THE STORIES WE (DON'T) TELL: USING CASE BRIEFING TO EXPLORE BIAS AND OPPRESSION IN THE LAW

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Abstract

Traditional case briefing focuses on the text of the opinion—how courts frame and resolve legal issues. This Essay explores how to teach case briefing to investigate bias and oppression in the law. By discussing socio-historical context during class or assigning reimagined judicial opinions alongside the original opinion, teaching case briefing this way asks students to consider the stories that judges don't tell (and why). This Essay proffers two examples that illustrate these approaches: United States v. Robinson*, 414 U.S. 218 (1973) and* Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (1965).*

Introduction

Case briefing has long been a cornerstone of American legal education, where the case method has dominated pedagogy since its inception in 1870.[1] This essential tool requires law students to actively

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engage in reading cases—helping them develop analytical skills and better understand judicial opinions.

Traditionally, a case brief includes the case name, identity of the parties, court and judge, material facts, procedural history, issue(s) presented, holding, judgment, reasoning (including dicta), and possibly a section for notes (including a summary of the concurrence and dissent, if either are included in assigned reading).[2] In this way, conventional case briefing focuses on the text of the opinion—how courts frame and resolve legal issues. Following this approach, Orin S. Kerr's popular guide for new law students, *How to Read a Legal Opinion*, instructs students to "know the facts," and "understand the reasoning [and] .... significance of the majority opinion."[3] While Kerr's guide is an invaluable resource for students, mastering these objectives solely through an examination of the opinion's four corners is impossible. Answering these questions competently requires studying the contextual backdrop in which a case unfolds. It means reading cases "differently"—including by "attending to the way judicial opinions function as cultural productions that create and recreate race,"[4] and cultivating an awareness of how law and culture are inseparable.[5]

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curriculum. For excellent research assistance, my sincere thanks to Katie Lombardi. Finally, a special thank you to Danielle Tully for encouraging me to write this Essay.

[1] *See, e.g.*, Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 569 (1991) (Langdell's pedagogy focused on teaching doctrine through studying judicial decisions).

[2] *See, e.g.*, MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL WRITING AND ANALYSIS 410–11 (3d ed. 2021).

[3] Orin S. Kerr, *How to Read a Legal Opinion: A Guide for New Law Students*, 11 GREEN BAG 2D 51, 57, 58, 60 (2007). This guide, "explains what judicial opinions are, how they are structured, and what law students should look for when reading them." *Id.* at 51.

[4] Bennett Capers, *Reading Back, Reading Black,* 35 HOFSTRA L. REV. 9 (2007). Capers shares his experience reading cases, where he is "attuned to matters of race even in the face of efforts to excise race—to render race invisible, immaterial." *Id.* at 11. Capers suggests that "judicial opinions function as grand narratives, as master texts that contribute to an ideology of race and racial hierarchy." *Id.*

[5] Law and culture are inseparable, and "to focus on culture is to locate the ways in which law influences who we are and who we aspire to be, and moves us beyond the standard critique of what the law is and what we want it to be." Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 61, 66 (2001).

This Essay demonstrates that legal educators can choose to teach case briefing[6] in a way that still achieves its traditional purpose, while also encouraging students to investigate bias and oppression in the law.[7] By discussing socio-historical context during class or assigning reimagined judicial opinions[8] alongside the original opinion, this method of teaching case briefing asks students to consider the stories that judges don't tell (and why).

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[6] Although I discuss a critical approach in the context of teaching case-briefing, these methods are broadly applicable to teaching critical legal analysis writ-large—across all law school courses. Furthermore, while the examples that follow in this Essay are inspired by Critical Race Theory (CRT), I wish to acknowledge space for an array of critical approaches, whereby we may invite law students to investigate normative assumptions and question legal outcomes that appear neutral and unavoidable. These approaches include, but are not limited to, critical race and feminist theories, which emerged from Critical Legal Studies (CLS). *See, e.g.*, Kimberlé Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1287–1300 (2011) (describing CRT's development as an offshoot of CLS and highlighting tensions among the two analytical frameworks).

[7] In this Essay, although I focus on race, critical analysis of bias and oppression in the law applies to all marginalized groups—people that the law either has treated as inferior or systemically maintained in positions of powerlessness. This includes discrimination and oppression based not only on race, but also on class, sexual orientation, gender identity and expression, physical and mental disability, age, nationality, and other markers of diversity that are sources of oppression.

[8] Educators interested in teaching students to look for untold stories might find reimagined judicial opinions to be of particular interest. *See, e.g.*, Kathryn Stanchi, Bridget Crawford & Linda Berger, *Teaching with Feminist Judgments*, *in* INTEGRATING DOCTRINE AND DIVERSITY: INCLUSION AND EQUITY IN THE LAW SCHOOL CLASSROOM 241 (Nicole P. Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russell & Genevieve B. Tung eds., 2021) (explaining Feminist Judgment Projects: "[A]uthors of rewritten opinions . . . act as judges . . . bound by the same facts and law in the original opinion—while demonstrating cases can still be decided in ways that address social justice concerns."); *see also* CRITICAL RACE JUDGMENTS: RE-WRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW (Bennett Capers, Devon W. Carbado, R.A. Lenhardt & Angela Onwuachi-Willig eds., 2022). On the back cover, Ibram X. Kendi reflects on the project: "What a brilliant idea to invite critical race theorists to reimagine some of the most important and impactful legal cases in our history. The provocative collection shows what might have been if justices and judges employed an equitable lens to cases. It also shows what can still be: a fairer, egalitarian world." *See also The U.S. Feminist Judgements: Rewriting Law From a Feminist Perspective,* William S. Boyd Sch. of L., https://law.unlv.edu/us-feminist-judgments [https://perma.cc/9XYL-CPC2] (last visited Dec. 15, 2023).

When teaching legal skills like case briefing, I intentionally highlight the non-neutrality of law and prepare students to understand the intersection of race and the law—both how race has impacted the development of law, and how race continues to affect the enforcement of law today. My class engages in this exercise early in the course,[9] setting the tone for how we will carefully, purposefully analyze and seek to understand the law. We acknowledge, from the outset of the course, that the law is not neutral and that uncovering bias, oppression, and discrimination in its application is paramount.[10] Not only are law students receptive to this critical approach, they welcome it.[11] Additionally, the American Bar Association now requires law schools to "provide education . . . on bias, cross-cultural competency, and racism."[12] The ABA conceives of this requirement as part of a lawyer's professional responsibility, which entails working towards a legal system that "provides equal access and eliminates bias, discrimination, and racism in the law."[13] This work is also an indispensable part of professional identity formation—as law students begin to understand their professional duties and identify what kind of lawyers they want to be.[14]

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[9] I assign a case briefing exercise for homework after the first day of class. We discuss the opinion in the second class session.

[10] "[T]he content and manner in which professors present material impact the lens through which their students view the legal system and the law." L. Danielle Tully, *Race and Lawyering in the Legal Writing Classroom,* 26 LEGAL WRITING 195, 202 (2022).

[11] *See, e.g.*, Sherri Lee Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students' Legal Imaginations*, 108 VA. L. REV. ONLINE 72, 72 (2022) ("[Many 1Ls are] hungry to advocate and determined to make a difference." (citing Tiffany D. Atkins, *#Fortheculture: Generation Z and the Future of Legal Education*, 26 MICH. J. RACE & L. 115, 127–32 (2020)).

[12] AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REVISIONS TO THE 2023–2024 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 18 (Standard 303(c)), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/2023-2024-aba-standards-rules-for-approval.pdf [https://perma.cc/65DP-QTKN].

[13] *Id.* at 19 (Interpretation 303-6).

[14] New ABA Standard 303(b) requires law schools to provide students with ample opportunity to develop their professional identities. *See, e.g., id.* (Standard 303(b), Interpretation 303-5) ("Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of a professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice."); *see also* Spencer Rand, *Social Justice as a Professional Duty: Effectively*

This Essay is situated among critical legal studies scholarship that acknowledges the traditional approach to case briefing is unsatisfactory at best, and deeply problematic at worst. Traditional case briefing does not provide students with the full picture,[15] and there is "no discussion of how to reveal what is not said in opinions."[16] It is not aimed at transformation, which "requires adding depth by uncovering narrative and including backstories" to "help[] students [] contextualize the law."[17] It presents the law as the neutral product of reasoned analysis[18]—even when the law produces outcomes that are unjust or discriminatory, or otherwise hurt marginalized groups. And, yet, with all its shortcomings, it forms the basis of 1L coursework.[19]

Meeting Law Student Demand for Social Justice by Teaching Social Justice as a Professional Competency, 87 U. CIN. L. REV. 77 (2018).

[15] *See, e.g.*, Jerome Frank, *Why Not a Clinical-Lawyer School?* 81 U. PA. L. REV. 907, 911, 916 (1933) (arguing that "the case-system should be revised"; opinions are not full explanations of judicial decisions because they only tell "a fractional part of how decisions came into being").

[16] Keene & McMahon, *supra* note 11, at 74.

[17] L. Danielle Tully, *The Cultural (Re)Turn: The Case for Teaching Culturally Responsible Lawyering*, 16 STAN. J. C.R. & C.L. 201, 242 (2020) (advocating for a "transformative legal analysis framework [which] requires adding depth by uncovering narrative and including backstories" and "helps students to contextualize the law").

[18] *See, e.g.*, Susan A. McMahon, *What We Teach When We Teach Legal Analysis*, 107 MINN. L. REV. 2511, 2515 (2023). In this article, McMahon calls for law schools to promote a pedagogy of disruption and creation to help "[s]tudents get in the mental habit of seeing rules as exercises in power distribution, rather than neutral and objective statements of principle." *Id.* at 2548; *see also* L. Danielle Tully, *Professional Identity Formation as a Power Skill*, 1 PROCEEDINGS No. 2 (Winter 2020) (discussing "the false narrative of neutrality" and how law professors can challenge that narrative); Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 3 (2003) (discussing how "legal writing courses [] can address cultural bias and its effect on legal analysis. . . . [including why] the law school curriculum should aid students in recognizing expressions of bias in legal analysis and language").

[19] *See, e.g.*, Etienne C. Toussaint, *The Purpose of Legal Education*, 111 CALIF. L. REV. 1, 9 (2023) (discussing the failure of law schools to address race in the classroom and arguing that studying the way legal systems "further racism, economic oppression, or social injustice" is a purpose of legal education); Amna Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 369–70 (2015) (noting that by not discussing race, gender, and sex, law schools "limit students' capacity to engage in full throttled analysis of law and the world"); Lucille A. Jewel, *Silencing Discipline in Legal Education*, 49 U. TOL. L. REV. 657, 662 (2018)

However, especially in the last two decades, more law professors are weaving critical context into their class discussions of cases and doctrine.[20] Here, I aim to provide practical guidance to build on these efforts, and hopefully to inspire others to try these methods in their law school classrooms. Thus, this Essay provides two concrete examples of how to engage students in the project of contextual case briefing.[21] The method I describe here spans teaching fact analysis as

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(discussing how legal formalism in law schools "reproduces collective thought patterns" and has the "deleterious effect of excluding voices in the process of making legal meanings"); Teri A. McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 WASHBURN L.J. 531, 532–33 (2019) ("[S]eek[ing] to reveal how legal education both prepares and fails to prepare students to represent diverse client groups . . . [and] engag[ing] radical, critical pedagogies to . . . dismantle the law school classroom as an incubator for professional practices that subvert the cause of justice."); Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205, 207 (2020) (advocating that traditional legal rhetoric taught in law schools should be remodeled because it currently "reinforce[s] inequality in terms of race, gender, and class").

[20] *See, e.g.*, Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242 (2004) (arguing for raising issues of race, class, and gender in Civil Procedure, along with suggestions on how to do so); Tamara F. Lawson, *Mainstreaming Civil Rights in the Law School Curriculum: Criminal Law and Criminal Procedure*, 54 ST. LOUIS U. L.J. 837, 855 (2010) (advocating for the "[use of] innovative and provocative course materials and presentations that incorporate civil rights issues [in Criminal Law and Procedure]"); K-Sue Park, *Race and Property Law, in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado, Emily Houh & Khiara M. Bridges eds., 2022) (offering suggestions on how to integrate the histories of conquest and slavery into property law courses). For additional suggestions on integrating critical approaches in first-year courses, *see* TERI A. MCMURTRY CHUBB, STRATEGIES AND TECHNIQUES FOR INTEGRATING DIVERSITY, EQUITY, AND INCLUSION INTO THE CORE LAW CURRICULUM: A COMPREHENSIVE GUIDE TO DEI PEDAGOGY, COURSE PLANNING, AND CLASSROOM PRACTICE (2022). For additional critical resources organized by course, see *1L Classes: Cases and Supporting Materials*, STAN. L. SCH., https://law.stanford.edu/clearinghouse-on-diversity-equity-inclusion-research/1l-classes-cases-and-supporting-materials/ [https://perma.cc/2YNG-AKV5] (last visited Dec. 15, 2023).

[21] Keene & McMahon, *supra* note 11, at 82 ("Our proposal is simple: move from the traditional case method to a *contextual* case method. To do this, we must assign additional materials—perhaps other documents in the case, like briefs, or legal scholarship or non-legal writing that provide a different perspective on the questions answered in the opinion."); *see also* Hoang

part of teaching legal analysis, the role of narrative and storytelling in the law and in legal discourse,[22] and the use of storytelling to investigate racial (in)justice. When I teach case-briefing this way, we first brief the case and aim to understand the opinion as written, then we discuss critical narratives missing from the majority opinion—either by studying historical context or by engaging with reimagined judicial opinions as a comparator.[23] This Essay proffers two examples that illustrate these approaches: *United States v. Robinson*, 414 U.S. 218 (1973) and *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (1965).[24]

Pham, *The Critical Case Brief: A Practical Approach to Integrating Critical Perspectives in the 1L Curriculum*, *in* INTEGRATING DOCTRINE AND DIVERSITY: INCLUSION AND EQUITY IN THE LAW SCHOOL CLASSROOM, *supra* note 8 at 51–60 (advocating for a "Critical Case Brief" framework that supplements the traditional case brief with "two components: (1) critical facts; and (2) critical analysis"); Sherri L. Keene, *Teaching Dissents*, 107 MINN. L. REV. 2619, 2625 (2023) ("This Article considers the role that dissenting opinions can play in preparing students to be critical readers of judicial texts who look beyond the court's language to find meaning and who consider court opinions in a broader social and cultural context.").

[22] *See, e.g.*, Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 884 (2010) (arguing that the stories in legal authority should be "recognize[d] and interrogate[d]").

[23] In this Essay, I focus on modeling the discussions I have in class when I unpack these cases with my students. My students modify their case briefs as we discuss—the same way they self-correct when reviewing cases in any law school class. I am fairly agnostic about the exact form in which critical observations appear in the brief itself. Form ultimately depends on the notetaker's preference and the source of the critical information augmenting the original opinion. For example, if using a reimagined opinion for context, one might brief that opinion separately from the original case brief and then write a summary paragraph contrasting the two opinions. If referencing a law journal article for untold facts, adding observations in a "Notes" section at the end of the case brief likely would work well. Whatever the written form, a clear demarcation of what content hailed directly from the judicial opinion versus from an outside source is essential so that the student readily sees the juxtaposition of the opinion as written with the critical content.

[24] Note that this Essay does not discuss every aspect of the published opinions. First, my project is narrower in scope; I intend to illustrate an alternative, critical approach to case briefing and analysis. Second, I provide edited opinions to my students and focus on the issues therein.

United States v. Robinson

In the following example, I demonstrate how I teach case-briefing using *United States v. Robinson*, 414 U.S. 218 (1973), by raising socio-historical context in class discussion.

In *United States v. Robinson*, the Supreme Court expanded the Fourth Amendment's search incident to arrest doctrine. Justice Rehnquist begins the opinion by providing a one-paragraph overview of procedural history: the U.S. District Court for the District of Columbia held that heroin introduced in evidence against Willie Robinson was lawfully obtained incident to his arrest; and then the Court of Appeals for the District of Columbia Circuit determined that the evidence was obtained in violation of Robinson's Fourth Amendment rights.[25] The Supreme Court granted certiorari.[26]

The reader meets Officer Jenks in the first sentence of the following paragraph: "On April 23, 1968, . . . Officer Richard Jenks, a *15-year veteran* of the District of Columbia Metropolitan Police Department, observed the respondent driving . . ."[27] From the outset of the story, it is not looking good for Robinson.

The opinion continues to describe the encounter. The reader learns that Robinson was driving in D.C. "near the intersection of 9th and C Streets, N.E.,"[28] and that Jenks had reason to believe that Robinson was operating a motor vehicle after his operator's permit had been revoked four days earlier.[29] Jenks arrested Robinson and searched him "in *accordance with procedures* prescribed in police department instructions . . . ."[30] He gave Robinson a patdown and felt something in his breast pocket.[31] Unable to identify the item, Jenks pulled it from Robinson's pocket—uncovering a "crumpled up cigarette package."[32] He then opened the package and found fourteen gelatin capsules of heroin,[33] evidence that led to Robinson's conviction at trial.[34]

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[25] 414 U.S. 218, 219–20.
[26] *Id.* at 220.
[27] *Id.* (emphasis added).
[28] *Id.*
[29] *Id.* (The opinion hints at a prior encounter between Jenks and Robinson: "Jenks, as a result of previous investigation following a check of respondent's operator's permit four days earlier, determined there was reason to believe . . . .").
[30] *Id.* at 221 (emphasis added).
[31] *Id.* at 223.
[32] *Id.*
[33] *Id.*
[34] *Id.*

Writing for the Court, Justice Rehnquist holds that the search was lawful, and describes the search incident to arrest exception to the Fourth Amendment's warrant requirement as "well-settled" throughout the opinion.[35] Citing *Chimel v. California*, the opinion notes the two justifications that undergird this exception: 1) promoting officer safety/preventing the arrestee's escape; and 2) preserving evidence.[36] Yet, the court nevertheless holds it does not matter why someone is arrested—all custodial arrests should be treated alike for purposes of the search incident to arrest doctrine.[37] Case-by-case adjudication of the facts to ascertain the reasonableness of the search is not required.[38] An officer's decision about "how and where to search" is "necessarily a quick, ad hoc judgment."[39] Thus, if the custodial arrest is lawful, "a search incident to that arrest requires no additional justification."[40] The concurrence goes even further down this path, asserting that a lawfully arrested person "retains *no* significant Fourth Amendment [protections]."[41]

I ask my students to summarize the narrative—the story—that the majority presents. Students typically identify that the facts signal there is a "good guy"—Officer Jenks, a "15-year veteran" who was "acting in accordance" with the police department's instructions. And then, there is Robinson, who was illegally driving his car without a valid license, carrying heroin. In terms of the story about the law and legal reasoning, students observe that the majority is proclaiming, "Nothing new to see here! This is how we have always done it. The search incident to arrest doctrine is *well-settled*."

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[35] *Id.* at 224 ("It is well-settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment."); *see also id.* ("The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation . . ."); *id.* at 233 ("[T]he issue was regarded as well settled.") (citing TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 44–45 (1969)) ("Taylor suggests that there is little reason to doubt that search of an arrestee's person . . . is as old as the institution of arrest itself.").

[36] *Id.* (citing Chimel, 395 U.S. 752, 762–63 (1960)) ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered . . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.").

[37] *Id.* at 235.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 237 (Powell, J., concurring) (emphasis added).

The issue the Supreme Court confronts, here, is whether a police officer can conduct a "full" search of a person incident to arrest—a search that includes their effects—without a specific reason. Students typically struggle to identify the issue with particularity—which makes sense because the majority appears to frame the issue as whether a search incident to arrest is lawful.

Read in isolation, the majority opinion is confusing. The dissent helps students recognize the novelty of the legal issue presented in this case and identify holes in the majority's reasoning. Writing for the dissent, Justice Marshall expressly calls out the majority for "fail[ing] to recognize that the search . . . did not merely involve a search of respondent's person"—it went further, with an additional search "of effects found on [Robinson]."[42] The dissent underscores that precedent requires analysis of each case on its own facts and circumstances: "The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case."[43] This essential "case-by-case" adjudication is needed to preserve individual rights.[44] Integral to that analysis, courts must consider the two *Chimel* justifications to evaluate whether the search incident to arrest was reasonable,[45] or if a search warrant should have been requested.[46]

The class identifies that the dissent includes additional facts the majority opinion leaves out—that Robinson was first stopped at the corner of 9th and U Streets in D.C. for a "routine spot check,"[47] and

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[42] *Id.* at 255 (Marshall, J., dissenting).

[43] *Id.* at 238 (quoting Sibron v. New York, 392 U.S. 40, 59 (1968)).

[44] *See, e.g.*, *id.* ("[T]he intensive, at times painstaking, case-by-case analysis characteristic of our Fourth Amendment decisions bespeaks our jealous regard for maintaining the integrity of individual rights.") (internal quotation marks omitted); *id.* at 248 ("[C]ase-by-case adjudication will always be necessary to determine whether a full arrest was effected for purely legitimate reasons or, rather, as a pretext for searching the arrestee.").

[45] *Id.* at 243 ("[D]elineating the proper scope of [SITA] requires consideration of the purposes of that exception as they apply to the particular search that occurred in this case.").

[46] *Id.* at 258 ("Would it not be more consonant with the purpose of the Fourth Amendment and the legitimate needs of the police to require the officer, if he has any question whatsoever about [the contents of a package], to hold on to it until the arrestee is brought to the precinct station?").

[47] *Id.* at 239. The Supreme Court held that routine spot checks were unconstitutional in 1979. *See* Delaware v. Prouse, 440 U.S. 648, 673 (1979)("[E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the

that Robinson "immediately complied" when the police asked him to pull over.[48] Justice Marshall also carefully emphasizes the three phases of the search: 1) the patdown; 2) removal of the unknown object; and 3) opening the crumpled-up cigarette package.[49] Further, he highlights that Officer Jenks had control of the package when he decided to open it, and admitted he had "[no] reason to believe, [n]or did in fact believe, that the objects were weapons of any sort."[50] Pulling out these threads of the dissent's reasoning, the class discusses the narrative Justice Marshall presents, and how the dissent's description of the facts obliterates the two *Chimel* justifications—there was no threat to officer safety and no concern about preservation of evidence once the package was in the officer's possession.[51]

Toward the end of the dissent, the opinion presents two hypotheticals to the reader: *What if Respondent were a businessman? What if Respondent were an attorney?*[52] I ask the class

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driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment."); *see also Handling Prisoners*, METRO. POLICE ACAD. 6.2, https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/6.2%20Handling%20Prisoners.pdf [https://perma.cc/WVP5-NRFF] (last updated Feb.24, 2023) (noting that routine spot checks "were common until 1979").

[48] *Id.* at 240. Furthermore, Justice Marshall underscores, "[n]or was there any particular reason in this case to believe that respondent was dangerous. He had not attempted to evade arrest, but had quickly complied with the police both in bringing his car to a stop after being signaled to do so and in producing the documents Officer Jenks requested. In fact, Jenks admitted that he searched respondent face to face rather than in spread-eagle fashion because he had no reason to believe respondent would be violent." *Id.* at 253.

[49] *Id.* at 241.

[50] *Id.*; *see also id.* at 251 ("He admitted . . . the object did not feel like a gun. . . . 'I just searched him.'").

[51] "The search conducted by [the officer] went far beyond what was reasonably necessary to protect him from harm or to ensure that respondent would not effect an escape from custody." *Id.* at 259.

[52] *Id.* at 257 ("One wonders if the result in this case would have been the same were respondent a businessman who was lawfully taken into custody for driving without a license and whose wallet was taken from him by the police. Would it be reasonable for the police officer, because of the possibility that a razor blade was hidden somewhere in the wallet, to open it, remove all the contents, and examine each item carefully? Or suppose a lawyer lawfully arrested for a traffic offense is found to have a sealed envelope on his person. Would it be permissible for the arresting officer to tear open the envelope in order to make sure that it did not contain a clandestine weapon—perhaps a pin or a razor blade?").

what they think Marshall was alluding to—responses vary: "social status," "class," "race?" The question lingers.

After we parse the majority's opinion and discuss the concurrence and dissent, we transition to discussing socio-historical context surrounding the opinion. I first ask the class if anyone recalls what was happening in U.S. history around the time of Robinson's arrest.[53] Several students are ready with an answer: "Dr. Martin Luther King Jr. was assassinated in April 1968." An alternative narrative begins to take shape. Through a combination of discussion and lecture, we begin to review the socio-historical context together.

Following the news of Dr. King's assassination on April 4, 1968, people began demonstrating throughout Washington, D.C.[54] Crowds started forming at 14th and U Streets and spread throughout adjacent neighborhoods, including Shaw and the Northeast H Street Corridor.[55] What began as peaceful protests[56] turned violent, with widespread looting and arson—resulting in more than 1,200 fires set ablaze.[57] Over 13,000 federal troops and members of the National Guard were called in on April 5,[58] and they remained in the city for several days.[59] In our discussion, students recall that Robinson was

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[53] To be sure, there is nothing in the opinion about what was happening in Washington, D.C. at the time of Robinson's arrest. And there is no mention of Robinson's race.

[54] Protests occurred in many cities through the United States, in what is now referred to as "The Holy Week Uprising" or "1968 riots." Lorraine Boissoneault, *Martin Luther King Jr.'s Assassination Sparked Uprisings in Cities Across America,* SMITHSONIAN (Apr. 4, 2018), https://www.smithsonianmag.com/history/martin-luther-king-jrs-assassination-sparked-uprisings-cities-across-america-180968665/ [https://perma.cc/H338-2L3J]. While I do not use the racially charged word "riot" in my own text, I have retained the word where it is quoted in cited sources. *See, e.g.*, Katy Steinmetz, *"A War of Words." Why Describing the George Floyd Protests as "Riots" Is So Loaded*, TIME (June 8, 2020), https://time.com/5849163/why-describing-george-floyd-protests-as-riots-is-loaded [https://perma.cc/EW26-98GH] ("[T]he word riot connotes meaningless violence . . . . [I]t also has a racial dimension in the U.S., as a term that's long been used (by white people) to drum up the image of black people wreaking senseless chaos in cities.").

[55] *Id.*

[56] Protests called for businesses to temporarily close out of respect for Dr. King's death.

[57] Boissoneault, *supra* note 54.

[58] *The D.C. Riots of 1968*, NATIONAL GUARD EDUC. FOUNDATION (2016), https://www.ngef.org/the-d-c-riots-of-1968/ [https://perma.cc/PCB6-6LL7].

[59] Sources conflict on whether April 6 or April 8 was the final day of violence following the protests. *Compare April 1968 Washington, D.C. Riots,* THE

first stopped for a "routine spot check" at 9th and U Streets on April 19, 1968, and that he was arrested four days later—on April 23. I pull up slides with a calendar and a map of D.C. to help the class compare the location and dates with the events that occurred in D.C. shortly after Dr. King's assassination.

As a class, we also situate Robinson's arrest against the backdrop of the Civil Rights Movement—noting milestones, such as the passage of the Civil Rights Act of 1964, Voting Rights Act of 1965, and the Fair Housing Act of 1968. We note the "long, hot summer of 1967,"[60] and the release of the Kerner Commission report, identifying racism and economic and residential segregation as key drivers of civil unrest.[61]

The shifting political landscape adds another layer. Richard Nixon became the 37th President of the United States on January 20, 1969.[62] As Nixon aide John Ehrlichman revealed many years after the Administration left office, the Nixon 1968 campaign and presidency "had two enemies: the antiwar left and black people . . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt

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UNWRITTEN RECORD, NATIONAL ARCHIVES (Apr. 5, 2023), https://unwritten-record.blogs.archives.gov/2023/04/05/april-1968-washington-dc-riots/ [https://perma.cc/2SCD-RM43] *with The D.C. Riots of 1968*, *supra* note 58.

[60] In the summer of 1967, 158 uprisings broke out across the United States. Farrell Evans, *The 1967 Riots: When Outrage Over Racial Injustice Boiled Over*, HISTORY, Jun. 21, 2021, https://www.history.com/news/1967-summer-riots-detroit-newark-kerner-commission [https://perma.cc/H39A-3FTB] (the Kerner Report).

[61] "In the first draft of the Kerner Report, entitled "The Harvest of American Racism," social scientists cited police brutality as the central cause of the uprisings and black discontent in urban America. But the commission buried those findings by the researchers, and President Johnson chose to focus his response on segregation and economic equality." *Id.*

[62] *President Nixon*, NATIONAL ARCHIVES, https://www.nixonlibrary.gov/president-nixon [https://perma.cc/5M8W-5YHW] (last visited Aug. 15, 2023).

those communities."[63] The campaign was marked by a focus on "law and order"—which was code for racialized politics.[64]

Additionally, by the time Robinson's case made its way to the Supreme Court in 1973, the composition of the Court had changed: The Warren Court[65] was replaced by the Burger Court in 1969.[66] The Burger Court was known for "bright-line fever" in its Fourth Amendment jurisprudence, aiming to promote predictability for law enforcement.[67] However, this approach often resulted in overly rigid

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[63] Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER'S MAG., Apr. 2016, https://harpers.org/archive/2016/04/legalize-it-all/ [https://perma.cc/5MXV-XJQW] ("The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.").

[64] Terence McArdle, *The 'Law and Order' Campaign That Won Richard Nixon the White House 50 Years Ago,* WASH. POST. (Nov. 5, 2018), https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/ [https://perma.cc/GJ9Q-XG99]; Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control*, FRONTLINE (Apr. 29, 2014), https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/ [https://perma.cc/G466-EBFA].

[65] The Warren Court, led by Chief Justice Earl Warren from 1953 to 1969, is renowned for its progressive decisions that expanded individual liberties and civil rights. It brought forth landmark civil rights and Fourth Amendment cases such as Brown v. Board of Education (1954), Miranda v. Arizona (1966), Loving v. Virginia (1967), Katz v. U.S. (1967), Terry v. Ohio (1968), and Chimel v. California (1969). *See* Nadra Kareem Nittle, *How the Warren Court Expanded Civil Rights in America*, HISTORY (Dec. 5, 2022), https://www.history.com/news/earl-warren-supreme-court-civil-rights [https://perma.cc/KM3Q-J6NY]; Jack E. Call, *The United States Supreme Court and the Fourth Amendment: Evolution from Warren to Post-Warren Perspectives*, 25 CRIM. JUST. REV. 93 (2000).

[66] Chief Justice Warren Burger led the Supreme Court from 1969 to 1986. *The Burger Court, 1969–1986*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-courts/burger-court-1969-1986/ [https://perma.cc/EJ9Y-Y2KF] (last visited Dec. 15, 2023).

[67] *See, e.g.*, Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); *see also* Call, *supra* note 65; Michael Vitiello, *Reflections on an Extraordinary Career: Thoughts about Gerald Caplan's Retirement ,* 46 MCGEORGE L. REV. 459, 493–94 (2014).

rules that failed to protect individual privacy rights, limiting the scope of the Fourth Amendment's protection.[68]

As we unveil this context, students begin to see additional layers animating the majority's opinion and Justice Marshall's dissent. The context provides a narrative not contemplated in the opinion—one where expansion of exceptions to the Fourth Amendment's warrant requirement occurred during the Civil Rights Movement, after the death of its leader—a story about racial tension, oppression, law and order, and brightline fever. We discuss this as a class, and also how being aware of context is important for challenging legal precedent—in impact litigation and public policy work. We underscore that context is a fact of the case—whether or not it is overt in an opinion's text. Finally, we acknowledge that context is something competent attorneys must consider as part of their litigation strategy—they might decide to not raise these factors when bringing a case but, to make an informed decision, they first must understand the surrounding social, historical, and political context in which a case arises.

This is one example of teaching case briefing by pulling in socio-historical context. Below, I offer an example of how to use a reimagined judicial opinion to engage in a similar, critical exercise.

Williams v. Walker-Thomas Furniture

When teaching case briefing using *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), I ask students to compare the original opinion with the reimagined opinion in *Critical Race Judgments: Rewritten U.S. Court Opinions on Race and the Law*.[69] Reviewing and discussing the powerful narrative that is completely absent from the original opinion makes for a formidable lesson about the stories judges choose to (not) tell and how they affect legal discourse.

Walker-Thomas Furniture is well known for its discussion of the unconscionability defense to contract enforcement. Appellants Williams and Thorne purchased many household items from the company on installment contracts over the course of several years.[70] When Appellants defaulted on their monthly payments, Walker-Thomas sought to repossess all the items that the families had ever

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[68] *See* Alschuler, *supra* note 67, at 231 ("[C]ategorical fourth amendment rules often lead to substantial injustice. . . .").

[69] Emily Houh, *Williams v. Walker-Thomas Furniture Co.*, *in* CRITICAL RACE JUDGMENTS, *supra* note 8 at 663.

[70] 350 F.2d 445, 447.

purchased from the company.[71] Before the D.C. Court of Appeals, Appellants argued "(1) there was a lack of meeting of the minds, and (2) the contracts were against public policy."[72] The Court of Appeals rejected the first argument,[73] relying on the duty to read rule.[74] With regard to the second argument, the Court held that there were no grounds for holding that the contracts ran afoul of public policy[75] and offered that Congress should enact "corrective legislation" to protect consumers.[76] Williams and Thorne appealed to the United States Court of Appeals for the District of Columbia Circuit.

I assign the D.C. Circuit Court's opinion to my class. Judge Skelly Wright wrote for the majority in *Walker-Thomas,* beginning with a very brief overview of the facts. Appellants Williams and Thorne[77] purchased several household items from Walker-Thomas Furniture between 1957 and 1962:[78] "The terms of each purchase were contained in a printed contract which set forth the value of the purchased item."[79] The contract required monthly payments and provided that if a customer defaulted on any payment, the company was able to reclaim the furniture.[80] There was also a provision stating that monthly payments would be attributed pro rata to each item a consumer obtained, as they made additional purchases. The majority opinion clarifies, "The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated."[81] Both Thorne and Williams defaulted on their monthly installments.[82] The Court focuses on Appellants' contention that the contracts were unconscionable, observing that the trial and appellate courts below

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[71] *Id.*
[72] 198 A.2d 914, 915.
[73] *Id.* at 916.
[74] *Id.* ("We have stated that one who refrains from reading a contract and in conscious ignorance of its terms voluntarily assents thereto will not be relieved from his bad bargain. One who signs a contract has a duty to read it and is obligated by its terms. . . . A careful review of the record shows that appellant's assent was not obtained 'by fraud or even misrepresentation falling short of fraud.'") (internal quotation marks omitted).
[75] *Id.*
[76] *Id.*
[77] The D.C. Circuit opinion combined two cases (Williams and Thorne).
[78] 350 F.2d at 447.
[79] *Id.* However, note that this is not accurate—the contracts did not include the value of the purchased item. They were signed in blank.
[80] 350 F.2d at 447.
[81] *Id.*
[82] *Id.*

rejected this argument.[83] There is no discussion of the parties' meeting of the minds argument.

In its description of the facts, the majority primarily focuses on the big-ticket item that Williams purchased last, noting, "appellant Williams bought a stereo set [for] $514.96" just prior to defaulting.[84] Buried in a footnote is an additional fact—that Williams had paid a total of $1,400 to the company prior to this purchase.[85] The opinion then goes on to quote a portion of the District of Columbia Court of Appeals opinion, below:

> "[P]rior to the last purchase appellant had reduced the balance in her account to $164. The last purchase, a stereo set, raised the balance due to $678. Significantly, [Walker-Thomas] was aware of appellant's financial position. The [] stereo contract listed the name of appellant's social worker and her $218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a $514 stereo set."[86]

As the class discusses the case, I pull up a slide with that quote and the footnote regarding Williams's $1,400 in prior payments. I prompt my students to consider what story emerges from these facts. Students offer their observations: "A single mother of seven struggling to survive on government assistance.[87] She has no agency. She irresponsibly bought a stereo. The furniture company should not have sold the stereo to her, since they knew she was on welfare." They raise concerns about the opinion's undeniably paternalistic tone,[88] the emphasis on the subject of her purchase (a "luxury" item), and the

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[83] *Id.* Notably, "Williams's attorneys fully briefed unconscionability as a defense only after Congress adopted the Uniform Commercial Code, when the case was on appeal to the D.C. Circuit." Anne Fleming, *The Rise and Fall of Unconscionability as the 'Law of the Poor*, 102 GEO L.J. 1383, 1414 (2014).

[84] 350 F.2d at 447.

[85] *Id.* at 448, n.1.

[86] *Id.* at 448.

[87] "The particular stereotypes implicated in Williams are associated primarily with African-American women: that [they] are disproportionately on welfare, irresponsible with money and likely to raise large families as single parents." Muriel Morisey Spence, *Teaching* Williams v. Walker-Thomas Furniture Co., 3 TEMP. POL. & CIV. RTS. L. REV. 89, 90 (1994).

[88] While the class does not discuss Judge Danaher's dissent in great detail, we note that it appears to take issue with the majority opinion's paternalistic approach. *See* Williams, 350 F.2d at 450; *see also* Fleming, *supra* note 83, at 1432 ("Danaher characterized the majority as monitoring the expenditure of welfare funds.").

fact that Williams had successfully already paid $1,400 to the company—a fact that was hidden in a footnote.

We interrogate these reflections, eventually linking the conversation to the Court's reasoning, which underscores that context matters when determining if a contract is unconscionable. The majority defines unconscionability as "an absence of meaningful choice on the part of one of the parties [ ] together with contract terms which are unreasonably favorable to the other party."[89] It then asserts, "[c]onsideration of *all* the circumstances" is the only way to judge "whether a meaningful choice is present."[90] This includes details about the transaction and the parties.[91] Yet, paradoxically, the majority opinion presents very few facts about the transaction and parties. In the end, the Court holds that there are grounds for deeming the contracts unenforceable and remands the case to trial court for further proceedings, since the lower courts had not made any findings regarding unconscionability.[92]

While I do not assign the lower court's (D.C. Court of Appeals) opinion[93] to my students, I mention in class that it included several facts the D.C. Circuit opinion left out: Williams was "a person of limited education separated from her husband."[94] She had signed fourteen contracts with Walker-Thomas; they were roughly "six inches in length and . . . contained a long paragraph in extremely fine print."[95] She signed the majority of these contracts in her home, in blank, and never received a copy.[96]

The D.C. Court of Appeals also includes a description of other items Williams had purchased, beyond the stereo set that the D.C. Circuit Court focuses on—including sheets, curtains, rugs, chairs, a chest of drawers, beds, mattresses, and a washing machine.[97]

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[89] 350 F.2d at 449.
[90] *Id.* (emphasis added).
[91] *Id.* ("The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?").
[92] *Id.* at 450 ("Because the trial court and the appellate court did not feel that enforcement could be refused, no findings were made on the possible unconscionability of the contracts in these cases. . . . [T]he record is not sufficient for deciding the issue as a matter of law. . . .").
[93] 198 A.2d 914.
[94] *Id.* at 915.
[95] *Id.*
[96] *Id.* (clarifying that contracts Williams signed did not include the actual price of the purchased items).
[97] *Id.*

Additionally, the appellate opinion discusses Williams's testimony at trial, which highlights that she misunderstood the contract's payment provision: She thought that once she had paid the amount an item cost, she owned it—not that monthly installments were allocated pro rata to all outstanding purchases.[98] However, when rejecting her argument that there was a lack of "meeting of the minds," the Court of Appeals still held that she had a duty to read, and was nevertheless bound by, the contract.[99] The Court spent more time analyzing Appellant's public policy argument, but ultimately affirmed the trial court's judgment for Walker-Thomas, expressing regret that there was "no ground upon which this court can declare the contracts in question contrary to public policy."[100]

We then turn our attention to the reimagined D.C. Circuit Court opinion[101] by "Judge" Emily Houh,[102] which includes a number of facts that were not reported in the *Walker-Thomas* cases.[103] We note the different emphasis, and some discrepancies, among the facts presented in the reimagined opinion:

- Appellants lived in predominately black and lower-income neighborhoods.[104]
- Walker-Thomas had a practice of using door-to-door salesmen to target individuals in these neighborhoods.[105]
- Williams signed sixteen contracts with Walker-Thomas, and purchased many household items: a wallet, drapes, an apron, a potholder, etc.[106]

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[98] *Id.* If Williams's interpretation of the clause were correct, she would have owned roughly twelve of the sixteen items she purchased at the time of default. E. ALLAN FARNSWORTH, CAROL SANGER, NEIL B. COHEN, RICHARD R.W. BROOKS & LARRY T. GARVIN, CASES AND MATERIALS ON CONTRACTS 641 (9th ed. 2019).

[99] 198 A.2d at 916.

[100] *Id.* (encouraging "Congress [to] consider corrective legislation").

[101] Houh, *supra* note 69.

[102] Emily M.S. Houh is the Gustavus Henry Wald Professor of the Law and Contracts and Co-founder of the Nathaniel R. Jones Center for Race, Gender, and Social Justice, College of Law. Houh teaches contracts, commercial law, and critical race theory. https://law.uc.edu/faculty/directory/emily-ming-sue-houh.html [https://perma.cc/YJ7S-2TUK].

[103] These facts come from Anne Fleming's research, published in *The Rise and Fall of Unconscionability as the "Law of the Poor*," 102 GEO L.J. 1383 (2014). Houh, *supra* note 69, at 663.

[104] Houh, *supra* note 69, at 663.

[105] *Id.* at 665.

[106] *Id.*

- Walker-Thomas seized several items from Williams, including a washing machine, bed, and chest of drawers. At the time, she owed "only $440.40 on all the purchases she had made since 1957."[107]
- At time of default, the Thornes had paid $1,442 on a total of $1,855 owed.[108]
- Not only was Williams never provided with copies of the contracts, she was routinely asked to sign contracts with no price or item description filled-in.[109]
- When asking for Mrs. Williams's signature, the Walker-Thomas agent would fold over the contract to show only the signature line.[110]
- Mr. Thorne had a third grade education; Mrs. Williams had an eighth grade education.[111]

The reimagined opinion builds out these facts, carefully leveraging them to support its reasoning. The "Court" rejects the appellate court's emphasis on the duty to read rule, given the tactics employed by the salesmen.[112] The "Court" also disagrees with the appellate court's holding that the trial court's record "did not support a possible finding of fraud or misrepresentation."[113] In addressing vulnerability and exploitation, fraud and misrepresentation, the opinion underscores that the law can balance interests to "distinguish[] between the willfully ignorant consumer and the consumer who, by virtue of his or her status in society, is particularly vulnerable to sharp sales practices . . . designed to exploit."[114]

The opinion is artfully written. Judge Houh emphasizes pivotal facts while prudently steering clear of stereotyping and paternalism. Furthermore, the opinion seamlessly incorporates socio-historical context as a foundational element within its analysis. For example, in its discussion of unconscionability's "unfairness" and "lack of meaningful choice" prongs,[115] Judge Houh expresses concern that Walker-Thomas targets "residents of poor, predominantly Black

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[107] *Id.* at 666.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 670. It was later revealed that Mrs. Williams had a sixth grade education "and was just barely literate." Fleming, *supra* note 83, at 1392, n.41.
[112] Houh, *supra* note 69, at 667.
[113] *Id.*
[114] *Id.* at 668.
[115] *Id.* at 673.

neighborhoods," and connects this observation to the realities of segregation and how "those living in poor neighborhoods have far fewer 'choices' when it comes to access to the market for consumer goods and services."[116] She questions freedom of contract in this context.[117] Judge Houh also asserts that education level should be considered in determining meaningful choice but cautions against stigmatizing stereotyping."[118]

The "Court" reverses the lower courts' finding that there was no fraud or misrepresentation, and remands the case for further analysis of those issues.[119] The Court also remands the cases for additional fact-finding to determine if the contracts are unconscionable "consistent with [its] reasoning."[120]

Returning to reality, I share that the case was never heard by the trial court on remand. The parties settled, with Walker-Thomas paying Williams only $200 for all the goods it had seized from her.[121] The conclusion is disappointing. The class can only speculate as to what would have happened if the trial court had the opportunity to "[c]onsider[] all the circumstances"[122] including "[t]he manner in which the contract was entered."[123] I then share a few additional

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[116] *Id.* at 671. ("[DC] is so severely segregated, with poverty most concentrated in Black neighborhoods such as the ones in which appellants reside, 'absence of meaningful choice' must be assessed in a broader commercial context that takes into account past and existing inequities borne out of residential racial segregation.")

[117] *Id.* at 673. ("Black Americans whose lack of equal access in this context is the direct result of national and local economies built on slavery and Jim Crow, and maintained by persistent de facto racial segregation and inequity in virtually all facets . . . of American life . . . .").

[118] *Id.* at 670. ("This is not to say that Ms. Williams' eighth-grade and Mr. Thorne's third-grade educations are irrelevant to the calculus of 'gross inequality of bargaining power' and 'absence of meaningful choice.' It's only to say that the analysis should not rest solely or even primarily on such characteristics, as even those with what most consider to be 'low' social status and little formal education may possess great intelligence, savvy, and individual agency. To prevent stigmatizing stereotyping from being used as an end run around actual analysis, courts must effect rigorous and nuanced assessments on better developed facts to determine the existence of gross inequality of bargaining power.").

[119] The reimagined opinion adopts the Restatement of Contracts provisions on fraud and misrepresentation. *Id.* at 673.

[120] *Id.* at 674.

[121] Fleming, *supra* note 83, at 1432.

[122] 350 F.2d at 449.

[123] *Id.*

details about the history of the case and the Walker-Thomas Furniture Company.

Walker-Thomas Furniture's customer base was comprised of people who needed installment credit.[124] Not only did the company provide "easy credit," but it *required* credit for purchases that exceeded $100.[125] Although the company had a brick-and-mortar store, it primarily conducted business with door-to-door salesmen.[126] These salesmen "provide[d] intangible, psychological rewards" to clients.[127] Mainstream stores would often reject "almost all unemployed and benefit-receiving credit applicants," or treat them poorly.[128] Walker-Thomas sales agents helped customers access previously unattainable items and treated them with respect.[129] Walker-Thomas agents also conveniently collected payments at consumers' homes.[130] In this way, agents would see their customers every month, year after year, developing "highly personal, highly informal" relationships through these repeated interactions.[131]

At trial, Williams provided additional details about signing the blank contracts that did not appear in Judge Wright's opinion: "'[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.'"[132] The class discusses possible reasons that Williams signed these blank contracts, particularly given the additional information about Walker-Thomas Furniture's business model. Was it out of desperation to obtain the needed items she could not get anywhere else? Misplaced trust in her "friend" the salesman? Again, we cannot say with certainty, but exploring these narratives helps students understand how it would be conceivable for Mrs. Williams

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[124] Daniel Greenberg, *Easy Terms, Hard Times: Complaint Handling in the Ghetto*, *in* NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 379, 381–84 (Laura Nadar ed., 1980) (quoting 1968 report by the National Advisory Commission on Civil Disorders).
[125] *Id.* at 381.
[126] *Id.* at 381–82.
[127] *Id.* at 383.
[128] *Id.* at 381.
[129] *Id.* at 383–84.
[130] *Id.* at 382 ("Since its primary source of income is the monthly benefit checks, salespeople [ ] schedule collection for days when checks are likely to arrive . . . .").
[131] *Id.* at 384.
[132] Fleming, *supra* note 83, at 1395.

to sign a blank contract that was folded over, only revealing the signature line.

For the curious, I mention Judge Wright's earlier, draft opinions to the class. They indicated that he believed this case was not unique and something more sinister was happening—that Walker-Thomas regularly sold "high-priced items [ ] when [customer's] debts were nearly paid off, with the knowledge that they would likely default."[133] It is unclear why this theory did not appear in the final opinion, which instead focused solely on what happened to Williams and Thorne as "unusually exploitative."[134] I end our discussion by briefly recognizing that this case, and the rise of unconscionability, occurred in the context of President Lyndon B. Johnson's war on poverty.[135] I also highlight a controversial post-hoc counternarrative: For a long time, scholars confidently asserted that while courts aimed to use the doctrine of unconscionability to protect consumers, they ultimately made it more expensive for retailers to engage with these populations by refusing to enforce contracts—unintentionally, "hurting the very people they were trying to help."[136] However, Duncan Kennedy's recent analysis demonstrates it is very unlikely that the development of the unconscionability doctrine hurt consumers in poor Black neighborhoods.[137] This creates another inflection point in the class

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[133] *Id.* at 1391. After default, "[Walker-Thomas] could then *repossess and resell the items to the next buyer*." *Id.* (emphasis added).

[134] *Id.* at 1391 (citing 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)).

[135] *Id.* at 1385.

[136] *See, e.g., id.* at 1387 ("The doctrine of unconscionability experienced a brief resurgence in the mid-1960s at the hands of naïve, 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 . . . . But courts' refusal to enforce terms they deemed 'unconscionable' served only to increase the cost of doing business with low-income households.").

[137] While the "conventional" analysis of *Williams* was that the unconscionability doctrine ultimately hurt low-income consumers by raising seller prices and forcing buyers out of the market, Duncan Kennedy recently demonstrated that banning the unconscionable clause in *Williams* helped consumers in low-income Black neighborhoods by precipitating fairer contract terms. Kennedy asserts that consumers were likely still able to get their goods on credit for the same prices. *See* Duncan Kennedy, *The Bitter Ironies of* Williams v. Walker-Thomas Furniture Co. *in the First Year Curriculum*, 71 BUFF. L. REV. 225, 267–69 (2023) (explaining how market forces would have prevented companies like Walker-Thomas from passing costs onto buyers: "Sellers almost certainly had to 'eat the cost' or the vast majority of it, because they had already exhausted buyer willingness to pay

discussion—where we might consider how even the post-hoc analysis of judicial opinions can be an interpretive act of storytelling.

Conclusion

Case briefing is a critical skill for law students to develop. The traditional method focuses on the text of the opinion—how courts frame and resolve legal issues. While it is, without doubt, essential for law students to understand the text of an opinion, focusing on the text alone often masks issues of bias, oppression, and injustice. By engaging students with socio-historical context and reimagined judicial opinions, we can teach case briefing in a way that asks students to examine the stories that judges don't tell—helping them become more competent legal thinkers and advocates in a system that aspires to "eliminates bias, discrimination, and racism in the law."[138]

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for the underlying good . . . ."); *see also* Eboni Nelson, *Where's the Harm*? JOTWELL (Sept. 7, 2023), https://contracts.jotwell.com/wheres-the-harm/ [https://perma.cc/TFD3-5EMD] (reviewing Duncan Kennedy, *The Bitter Ironies of* Williams v. Walker-Thomas Furniture Co. *in the First Year Curriculum*, 71 BUFF. L. REV. 225 (2023).

[138] AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 12, at 19 (Standard 303(c), Interpretation 303-6).