sup>257</sup> Rather, he opposed the method of imposing these controls—regulation “via the judicial bureaucracy, on an *ad hoc* case-by-case basis essentially unrestrained by legislative or administrative guidance.”<sup>258</sup> Furthermore, few such cases would make it to a judge because only consumers with free legal representation could afford to test the legality of their contract terms in court.<sup>259</sup>

It would be better to let legislatures, rather than judges, make such political decisions and ban certain contract terms outright. Indeed, these contracts were not really contracts at all, Leff argued. They were more like “products,” things.<sup>260</sup> These were not bargained-for exchanges in the traditional contract law model. Nor would it be desirable to make consumers bargain for contract

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253. *Id.* at 515.

254. *Id.* at 557.

255. Peters, *supra* note 250, at 231. Leff’s framework tracks Wright’s unconscionability analysis in *Williams*. As Leff observed, Wright recognized “that unconscionability has to have two foci, the negotiation which led to the contract and that contract’s terms.” Leff, *supra* note 119, at 552.

256. Leff noted that there were only two possible reasons to find the contract substantively unconscionable: the court objected to either the entire transaction or just the pro rata provision. But, he explained, the court would have been hard-pressed to label an add-on clause unconscionable because similar clauses had legislative sanction in nearby states like Maryland. Leff, *supra* note 119, at 554–55. Maryland did allow the use of add-on clauses like the one in *Williams*, but it did not permit the Walker-Thomas Furniture method of accounting for payments received and allowed the buyer to redeem any repossessed item in exchange for the amount owed on that item. MD. ANN. CODE art. 83, § 137 (1957).

257. Leff, *supra* note 119, at 555–56 (footnote omitted).

258. Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 353 (1970).

259. *See id.* at 356 (noting that “you need free legal help for the consumer” to use common law adjudication to “regulate the quality of transactions on a case-by-case basis, each one of which is economically trivial”).

260. *Id.* at 352 n.18. This was also the title of another article, Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970). In a recent article, Oren Bar-Gill and Elizabeth Warren made the same comparison. *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 6 (2008) (“Credit products should be thought of as products, like toasters and lawnmowers, and their sale should meet minimum safety standards.”).

terms, which would increase the cost of these transactions. Rather, Leff argued, legislatures should face the policy questions raised by such “products” and decide what terms were off-limits, much like they would regulate the minimum quality of goods for sale.<sup>261</sup> Leff feared that the availability of unconscionability review might “stall the hard thinking and lobbying that has to be done” to deal with such questions through statute.<sup>262</sup> In fact, the *Williams* litigation had the opposite effect.

#### B. CONGRESS ACTS

The *Williams* litigation catalyzed a process of local legislative reform to put in place new regulations for installment sales. Shortly after the D.C. Court of Appeals affirmed the judgment in favor of Walker-Thomas Furniture, reformers mobilized. In denying *Williams* relief, the Court of Appeals had faulted the legislature; the District of Columbia had no Retail Installment Sales Act to protect installment buyers like *Williams*.<sup>263</sup> The D.C. Board of Commissioners took note. On the Board’s instruction, the Corporation Counsel set to work assembling a committee to “draft legislation to deal with the problem.”<sup>264</sup> One member of the committee described the proposed legislation as “the direct result of the factual situation in the *Williams* case.”<sup>265</sup>

References to the *Williams* litigation recur throughout the debates about consumer protection measures in the District of Columbia. In 1967, Professor Egon Guttman of Howard Law School testified before Congress in favor of installment sales regulation, on behalf of a coalition of organizations involved in drafting the proposed legislation. The consumer coalition members agreed that protective legislation must include an “Ora Lee *Williams* clause,” to limit installment sellers’ right to repossess.<sup>266</sup> (Guttman was quite familiar with the *Williams* situation; he had assisted in drafting the amicus brief filed with the D.C. Circuit.) Another witness at the same hearing applauded the proposed

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261. Leff, *supra* note 258, at 352 n.18.

262. *Id.* at 357.

263. *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964). The case was decided on March 30, 1964. *Id.* at 914.

264. *Consumer Protection Legislation for the District of Columbia: Hearings on S. 316, S. 2589, S. 2590, and S. 2592 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 90th Cong. 29–30 (1968) (letter from Walter E. Washington, Comm’r of the District of Columbia).

265. Kass, *supra* note 33. Contracts scholar Charles Knapp has theorized that unconscionability operates as a “safety valve,” which allows judges to reach the desired result in an individual case but also raises an alarm about “social evils” in need of redress. Knapp, *supra* note 30, at 609. He focuses on decisions concerning arbitration. *Id.* at 626–28 (suggesting that state court decisions invalidating mandatory arbitration clauses on unconscionability grounds serve this function, blowing off steam and sending up an alarm). Another scholar has used the similar metaphor of a “safety net.” Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 73 (2006). The *Williams* decision seems to have worked as a “safety valve.”

266. *Consumer Protection Legislation for the District of Columbia: Hearings on S. 316, S. 2589, S. 2590, and S. 2592 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 90th Cong. 60 (1968) (statement of Egon Guttman, Professor of Law, Howard University).

legislation for attacking “the Ora Lee Williams situation.”<sup>267</sup> In its statement in support of the bill, the D.C. Bar Association likewise referenced the facts of *Williams*, arguing that the law offered protection without overreaching.<sup>268</sup> It would “discourage installment sellers” from offering a “combination hi-fi-TV set costing \$500.00” to “a person living on welfare,” without outright barring “such sales to such persons.”<sup>269</sup> Committee reports similarly noted that the legislation would help “eliminate the type of abuse illustrated by the celebrated case of *Williams*.”<sup>270</sup> Yet, as soon as these local measures were introduced in Congress, events conspired to shift lawmakers’ attention to the national stage. Federal consumer credit regulation quickly took priority over local legislation for the District of Columbia.

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The outbreak of unrest across the country, during the “long hot summers” of the mid-1960s, made the problems of poor, urban households nationwide difficult for Congress to ignore.<sup>271</sup> The same day that *Williams* was decided, the California highway patrol pulled over Marquette Frye in the Los Angeles neighborhood of Watts, setting off a chain of events that would lead to six days of civil disorder and leave millions in property damage and thirty-four dead.<sup>272</sup> Contemporary observers could offer no singular explanation for what sparked and then fueled the fires that burned in America’s cities, but they agreed that the credit practices of “ghetto” merchants were a contributing factor.<sup>273</sup> In a subsequent 1968 study of the uprisings in Watts and other urban centers across the nation, a federal investigatory commission concluded that city residents had “[s]ignificant grievances concerning unfair commercial practices.”<sup>274</sup> “[M]any merchants in ghetto neighborhoods take advantage of their superior knowledge of credit buying by engaging in various exploitative tactics,” including charging

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267. *Consumer Protection Legislation for the District of Columbia: Hearings on S. 316, S. 2589, S. 2590, and S. 2592 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 90th Cong. 119 (1968) (statement of Stephen M. Nassau, representing the Consumer Protection Committee of the Greater Washington Chapter of Americans for Democratic Action). Hearing testimony also showed that the situation was ongoing. One witness described buying goods on credit from the “WT” company on Seventh Street and his surprise to learn from his legal aid lawyer about the pro rata provision in his contracts. *Id.* at 82 (statement of James Whitaker, “WT” customer and father of five).

268. *Id.* at 26 (Report of the Bar Association of the District of Columbia).

269. *Id.*

270. S. REP. NO. 90-1519, at 15 (1968); *see also* S. REP. NO. 92-500, at 7–8 (1971) (citing *Williams* as a “celebrated” example of the hardships created by add-on clauses).

271. *See* THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 313–55 (2008).

272. Lacey P. Hunter, *Los Angeles, California, Riot 1965*, in 3 *ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY* 865, 865 (Leslie M. Alexander & Walter C. Rucker eds., 2010).

273. U.S. KERNER COMM’N, *supra* note 55, at 139–40.

274. *Id.* at 139.

“exorbitant prices or credit charges.”<sup>275</sup> Participants in the uprisings targeted retailers’ credit records. “These were destroyed before the place was burned,” one witness recalled.<sup>276</sup>

In April 1968, over a hundred American cities erupted in the wake of the assassination of Dr. Martin Luther King, Jr. As fires burned in the District of Columbia on the night of April 6, the Court of General Sessions reopened for a special nine-o’clock evening session to set bail for the arrested looters.<sup>277</sup> The same courthouse had set the scene, years before, for the *Williams* and *Thorne* trials. In the streets, rioters targeted “buy now, pay later” stores. Several buildings on the Seventh Street easy-credit corridor, just down the block from Walker-Thomas Furniture, burned to the ground.<sup>278</sup> Angry customers sought out merchants’ credit records, “the books,” which recorded their debts and symbolized their perceived exploitation by ghetto retailers like Walker-Thomas Furniture. A woman yelled at looters in the Walker-Thomas Furniture store: “Get the books! Get the books!”<sup>279</sup> A man watching a clothing store burn shouted, “[b]urn those damn records!”<sup>280</sup> “Don’t grab the groceries,” a woman rummaging through a delicatessen near Seventh and S Streets advised her son, “grab the book.”<sup>281</sup>

Following the civil unrest in the District of Columbia and other American cities, Congress took action on national consumer credit reform.<sup>282</sup> Earlier efforts to pass federal legislation had failed,<sup>283</sup> but recent events reinvigorated the effort to address the problem. After the 1967 wave of uprisings, Office of Economic Opportunity head Sargent Shriver testified that problems with the provision of consumer credit to the poor have “been a major contributor to the

275. *Id.* at 140. These tactics also included “high-pressure salesmanship, ‘bait advertising,’ misrepresentation of prices, substitution of used goods for promised new ones, failure to notify consumers of legal actions against them, refusal to repair or replace substandard goods . . . and use of shoddy merchandise.” *Id.*

276. GERALD HORNE, *FIRE THIS TIME: THE WATTS UPRISING AND THE 1960s* 65 (1995) (quoting observer John Buggs of the Los Angeles Human Relations Commission).

277. Willard Clopton, *Curfew Imposed as Roving Bands Plunder and Burn*, WASH. POST, Apr. 6, 1968, at A1.

278. Photograph: D.C. Riot. April '68. Aftermath (Warren K. Leffler, Apr. 8, 1968) (on file with Library of Congress, Prints & Photographs Division), available at <http://hdl.loc.gov/loc.pnp/ppmsca.04301>.

279. William Raspberry, *Lessons of the Riots*, WASH. POST, Apr. 3, 1988, at A1.

280. Willard Clopton Jr. & Robert G. Kaiser, *11,500 Troops Confront Rioters; Three-Day Arrest Total at 2686*, WASH. POST, Apr. 7, 1968, at A1.

281. Ward Just, *Generation Gap in the Ghetto*, WASH. POST, Apr. 7, 1968, at B6.

282. Historian Louis Hyman argues that federal credit reform “acquired a new urgency” after the riots. Hyman, *supra* note 56, at 210–11.

283. Senator Paul Douglas introduced legislation requiring credit disclosures in 1960, 1961, and 1965. Senator Proxmire introduced legislation in 1967 that led to the passage of the Truth in Lending Act in 1968. President Johnson signed the bill into law on May 29, 1968. The Senate also held hearings on proposed retail installment sales regulation, but the bills did not become law. *Consumer Protection Legislation for the District of Columbia: Hearings on S. 316, S. 2589, S. 2590, and S. 2592 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 90th Cong. 255 (1968). Congress eventually passed regulation in 1971.

frustrations and the despair which finally led to the tragic upheavals which have recently rocked Newark, Detroit and so many other cities.”<sup>284</sup> He urged passage of truth-in-lending legislation. In his view, the common law of contracts was out of date, “built to meet the needs of the Industrial Revolution and adapted since to serve the interests of the Affluent Society” and had “very little relevance to the ghetto resident.”<sup>285</sup>

In hearings held shortly before the passage of the Truth in Lending Act, Senator Proxmire noted that the “problem of obtaining adequate consumer credit in the ghettos on reasonable terms is becoming one of national concern.”<sup>286</sup> This hearing followed after the February release of a federal study of the urban riots and the March publication of a Federal Trade Commission study of credit practices in the District of Columbia. According to Proxmire, “[r]ecent events” in the District of Columbia showed “a deep-seated antagonism between residents of the inner city and those merchants who serve the inner-city market.”<sup>287</sup> Betty Furness, Special Assistant to the President for Consumer Affairs, agreed that “the poor are paying more,” and the proof “was right here in the streets 2 weeks ago.”<sup>288</sup>

A wave of consumer credit regulation followed.<sup>289</sup> The first major piece of the legislation, the Truth in Lending Act, provided for uniform and complete disclosure of loan terms.<sup>290</sup> A few years later, the Equal Credit Opportunity Act of 1974 barred discrimination against borrowers based on sex and marital status.<sup>291</sup> Two years after its passage, Congress amended the Act to include race, religion, national origin, and age. It also barred discrimination against welfare

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284. *Consumer Credit Protection Act, Part I: Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency*, 90th Cong. 242 (1967) (statement of Sargent Shriver, Director, Office of Econ. Opportunity).

285. *Id.*

286. *Consumer Credit and the Poor: Hearing on the Federal Trade Commission Report on Credit Practices Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking & Currency*, 90th Cong. 1 (1968) (statement of Sen. Proxmire, Chairman, S. Comm. on Banking & Currency).

287. *Id.*

288. *Id.* at 26 (statement of Betty Furness, Special Assistant to the President for Consumer Affairs).

289. The federal Truth in Lending Act passed in 1968 as Title I of the Consumer Credit Protection Act. The Fair Credit Reporting Act (1970), Equal Credit Opportunity Act (1974), and the Fair Debt Collection Practices Act (1978) followed shortly after. Congress also passed the Housing and Urban Development Act of 1968 (H.U.D. Act), which included a mortgage subsidy program for low-income borrowers, and the Fair Housing Act of 1968, which barred discrimination in home mortgage lending based on race. *See* Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476 (codified as amended in scattered sections of the U.S. Code); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619 (2012)). On the H.U.D. Act subsidy program, see Hyman, *supra* note 56, at 212. The Fair Credit Reporting Act regulates the collection and use of consumer information, but not lending practices directly. *See* Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1128 (codified as amended at 15 U.S.C. §§ 1681–1681t (2012)).

290. *See* Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1693 (2012)).

291. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691a–1691f (2012)).

recipients.<sup>292</sup> The National Welfare Rights Organization had fought against welfare discrimination for several years, including demonstrations outside the Walker-Thomas Furniture store.<sup>293</sup> Together, these measures required lenders to disclose loan terms and to extend credit without regard to the borrower's race, sex, or other protected status.

Yet, commentators generally agreed that antidiscrimination and truth-in-lending measures would do little to help poor borrowers like Williams.<sup>294</sup> As FTC Chairman Paul Rand Dixon advised, "truth in lending is not going to reach the problem in the ghetto."<sup>295</sup> The problem was not lack of information but lack of choice. The ghetto was not a competitive marketplace. Congress, in Dixon's view, needed to "figure out some way to put the ghetto back into the stream of America."<sup>296</sup> Many activists and academics concurred.<sup>297</sup> Outlawing race-based discrimination might help middle-class minority borrowers but not consumers like Williams. A federal commission charged with the study of consumer credit concluded that "full access to the legal credit market by the poor will be effectively provided only by improving their incomes," and that the "basic problem of the poor is that they do not have the same ability to repay obligations as other consumers." The solution to the problem "lies not in glossing over the symptoms but in dealing with the major causes."<sup>298</sup>

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292. Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (codified as amended at 15 U.S.C. §§ 1691a-1691f (2012)).

293. Felicia Kornbluh, *To Fulfill Their "Rightly Needs": Consumerism and the National Welfare Rights Movement*, 69 RADICAL HIST. REV. 76, 90 (1997) (quoting activist who said that "[w]e do not believe a person should be refused credit for the simple reason that he is a recipient of public assistance"). Welfare Rights activists protested outside the Walker-Thomas Furniture store in the District of Columbia in 1969. *Welfare Units Picket Store, Urge Boycott*, WASH. POST, May 30, 1969, at B10.

294. *But see Consumer Credit Protection Act, Part 2: Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency*, 90th Cong. 803 (1967) (statement of Pat Greathouse, Vice President, United Automobile, Aerospace & Agricultural Implement Workers of America) (stating that truth-in-lending legislation would "especially help those who are most deceived by present credit practices, the poor and the disadvantaged in the inner city ghettos and in the isolated rural slum areas").

295. *Consumer Credit and the Poor: Hearing on the Federal Trade Commission Report on Credit Practices Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking & Currency*, 90th Cong. 10 (1968) (statement of Paul Rand Dixon, Chairman, FTC).

296. *Id.* at 11.

297. *See, e.g., Consumer Credit Protection Act, Part 1: Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency*, 90th Cong. 242 (1967) (statement of Hon. R. Sargent Shriver, Director, Office of Econ. Opportunity) ("Disclosure alone will not solve all the credit problems of the poor . . . [d]isclosure presupposes the ability to choose, which is just what the poor do not have . . ."); Robert L. Jordan & William D. Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. INDUS. & COM. L. REV. 441, 449 (1967); Benny Kass, *Consumer's View*, 26 BUS. LAW. 847, 852 (1971) ("Truth in Lending does not get to the real serious problem in inner cities which goes to the question of availability of credit . . .").

298. *Equal Credit Opportunity Act Amendments and Consumer Leasing Act—1975: Hearings on S. 483, S. 1900, S. 1927, S. 1961, and H.R. 5616 Before the Subcomm. on Consumer Affairs of the S. Comm. on Banking, Hous. & Urban Affairs*, 94th Cong. 346 (1975) (excerpts from the 1972 National Commission on Consumer Finance Report on Consumer Credit in the United States).

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Congress delayed in passing installment sales legislation for the District of Columbia until the early 1970s. To stress the need for action, reformers reminded lawmakers of Ora Lee Williams. One report measured the delay in the number of years since *Williams*.<sup>299</sup> Another witness also brought up “Mrs. Williams” and lamented Congress’s failure to enact reform in the intervening years.<sup>300</sup> Finally, in 1971, Congress passed the D.C. Consumer Credit Protection Act.

The law took aim at “overreaching and unconscionable commercial practices,” specifically outlawing pro rata provisions like the one in Ora Lee Williams’s contract.<sup>301</sup> Instead, lenders were required to apply payments to retiring the oldest debts first.<sup>302</sup> The new law also expressly gave courts the power to refuse enforcement of “unconscionable” loans.<sup>303</sup> Under the now-required accounting method, Williams would have paid off everything except for the stereo before she defaulted. The D.C. Council also later enacted an unfair and deceptive acts and practices law, known as a “UDAP” statute, which prohibited specified unfair trade practices and, more generally, “unconscionable” contracts.<sup>304</sup>

With many lending terms set by law, the price term (both the price of the goods sold and the interest rate) was one of the few items in a consumer credit sale subject to bargaining and to challenge as unconscionable. But procedural rules restricted the ability of poor consumers to assert the defense. After *Williams*, the D.C. Court of Appeals affirmed that a contract might be found unconscionable based on the price term.<sup>305</sup> Yet, courts required buyers to set out the factual basis for the defense in their complaint, while limiting their ability to

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299. *Interest and Usury: Hearing on S. 1938 Before the S. Comm. on Dist. of Columbia*, 92d Cong. 14 (1971) (Report and Recommendation to the City Council from the Commission on Interest Rates and Consumer Credit).

300. *Interest, Usury, and Consumer Credit: Hearings on S. 1938 and H.R. 10523 Before the Subcomm. on Judiciary of the H. Comm. on the Dist. of Columbia*, 92d Cong. 183–84 (1971) (statement of Benny Kass, Comm’r, Commission on Uniform State Laws, District of Columbia).

301. S. REP. NO. 92-500, at 6 (1971).

302. District of Columbia Consumer Credit Protection Act of 1971, Pub. L. No. 92-200, sec. 4, § 28-305, 85 Stat. 665, 670 (codified as amended at D.C. CODE § 28-3805 (2012)).

303. For the provision on unconscionability, see *id.* sec. 4, § 28-3812(g).

304. District of Columbia Consumer Protection Procedures Act of 1976, D.C. Law 1-76 (codified as amended at D.C. CODE §§ 28-3901 to 28-3913 (2012)). For the provision on unconscionability, see *id.* § 28-3904(r). Like other state UDAP laws enacted around this time, the law appears to have been modeled on the 1973 Suggested State Provisions for the Uniform Consumer Sales Practices Act, drafted by the National Conference of Commissioners on Uniform State Laws. Patricia Ryan Yohay, *D.C. Consumer Protection Procedures Act*, 27 CATH. U. L. REV. 642, 644 (1978). The 1984 FTC Credit Practices Rule also offers some protection to buyers like Williams. Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 951 (2006). It bans the taking of a “nonpossessory security interest in household goods other than a purchase money security interest.” 16 C.F.R. § 444.2 (2013).

305. See *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 113–14 (D.C. 1971).



get necessary information from the seller through discovery.<sup>306</sup> As a result, few consumers prevailed in challenging contracts based on price.<sup>307</sup> Statutory claims were more likely to succeed.<sup>308</sup>

Thus, by the late 1970s, some poor people's consumer contracts were partially carved out of the common law of contracts and regulated according to a more narrowly tailored set of legal standards.<sup>309</sup> The new statute-based regime stressed disclosure, nondiscrimination, and regulation of some small-sum loan terms. D.C. law banned the Walker-Thomas Furniture pro rata accounting method outright. Future D.C. borrowers faced with pro rata clauses could defend based on statutory protections, rather than rely on the doctrine of unconscionability. This shift, towards a statutory scheme that specified which terms were subject to bargaining and which were banned, effectively shrank the space in which unconscionability could operate. It rendered unconscionability less important to "the law of the poor" and to modern day poor consumers than Wright anticipated. The new legal regime that regulated poor people's consumer contracts more closely resembled the system that Arthur Leff and Judge Danaher imagined, rather than what Karl Llewellyn or Judge Wright likely envisioned.<sup>310</sup>

It also better suited the changing intellectual climate of the times. In the late 1970s and 1980s, New Right politicians and activists voiced renewed hostility towards "activist" judging and state interference with contractual freedom.<sup>311</sup> Unconscionability analysis, and the balancing it entailed, smacked of free-wheeling judicial policymaking, rather than neutral or efficiency-guided judg-

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306. To get discovery related to the unconscionability of the price term, a consumer first had to plead a "sufficient factual predicate for the defense." *Id.* at 114.

307. Patterson's claim failed, as did the price unconscionability claim in *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. 1971). Morris obtained discovery on the seller's purchase price and discovered that the goods cost the seller \$234.35, yet Morris paid \$832 over the course of two years, including taxes and a "credit charge." *Id.* at 776.

308. *See, e.g.*, *Blackmond v. Walker-Thomas Furniture Co.*, 428 F. Supp. 344, 346 (D.D.C. 1977) (judgment for plaintiff-buyer on Truth in Lending Act claim); *Lewis v. Walker-Thomas Furniture Co.*, 416 F. Supp. 514, 518 (D.D.C. 1976) (granting partial summary judgment to plaintiff-buyer on Truth in Lending Act claims).

309. *See* Lawrence M. Friedman & Stewart Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805, 812; Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1056 n.18 (1966).

310. This is not to suggest that Wright preferred litigation to legislation as a method for correcting perceived abuses in the low-income marketplace. In fact, he most likely would have favored a legislative solution over litigation. In a D.C. school desegregation case, he wrote that "[i]t would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government," rather than by the judiciary. *Hobson v. Hansen*, 269 F. Supp. 401, 517 (D.D.C. 1967). Leff would not have been entirely happy with the new regime either, since it still allowed review of consumer contracts for unconscionability.

311. On the worldview of grassroots New Right activists, see LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* (2001). On businessmen and the New Right, see KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL* (2009).

ing.<sup>312</sup> Within the legal academy, law and economics scholars also attacked the institutional competence of courts to make distributive decisions and analyze the fairness of contract terms. They argued that legislators were better suited than judges to divide the wealth produced by an efficient, free-market economy.<sup>313</sup> Critics of the doctrine labeled it paternalistic and inefficient.<sup>314</sup>

For some, *Williams* illustrated the most glaring problems with unconscionability review. A sympathetic judge might easily deem an add-on clause, like the one at issue in *Williams*, unconscionable when weighing the fate of a poor borrower before the court. But, critics argued, “add-on” clauses were not in fact harmful to the poor as a general matter; they made “good [economic] sense.”<sup>315</sup> By allowing creditors to collect more easily from defaulting debtors, such clauses reduced the cost of doing business with low-income customers who might not otherwise have access to credit.<sup>316</sup> Statutory rules would ensure that sellers recovered no more than what was owed: principal, interest, and costs.<sup>317</sup>

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312. Duncan Kennedy describes balancing, as a mode of legal reasoning, as “in retreat” in America after 1980. Duncan Kennedy, *A Transnational Genealogy of Proportionality in Private Law*, in *THE FOUNDATIONS OF EUROPEAN PRIVATE LAW* 185, 216 (Roger Brownsword et al. eds., 2011). Another scholar describes the shift as the “anti-emphatic turn” from “moral” to “scientific” judging. Robin West, *The Anti-Empathic Turn* 8–10 (Georgetown Public Law & Legal Theory Research, Paper No. 11-97, 2011), available at <http://ssrn.com/abstract=1885079>.

313. On the history of the law and economics movement, see STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 90–134 (2008). But note that Arthur Leff, an early critic of unconscionability, does not fall within this camp. Leff had no doubt that the government should intervene in the consumer marketplace. He fully endorsed the outcome in *Williams* but rejected the “litigation model” of intervention at work in *Williams*. Instead, he asked: “Wouldn’t it be better, finally, to face the political problems and pass a statute that deals with cross-collateral clauses . . . ?” Leff, *supra* note 258, at 357.

314. See Epstein, *supra* note 23, at 293–95 (arguing against invalidation of contract terms based on a finding of mere substantive, rather than also procedural, unconscionability). But note that paternalism may be justified, from a law and economics perspective, when public welfare money is at stake. See, e.g., Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995). Some law and economics scholars did not reject unconscionability outright but argued instead for a more nuanced approach to the doctrine. Richard Craswell, for example, contended that scholars focused too much attention on deciding when a contract ought to be invalidated, while ignoring the question of what remedy should protect the nonconsenting party. Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 1–7 (1993).

315. Epstein, *supra* note 23, at 306 n.36, 307.

316. *Id.* at 307.

317. *Id.* at 308. Although this was true when Epstein wrote in 1975, it was not the case in the District of Columbia before 1965. Before the Code took effect in 1965, a seller under a “conditional sale” or “lease-purchase” agreement could sue a defaulting buyer either for the amount owed or could “treat the sale as a nullity” and recover the goods. *Marvins Credit, Inc. v. Morgan*, 87 A.2d 530, 531 (D.C. 1952). The District of Columbia had not enacted the Uniform Conditional Sales Act, which required creditors to return any surplus received from the seizure and sale of the goods to the buyer. Then, in 1965, the Code eliminated the formal distinctions between conditional sales and other forms of security interests. Under the Code, the Walker-Thomas Furniture conditional sale would be deemed a secured transaction. The Code required secured creditors like Walker-Thomas Furniture to account for any surplus after seizing and selling the collateral. D.C. CODE § 28:9-504(2) (1963) (“If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus . . . .”) (modern provision at D.C. CODE § 28: 9-615(d) (2014)).

## V. THE AFTERMATH

On remand to the trial court, the *Williams* case did not end in a clear victory for the store or for the borrower. It settled. After the D.C. Circuit decision came down, Williams and Walker-Thomas Furniture returned to the trial court. The case dragged on for a few months longer, but Walker-Thomas Furniture ultimately agreed to pay Williams \$200 for the goods seized from her home three years earlier.<sup>318</sup> Williams's lawyer, Pierre Dostert, later remarked that Walker-Thomas Furniture should never have permitted the case to reach the appeals court.

But Dostert did not view the opinion as a clear victory. Instead, it created "a degree of uncertainty" and "a dormant threat to unconscionable conduct which could become very active with little or no notice."<sup>319</sup> He also predicted that lenders would be more likely to settle at trial, rather than risk a finding of unconscionability.<sup>320</sup> He was right on both counts. The D.C. Neighborhood Legal Services Project (NLSP) did make use of the decision in defending its poor clients against repossession actions by local retailers.<sup>321</sup> Nationwide, legal aid attorneys and pro se consumers successfully raised unconscionability as a defense in a series of consumer contract cases in the late 1960s and early 1970s.<sup>322</sup> Many cases likely never made it before a judge, however. After

318. Paul Richard, *Installment-Plan Law Will Shield the Needy*, WASH. POST, Mar. 28, 1966, at B1.

319. Skilton & Helstad, *supra* note 60, at 1480 (quoting Letter from Pierre E. Dostert to Richard H. Skilton (Feb. 1, 1967)).

320. *Id.*

321. Dostert, *supra* note 139, at 1186 (noting that local lawyers "began to make extensive use of Judge Wright's opinion in defending indigent persons at the trial level"). Dostert himself was "forced by the pressure of private practice to discontinue legal aid work." *Id.*; see also *More Clients Have Been Victims of Gross Overcharging by Some Appliance Stores*, HIGHLIGHTS OF RECENT CASES (United Planning Org./Neighborhood Legal Servs. Project, Washington, D.C.), June 2, 1965, at 3 (Microfilm Reel 2250, Grant PA64-183, Ford Foundation Archives) ("Many examples of gross overcharging in the sale of television sets by some local merchants continue to come to the attention of our offices. . . . In many of these actions, NLSP is advancing the theory that these sales contracts are unconscionable as a matter of law because of the gross discrepancy between price and value."). The NLSP raised unconscionability in another case against Walker-Thomas Furniture in 1971, but lost. *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 113 (D.C. 1971). Maribeth Hollaran, a consumer attorney in the law reform unit of NSLP, represented the defendant-borrower. *Gross Overpricing May Constitute Unconscionability*, 5 CLEARINGHOUSE REV. 534, 534 (1972) (noting that Patterson was represented by Halloran, Neighborhood Legal Services Project); see also Oral History by Mary Wolf with Florence Wagman Roisman, Professor of Law, Ind. Univ., in Bloomington, Ind. (Session 3.2, July 26, 2006) available at [http://www.americanbar.org/content/dam/aba/directories/women\\_trailblazers/roisman\\_interview\\_3\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/women_trailblazers/roisman_interview_3_authcheckdam.pdf) (noting that Halloran was the "consumer person" in the law reform unit at NLSP).

322. Advocates started discussing and citing *Williams* immediately after the case was decided. The organizer of a conference on "Consumer Credit and the Poor" at the University of Chicago wrote to the D.C. Circuit right away to order a copy of the briefs and record abstract. In her words, the decision "exemplified the ideas we will explore in our Conference." Letter from Barbara J. Hillman, Conference Planning Comm., to Clerk of the Court, U.S. Court of Appeals, D.C. Circuit (Sept. 10, 1965) (Case File 18604, U.S. Court of Appeals for the D.C. Circuit; Record Group 276, Records of U.S. Courts of Appeals, National Archives and Records Administration).

In 1964, the Supreme Court of New Hampshire also provided a useful precedent for the legal aid attorneys in *American Home Improvement, Inc. v. MacIver*, in which the court found unconscionable a

*Williams* and the unconscionability cases that followed in its wake, lenders likely wised up to the dangers of going to court to enforce potentially unconscionable contracts. Given that few consumers had the resources or legal acumen to raise unconscionability as a defense, creditors like Walker-Thomas Furniture perhaps realized that they would be better off dropping their claims against the few “squeaky wheels” like *Williams* who put up a fuss.<sup>323</sup>

In response to the new D.C. installment sales legislation, Walker-Thomas Furniture seems to have changed its contracts to comply with the law. By 1977, the furniture company had deleted the pro rata clause from its form contract, instead applying payments to the oldest purchase first.<sup>324</sup> Walker-Thomas Furniture did not fundamentally alter its business practices, however.<sup>325</sup> In the mid-1970s, the company continued to solicit business and collect payments through door-to-door salesmen and to sell used and repossessed merchandise as “new.”<sup>326</sup> In many cases, customers did not learn the cost of the merchandise they had purchased until after it was delivered. Collection agents would time

contract that required the customers to “pay[] \$1,609 for goods and services valued at far less.” 201 A.2d 886, 889 (N.H. 1964).

After *Williams*, courts found contracts for the sale of goods to be unconscionable in several cases. See, e.g., *Kugler v. Romain*, 279 A.2d 640 (N.J. 1971) (seller targeted low-income buyers and those on welfare); *Toker v. Westerman*, 274 A.2d 78 (Union County Ct., N.J. 1970) (buyers received welfare during period of installment contract); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969) (same); *Lefkowitz v. ITM, Inc.*, 275 N.Y.S.2d 303 (N.Y. Sup. Ct. 1966) (Attorney General suit on behalf of buyers statewide); *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757 (N.Y. Dist. Ct. 1966) (Spanish-speaking buyer with one week left on his job at time of sale), *rev’d on issue of damages and aff’d*, 281 N.Y.S.2d 964 (N.Y. App. Div. 1967).

A few cases involved contracts for consumer services, rather than goods. See, e.g., *Lefkowitz v. Bel Fior Hotel*, 408 N.Y.S.2d 696 (N.Y. Sup. Ct. 1978) (Attorney General suit on behalf of community college student tenants); *Albert Merrill Sch. v. Godoy*, 357 N.Y.S.2d 378 (N.Y. Civ. Ct. 1974) (pro se student with high school education and limited English proficiency challenging trade school contract); *Seabrook v. Commuter Hous. Co.*, 338 N.Y.S.2d 67 (N.Y. Civ. Ct. 1972) (pro se tenant challenging lease terms); *Educ. Beneficial, Inc. v. Reynolds*, 324 N.Y.S.2d 813 (N.Y. Civ. Ct. 1971).

The defense was raised without success in two D.C. cases: *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111 (D.C. 1971), and *Diamond Housing Corp. v. Robinson*, 257 A.2d 492 (D.C. 1969). The author identified the above cases through a review of all decisions included in the “WESTLAW ALLCASES” database that cited *Williams* and were decided before 1980.

323. On the “squeaky wheel” problem, see Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279 (2012).

324. The new Walker-Thomas Furniture provision provided:

Whenever subsequent purchases have been added and consolidated in a new balance, the payment provided herein on the new balance shall be considered allocated to the first purchase, and, in order, to each subsequent purchase. Each purchase will be considered a single unit for the purposes of each allocation, thereby each purchase unit will be completely paid for in order of seniority, the seller retaining title only to those purchases not completely paid for on this allocation. The amount of any down payment on a subsequent purchase shall be allocated in its entirety to such subsequent purchase. In the case of items purchased on the same date, the lowest priced shall be deemed first paid for.

*Blackmond v. Walker-Thomas Furniture Co.*, 428 F. Supp. 344, 345 (D.D.C. 1977).

325. For a longer discussion of the effects of the decision on Walker-Thomas Furniture, see Colby, *supra* note 23, at 646–60.

326. Greenberg, *supra* note 44, at 381.

their visits to coincide with the arrival of customers' welfare or social security checks.<sup>327</sup> Salespersons cleverly provided check-cashing services for their customers, thereby allowing the company to deduct the monthly installment payment before handing over the remaining cash to the customer.<sup>328</sup>

If a customer failed to pay, the store would send threatening letters, make early morning and late evening collection calls, contact the borrower's relatives and friends, and—if necessary—repossess the merchandise. Often, Walker-Thomas Furniture would repossess goods by removing them from the customer's home when no adults were present or would intimidate the customer into turning over the goods without a court order.<sup>329</sup> When necessary, the company would sue to recover the balance owed, seeking either judicially sanctioned repossession or an order for a money judgment.<sup>330</sup>

The store gained additional leverage over some customers from the rules governing provision of welfare benefits. By the mid-1970s, most Walker-Thomas Furniture clients were still "working poor" and many received government assistance.<sup>331</sup> To dissuade such customers from complaining to outside authorities, a salesperson might threaten to withhold credit in the future, or to notify state authorities about unreported income.<sup>332</sup> Walker-Thomas Furniture employed six men, known as "pimps," who investigated customers to obtain information that might be used to intimidate them into not complaining.<sup>333</sup> For women on welfare, this might include the whereabouts of an estranged spouse whose income would disqualify the family from receiving relief.<sup>334</sup> The Federal Trade Commission investigated Walker-Thomas Furniture in 1975; the company later entered into a consent decree to halt its unfair, false, misleading, and deceptive trade practices.<sup>335</sup>

The Walker-Thomas Furniture storefront on Seventh Street was eventually shuttered,<sup>336</sup> but similar companies remain in business today.<sup>337</sup> The rent-to-

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327. *See id.* at 382.

328. *Id.*

329. *Id.* at 385–86.

330. Citing an interview with one of Walker-Thomas Furniture's lawyers, Colby states that Walker-Thomas Furniture changed its strategy after *Williams* and started suing customers for the balance due under their contracts, rather than seeking seizure orders (writs of replevin). Colby, *supra* note 23, at 657. However, repossession did not die out completely. In 1968 the company sued to repossess another customer's goods. *Roebuck v. Walker-Thomas Furniture Co.*, 310 A.2d 845, 846 (D.C. 1973).

331. Greenberg, *supra* note 44, at 381.

332. *Id.* at 389–90.

333. *Id.* at 390.

334. *Id.* at 390–91.

335. *In re Walker-Thomas Furniture Co.*, 87 F.T.C. 26 (1976). Colby likewise concludes that unconscionability "did not appear to substantially advance justice and fair play for the customers" of Walker-Thomas Furniture. Colby, *supra* note 23, at 657. The company complied with the letter of consumer protection laws, "but clearly made little effort to make its contracts fundamentally more fair." *Id.* at 658.

336. Walker-Thomas Furniture remained in business through the late 1980s. *Morris Levin Businessman Mo*, WASH. POST, Jan. 30, 2007, at B5 (noting that Levin, a Walker-Thomas Furniture executive, retired from the firm in 1987).

own industry, which includes national chains like Rent-A-Center, serves a similar clientele.<sup>338</sup> Rent-to-own stores “lease” furniture and other consumer goods to their customers on a weekly or monthly payment schedule, with an option for the customer to buy the goods at the end of the lease term. The majority of contracts end in a sale.<sup>339</sup> Like Walker-Thomas Furniture in the 1960s, the modern rent-to-own industry is regulated by state law, with no federal oversight.<sup>340</sup> Most states, including the District of Columbia, treat rent-to-own transactions as leases, rather than credit sales.<sup>341</sup> The industry operates beyond the bounds of the installment sales regulations Congress passed in the wake of *Williams* to police lending to the poor in the District of Columbia.

Indeed, the idea of the “law of the poor” was already in retreat by the late 1970s, after the Supreme Court issued a string of rulings refusing to incorporate the concept into constitutional law. In a series of cases in the late 1960s and early 1970s, poverty lawyers urged the Court to review the “law of the poor” more closely, by applying heightened scrutiny to legal distinctions based on wealth. The Court rejected the invitation.<sup>342</sup> The poor did not constitute a distinct and protected class for equal protection purposes, the Court decided.<sup>343</sup>

The Justices did modernize the “law of the poor,” sweeping away many

337. Note that the Walker-Thomas Furniture contracts were structured in the same way as modern rent-to-own agreements, as leases rather than sales of goods. *See, e.g.*, Transcript of Record at 116, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389). In *Williams*’s contracts, the words “Lease No. \_\_\_\_” appeared in the upper left-hand corner of the Walker-Thomas Furniture form agreement, in small type. *Id.* Buried within the body of the form, the contract also specified that *Williams* “hired” (rather than “bought”) the property listed on the form. *Id.* Walker-Thomas Furniture retained legal title to the goods specified in the contract until the customer tendered receipts showing payment of the full amount owed. *Id.*

338. JAMES M. LACKO ET AL., FED. TRADE COMM’N, SURVEY OF RENT-TO-OWN CUSTOMERS 32–33 (2000) (finding 59% of rent-to-own customers had household incomes under \$25,000).

339. *Id.* at ES-1.

340. *Id.* at 3.

341. *See, e.g.*, Lease-Purchase Agreement Amendment Act of 2002, 49 D.C. Reg. 1000 (Apr. 13, 2002) (codified as amended at D.C. CODE § 42-3671.01 to .14 (2012)). Only a handful of states deem rent-to-own transactions to be credit sales, to which installment sales regulations apply. *See, e.g.*, *Perez v. Rent-A-Center, Inc.*, 892 A.2d 1255, 1268 (N.J. 2006) (finding “entire transaction was structured with ownership as its goal”). In Wisconsin, Rent-A-Center has tried, so far without success, to modify the form of its transactions to avoid being subject to the state’s Consumer Act. *See Burney v. Thorn Ams., Inc.*, 944 F. Supp. 762, 764 (E.D. Wis. 1996); *Rent-A-Center, Inc. v. Hall*, 510 N.W.2d 789, 790–91 (Wis. Ct. App. 1993).

342. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (holding Texas school financing system did not violate Equal Protection Clause); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding state eviction law concerning nonpayment of rent did not violate Equal Protection Clause); *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (holding Maryland Aid to Families with Dependent Children formula imposing upper limit on welfare benefits did not violate Equal Protection Clause).

343. Anti-poverty research reinforced this conclusion. Researchers increasingly fixated on the individual behavior and characteristics of poor people, rather than the role of private, nonstate actors in constructing and maintaining barriers to economic mobility for the poor as a class. *See ALICE O’CONNOR, POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH-CENTURY U.S. HISTORY* 291–92 (2001).

vestiges of the old “poor law,” without imposing a heightened standard of review for laws directed at “the poor” as a class. Vagrancy laws criminalizing begging and loitering were struck down as “archaic” holdovers from the Elizabethan era.<sup>344</sup> Residency requirements to obtain welfare benefits, and limits on the migration of poor people across state lines—other remnants of the old “poor law” system—were also declared unconstitutional.<sup>345</sup> To reach these results, the Court relied on generally applicable constitutional rights, such as the right “to travel” and to “due process,” rather than by recognizing poverty as a suspect classification.<sup>346</sup> “The poor,” as a category of analysis, found little traction in the Court in the 1970s and beyond. The study of poverty law also fell out of fashion in the legal academy by the late 1970s.<sup>347</sup>

Unconscionability did not flourish, but it survived.<sup>348</sup> However, by the early twenty-first century, the doctrine had become conceptually unmoored from Wright’s idea of the “law of the poor.” Modern proponents of the doctrine of unconscionability rarely invoked the “law of the poor” in its defense.<sup>349</sup> Instead,

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344. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). The Court nearly decided the question in a District of Columbia case, but then dismissed the appeal. *See Hicks v. District of Columbia*, 383 U.S. 252, 252 (1966) (dismissing writ of certiorari). On the drafting of *Papachristou* and the history of vagrancy laws, see Risa L. Goluboff, Essay, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1372–73 (2010).

345. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); *Edwards v. California*, 314 U.S. 160, 174–75 (1941).

346. *See Goldberg v. Kelly*, 397 U.S. 254, 269–70 (1970) (procedural due process); *Shapiro*, 394 U.S. at 629–30 (right to interstate travel). Early drafts of *Papachristou* also used fundamental “rights” reasoning. Justice Douglas described “walking, strolling, loafing, wandering, [and] nightwalking” as rights protected by the Ninth Amendment. *See Goluboff, supra* note 344, at 1364. In the end, the Court scraped this argument and declared the law at issue void for vagueness. *Id.* at 1366–67.

347. Some law schools continued to offer courses on “poverty law,” but interest in the subject declined among both students and faculty after the early 1970s. *See, e.g., Amy L. Wax, Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century*, 34 FORDHAM URB. L.J. 1363, 1363–64 (2007). *But see Martha F. Davis, The Pendulum Swings Back: Poverty Law in the Old and New Curriculum*, 34 FORDHAM URB. L.J. 1391, 1405–15 (2007) (suggesting that “human rights” law courses may serve a similar function in the law school curriculum); Howard S. Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress*, 43 J. LEGAL EDUC. 199, 199 (1993) (noting that interest in poverty law, “a prominent subject of legal study in the 1960s and early 1970s, faded during the late 1970s and 1980s” but rose again in the 1990s).

348. *See, e.g., Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 920 (N.J. Super. Ct. Ch. Div. 2002) (finding contract unconscionable, but observing that unconscionability review, “which began in earnest in the mid-1960s, slowed soon thereafter” and that decisions from that period “generally involved contracts where, due to unsophistication or lack of education, the consumer entered into a grossly unfair agreement”). In the twenty-first century, unconscionability is most often invoked to challenge mandatory arbitration provisions. *See* discussion and authorities cited *supra* note 16.

349. A poverty law textbook, entitled *Law of the Poor*, came out in 1973, after Wright’s letter to the American Law Reports about *Williams*. ARTHUR B. LAFRANCE ET AL., *LAW OF THE POOR* (1973). The text covers low-income consumer law, housing and poverty, welfare, and “federal judicial remedies for the poor.” *Id.* at 381. Other casebooks used the terms “poverty law” or “law and poverty.” *See, e.g., GEORGE COOPER ET AL., CASES AND MATERIALS ON LAW AND POVERTY* (2d. ed. 1973). The term “poverty law” remained in use. *See, e.g., JULIE A. NICE & LOUISE G. TRUBEK, CASES AND MATERIALS ON POVERTY LAW* (1997); Wax, *supra* note 347, at 1363. But references to the “law of the poor” do not appear in journal articles after the mid-1970s, except for citations to the LaFrance textbook and tenBroek’s 1966

cutting-edge arguments in favor of unconscionability review rested on insights gathered from behavioral psychology. Consumers (regardless of wealth) were cognitively prone to make irrational decisions sometimes, scholars argued. To correct for such defects in reasoning, the state could justifiably intervene in their bargains.<sup>350</sup> Scholarly treatment of unconscionability, and of the *Williams* decision, thus reflected the shifting trends in legal thought at the end of the twentieth century away from conceptions of law rooted in “context, social circumstance, institutions, and history.”<sup>351</sup> “The law of the poor,” a concept “thick” with social circumstance and history, had no place in this logic.<sup>352</sup>

#### CONCLUSION

By the end of the century, the “law of the poor” no longer appeared to be a “growing area of the law,” as Judge Wright had forecast in 1967.<sup>353</sup> Yet, Wright’s prediction about the trajectory of the “law of the poor” did not entirely miss the mark. He was right that *Williams* would prove “very helpful” to anti-poverty advocates.<sup>354</sup> The litigation raised public consciousness of problems in the low-income marketplace and alerted concerned citizens and D.C. lawmakers to a recurring problem in need of a legislative fix. It catalyzed a process of legislative reform that culminated in the passage of a retail installment sales act for the District of Columbia.<sup>355</sup>

This Article emphasizes the importance of this interplay between courts and legislatures in creating a regulatory regime for consumer lending to low-income households in Washington, D.C. in the 1960s and 1970s. It also highlights the role of common law litigation in the process of legal change. As other scholars have observed, deciding how best to regulate boilerplate language in consumer contracts involves a choice among three possible institutions. The market, the

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*California Law Review* symposium by the same name. See, e.g., Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 *YALE L.J.* 1270, 1272–73 (1983).

350. See Bar-Gill & Ben-Shahar, *supra* note 20, at 738–40 (proposing framework for “credibility analysis” of *Williams* context); Korobkin, *supra* note 17, at 458–67 (applying behavioral law and economics insights to analyze whether the *Williams* contract should be enforced); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 *U. CHI. L. REV.* 1203, 1278–90 (2003) (proposing courts liberally refuse to enforce terms found unconscionable under a modified version of the doctrine that incorporates behavioral law and economics insights). *But see* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 *PHIL. & PUB. AFF.* 205, 208 (2000). Shiffrin offers a different defense of unconscionability than the behavioral law and economics scholars. *Id.* She argues that states may refuse to enforce unconscionable agreements to avoid abetting socially harmful conduct. *Id.*

351. DANIEL T. RODGERS, *AGE OF FRACTURE* 3 (2011) (“[C]onceptions of human nature that in the post-World War II era had been thick with context, social circumstance, institutions, and history gave way to conceptions of human nature that stressed choice, agency, performance, and desire. Strong metaphors of society were supplanted by weaker ones. Imagined collectivities shrank; notions of structure and power thinned out.”).

352. *See id.*

353. Letter from Hon. J. Skelly Wright to William E. Shipley, *supra* note 1; *see supra* Part V.

354. Letter from Hon. J. Skelly Wright to William E. Shipley, *supra* note 1.

355. *See supra* section IV.B.



courts, or the legislature can supply the enforceable terms of standard form contracts.<sup>356</sup> Considered in the snapshot of the present, these institutions appear to be alternative options, each governed by their own decision-making rules.<sup>357</sup> But when viewed over a longer expanse of time, the interplay between them becomes apparent.

As contracts scholars have theorized, contract-based disagreements that are “frequently litigated” and involve a “specific type-situation” do not remain subject to the basic rules of the judge-administered common law for more than a generation or two.<sup>358</sup> When such “problems reach the threshold of public or general business concern, they are solved or at least coped with by other means—by legislation, for example.”<sup>359</sup> They are carved out of the common law, through statutes “removing a whole area from the domain of contract law.”<sup>360</sup>

This Article offers a case study of this process in action and suggests the importance of litigation in elevating a recurring contractual problem to the threshold of public concern. It explains how the legislative revival of unconscionability in the Uniform Commercial Code laid the groundwork for new common law arguments to be raised in the D.C. courts in the *Williams* case. In turn, the *Williams* litigation brought together a coalition of reformers, who pressured Congress to adopt a new set of rules for policing installment sales. Repeatedly citing the facts of *Williams* as evidence of the need for a statutory fix, reformers eventually achieved their goal. In 1971, Congress passed the District of Columbia Consumer Credit Protection Act, which banned the Walker-Thomas Furniture pro rata accounting method outright. Accordingly, within a decade after *Williams*, retail installment sales contracts in the District of Columbia were partially carved out of the common law of contracts. They were instead regulated according to a more narrowly tailored set of statutory standards. Thus, in the end, the *Williams* litigation did play a role in creating a “law of the poor” consumer. It was just not the part that Judge Wright likely envisioned.

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356. See, e.g., Whitford, *supra* note 25, at 194.

357. For a discussion of institutional choice and unconscionability that does not employ a historical perspective, see Neil Komesar, *The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness*, 2013 WIS. L. REV. 265, 282–85.

358. Friedman & Macaulay, *supra* note 309, at 812.

359. *Id.*

360. Macaulay, *supra* note 309, at 1056 n.18.

APPENDIX A: TEXT OF THE *WILLIAMS* CONTRACT<sup>361</sup>

Lease No. \_\_\_\_\_ READ CONTRACT BEFORE SIGNING

This Deed Witnesseth that upon and subject to the terms and conditions hereinafter stated, I \_\_\_\_\_ have this day hired of and from THE WALKER-THOMAS FURNITURE COMPANY, (a partnership) having an office at Nos. 1027-1031 Seventh Street, Northwest, in the City of Washington, District of Columbia, certain property of the description and value as follows, viz:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Total value \_\_\_\_\_ Dollars. The terms and conditions aforesaid which I hereby agree to perform and abide by are as follows, viz: Said hiring is only for my own personal use of said property at my home No. \_\_\_\_\_ Street \_\_\_\_\_ in said City of Washington, where, at my said home, said property may be seen at all times by the agents of said Company, and I shall not without the consent of said Company in writing and subject to the conditions of such consent, cause or permit any of said property to be removed therefrom or placed in storage, nor shall I without such consent in writing transfer any of my rights hereunder; nor shall I mortgage, rent, pawn, dispose of or sell said property or any part thereof; nor shall I do anything whereby the rights of said Company hereunder or its title to, or my actual possession of, said property or any part thereof, shall or might be in anywise endangered, impaired or lost. For such use I shall pay to said Company now the sum of \_\_\_\_\_ dollars cash, and hereafter I shall pay, without any demand therefor, to said Company at its store, or at such other place or places in said City as said Company shall hereafter in writing direct \_\_\_\_\_ dollars on the \_\_\_\_ day of each \_\_\_\_ until all said payments actually and promptly made shall in the aggregate equal the total value aforesaid; and thereupon the said Company, upon the surrender to said Company of the receipts given for all such payments, shall transfer to me at my own expense by bill of sale the title to said property, but until such transfer such title shall remain in said Company, and I shall not have or claim the same, provided, that before such transfer of title, in case of default by me hereunder, I shall also fully reimburse said Company for all its expenses reasonably incurred in any efforts it may make to recover and maintain possession of said property hereunder. For every such payment the Company shall give me a written receipt, which shall be my only evidence of such payment, and I shall never claim any benefit of any payment of which such evidence shall have been lost or destroyed. Upon my failure to make any of said payments at the time or place

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<sup>361</sup>. Transcribed from Transcript of Record at 122, *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. 1964) (No. 3389).

aforesaid, although there shall have been no legal or formal demand therefor, or in case of failure on my part to take such care of any of said property as is required of a bailee for hire, or my failure to perform or abide by any of the terms and conditions of this agreement the said Company, by its agents, or the United States Marshal in and for the District of Columbia, or his deputies at the instance of said Company, may enter my said home or any place where any of said property may be found or where said Company may have reasonable cause to believe the same to be, and take actual possession of such property and remove the same therefrom either with or without legal process, and without previous demand therefor, and in such case I hereby waive and relinquish to, and forever discharge the said Company of and from all payments previously made hereunder, and I hereby release and discharge the said Company and its agents and the said United States Marshal and his deputies of and from any and all damages caused by such entry or by such taking or removal and of and from all claims which I may ever have by reason of any such payments, entry, taking, or removal. If I am now indebted to the Company on any prior leases, bills or accounts, it is agreed that the amount of each periodical installment payment to be made by me to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by me under such prior leases, bills or accounts; and all payments now and hereafter made by me shall be credited pro rata on all outstanding leases, bills and accounts due the Company by me at the time each such payment is made. No indulgence to me by said Company as to time, amount, or place of payment or otherwise hereunder shall be construed to be a waiver by said Company of any of its rights or any of my duties hereunder, and no clause or stipulation of this agreement shall be deemed rescinded as against said Company unless such rescission is in writing and signed by the said Company. The word "Company" wherever it appears in this deed includes and shall be construed to mean The Walker Thomas Furniture Company aforesaid and its successors and assigns and each of them. This agreement is made subject to the approval of said Company, such approval to be evidenced only by the delivery to me of said property, and at any time before such delivery the said Company may, if it so elect, refuse to deliver said property to me, which refusal shall operate as a cancellation of this deed, and any rights which I may have or might have had hereunder shall immediately cease and determine. I also agree to pay attorney's fees of no less than \$10 resulting from my breach of this lease in case a judgment for the deficiency in balance is awarded against me or possession of articles listed above is awarded to said Company. And hereunto I bind myself, my heirs, executors, administrators and assigns forever.

WITNESS my hand and seal this \_\_\_ day of \_\_\_ 19 \_\_

\_\_\_\_\_

Husband

\_\_\_\_\_

Wife

Signed, sealed and delivered in the presence of:

\_\_\_\_\_

Guarantor

NO DEPOSITS REFUNDED FREE STORAGE FOR CUSTOMERS NO GOODS EXCHANGED