

# Race, Unconscionability, and Contractual Equality

---

Sabine Tsuruda\*

## ABSTRACT

*Racially discriminatory contracts should be paradigmatically unconscionable in contract law. The unconscionability doctrine permits a court to refuse to enforce an unfair contract. Classically interpreted, the doctrine narrowly conceptualizes an unfair contract as an extremely nonstandard contract obtained by manipulating or circumventing the disadvantaged party's decision-making abilities. But racial discrimination can be the market norm, and bargaining disadvantages occasioned by racial discrimination are not usually incapacitating. Racially discriminatory contracts are thus typically not unconscionable, and when they are, it is only incidentally and for reasons having little to do with their discriminatory character.*

*The unconscionability doctrine's failure to reach discriminatory contracts is problematic. Declining to apply the unconscionability doctrine to racially discriminatory contracts suggests that exploiting racial inequality is a suitable form of bargaining, and that racial discrimination is objectionable merely because of the negative externalities it produces. Statutory antidiscrimination law's fixation on comparators and classifications is also underinclusive. Unconscionability's overly narrow vision of contractual equality thus distorts the moral character of racial discrimination and facilitates legal enforcement of racially discriminatory contracts.*

*Although numerous states have loosened unconscionability's classical requirements, the classical interpretation still usually supplies the basic framework for unconscionability. But there are indications of a promising alternative. Drawing on recent arbitration jurisprudence, this Article advances a "basic interests" approach to the unconscionability doctrine. Under this approach, the doctrine would ask whether contract enforcement is consistent with treating the parties as equals—not just with respect to their capacities for choice, but with respect to their basic interests and inalienable rights. Racially discriminatory contracts would paradigmatically fail to meet this standard.*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	161
I. CLASSICAL UNCONSCIONABILITY . . . . .	166
A. <i>Contract Law's Classical Autonomy Ideal</i> . . . . .	168
B. <i>Unusual and Severe Bargaining Disadvantages</i> . . . . .	169

---

\* Assistant Professor, Faculty of Law, University of Toronto. Many thanks to Peter Benson, Nicolas Cornell, Courtney Cox, Hanoch Dagan, Avihay Dorfman, Christopher Essert, Kerah Gordon-Solmon, Duncan Kennedy, Meena Krishnamurthy, Rahul Kumar, Joanna Langille, Jed Lewinsohn, Margaret Moore, Seana Shiffrin, Zoë Sinel, Stephen Smith, Rebecca Stone, Ashwini Vasanthakumar, and the participants of the University of Toronto Legal Theory Workshop, the North American Workshop in Private Law Theory, and the Canadian Private Law Theory Workshop. I am also indebted to the editors of the *Harvard Civil Rights-Civil Liberties Law Review* for their help and insightful feedback.

C.	<i>Agnosticism About the Morality of Market Norms</i> . . . . .	170
D.	<i>Contractual Equality</i> . . . . .	173
II.	THE FALSE PROMISE OF CONTRACTUAL EQUALITY . . . . .	174
A.	<i>Contract Buyers League v. F &amp; F Investment</i> . . . . .	175
B.	<i>Williams v. Walker-Thomas Furniture Co.</i> . . . . .	179
1.	<i>Litigating Williams</i> . . . . .	179
2.	<i>Racial Inequality in the Contracting Process</i> . . . . .	183
3.	<i>Whose Commercial Norms?</i> . . . . .	186
4.	<i>Racially Subordinating Terms</i> . . . . .	187
C.	<i>The Invisibility of Racial Inequality</i> . . . . .	190
III.	THE NEED FOR AN ALTERNATIVE THEORY OF UNCONSCIONABILITY . . . . .	191
A.	<i>The Limits of Statutory Antidiscrimination Law</i> . . . . .	192
1.	<i>The Fate of the Contract Buyers League Litigation</i> . . . . .	192
2.	<i>The Narrow Scope of Statutory Discrimination</i> . . . . .	193
B.	<i>Unconscionability as Contract's Core Fairness Principle</i> . . . . .	195
C.	<i>Rethinking Contract Law's Relationship to Social Inequality</i> . . . . .	197
D.	<i>The Lasting Influence of Classical Unconscionability</i> . . . . .	199
1.	<i>Defective Formation Requirements</i> . . . . .	199
2.	<i>The Limits of a Reasonableness Standard for Unconscionability</i> . . . . .	201
IV.	TOWARD A BASIC INTERESTS APPROACH TO UNCONSCIONABILITY . . . . .	203
A.	<i>General Features of a Basic Interests Approach</i> . . . . .	204
1.	<i>The Possibility of Pure Substantive Unconscionability</i> . . . . .	205
2.	<i>Attentiveness to Inequality Between Co-contractors</i> . . . . .	205
3.	<i>Equal Basic Interests</i> . . . . .	206
4.	<i>Not Simply Public Policy</i> . . . . .	206
5.	<i>A Duty to Bargain in Good Faith</i> . . . . .	207
B.	<i>Developing a Basic Interests Interpretation of Unconscionability</i> . . . . .	209
1.	<i>Arbitration and Inalienability</i> . . . . .	209
2.	<i>A Common Law of Equal Basic Interests</i> . . . . .	211
3.	<i>Remaining Questions</i> . . . . .	211
C.	<i>Contractual Equality, Revisited</i> . . . . .	212
1.	<i>From Conscience to Right</i> . . . . .	212
2.	<i>The Assumption of Free and Equal Contractors</i> . . . . .	214
3.	<i>Contract Law as Civil Rights Law</i> . . . . .	214
	CONCLUSION . . . . .	215

## INTRODUCTION

In *The Alchemy of Race and Rights*, Patricia Williams famously recounts the different approaches she and her colleague, Peter Gabel, took to finding an apartment upon moving to New York.<sup>1</sup> Gabel, a white man, sought to establish a relationship of trust and closeness with his sublessors through informality.<sup>2</sup> Rather than negotiate a lease, Gabel secured his apartment through a “pleasant conversation,” a \$900 cash deposit, and a handshake.<sup>3</sup> Williams explains that Gabel “appeared to be extremely self-conscious of his power potential . . . as a white or male or lawyer authority figure.”<sup>4</sup> For Gabel, informality was the means by which he could “overcome the wall that image might impose.”<sup>5</sup>

Williams instead sought the formality of contract. She explains,

I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute. . . . [T]he lack of formal relation to [others] would leave me estranged. It would risk a figurative isolation from that creative commerce by which I may be recognized as whole, by which I may feed and clothe and shelter myself, by which I may be seen as equal—even if I am a stranger.<sup>6</sup>

Williams’s orientation toward contracts reflects her experiences of living in the “shadow” of slavery,<sup>7</sup> and of having to navigate a social and commercial world with uncertain status as a rights holder.<sup>8</sup> Contract law promises a way of overcoming that precarity of status in daily life. Contract law classically assumes that people are free and equal, simply by virtue of possessing the ability and basic moral authority to choose what contractual relationships to undertake.<sup>9</sup> By defining contractual equality in isolation from people’s social statuses and positions, contract law holds out the prospect of occupying a distinct and egalitarian status—the status of a co-contractor, as a “bargainer of separate worth, distinct power, [and] sufficient *rights* to manipulate commerce.”<sup>10</sup> For Williams, contract law thus promises not “alienation” and “commodification,” but a valuable kind of equality.<sup>11</sup>

---

<sup>1</sup> PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146-48 (1991).

<sup>2</sup> *See id.*

<sup>3</sup> *Id.* at 146.

<sup>4</sup> *Id.* at 147.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 147-48.

<sup>7</sup> *Id.* at 154.

<sup>8</sup> *Id.* at 158.

<sup>9</sup> *See infra* section I.A.

<sup>10</sup> WILLIAMS, *supra* note 1, at 148.

<sup>11</sup> *Id.*

But the emancipatory promise of contract law breaks down precisely where it is most needed.<sup>12</sup> In the misguided effort to maintain the classical assumption of free and equal contractors, contract law has traditionally and systematically excluded racially discriminatory contracts from the common law's primary category of unfair contracts: unconscionable contracts. The unconscionability doctrine permits a court to refuse to enforce a contract on the ground that it is exploitative,<sup>13</sup> "unreasonably favorable" to one of the parties,<sup>14</sup> or otherwise extremely unfair.<sup>15</sup> To preserve the assumption of free and equal contractors, the unconscionability doctrine classically applies only to circumstances where the disadvantaged party was unable to exercise their decision-making abilities, either due to personal idiosyncrasies or happenstance, and the doctrine is agnostic about the morality of common market practices.<sup>16</sup> But constraints on choice occasioned by racial inequality tend to be widespread and are not necessarily, or even typically, incapacitating.<sup>17</sup> Racial discrimination can also be the market norm.<sup>18</sup> Contract law thus tends to systematically exclude racially discriminatory contracts from its primary category of unfair contracts.<sup>19</sup>

As a result, if a person wants to rely on the unconscionability doctrine to resist enforcement of a discriminatory contract, they must highlight their powerlessness in the formation process and present their contracting experience as if it were aberrational. As Williams explains, "[i]t is this experience of having, for survival, to argue for our own invisibility in the passive, unthreatening rhetoric of 'no rights' which . . . is both paradoxical and difficult for minorities to accept."<sup>20</sup>

---

<sup>12</sup> See *id.* at 155-58 (describing how contract law offers no resources to vindicate the rights of "victims of excessive power"); Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1265-69 (2022) (describing some of the unconscionability doctrine's lost opportunities to address the nexus between racial inequality, housing, and poverty).

<sup>13</sup> See, e.g., *Kelker v. Geneva-Roth Ventures, Inc.*, 303 P.3d 777, 782 (Mont. 2013) (explaining that "exploitation of the weaker party's vulnerability or lack of sophistication" is a common "element" of unconscionability).

<sup>14</sup> RESTATEMENT (SECOND) OF CONTS. § 208 cmt. d (AM. L. INST. 1981) ("[A] gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.").

<sup>15</sup> See, e.g., U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2022) (explaining that the unconscionability doctrine is intended to prevent "unfair surprise").

<sup>16</sup> See *infra* sections I.B.-I.C.

<sup>17</sup> See, e.g., *Cont. Buyers League v. F & F Inv.*, 300 F. Supp. 210, 227-28 (N.D. Ill. 1969), *aff'd sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970) (declining to apply the unconscionability doctrine to a contract that exploited racial residential segregation in part because the Black buyers did not contract under circumstances of "absolute need and dire shortage").

<sup>18</sup> See, e.g., *id.* at 215-16 (discussing the pervasive character of discriminatory exploitation of racial residential segregation in Chicago); see also *infra* Part II.

<sup>19</sup> See *infra* sections II.A., III.A.

<sup>20</sup> WILLIAMS, *supra* note 1, at 158.

The problematic treatment of racial inequality under the unconscionability doctrine is not new.<sup>21</sup> Yet the classical interpretation of the unconscionability doctrine remains highly influential in law and contract theory. Although many U.S. jurisdictions have relaxed the requirement of a defective formation process,<sup>22</sup> some kind of procedural defect is still typically required,<sup>23</sup> and commercial norms commonly operate as the measure of unfairness.<sup>24</sup> Even Canada, which has embraced a rich and substantive conception of equality in its antidiscrimination jurisprudence,<sup>25</sup> has recently affirmed the classical interpretation of unconscionability.<sup>26</sup> Meanwhile, liberal and libertarian contract theories have tended to ignore the question of how racial discrimination should be treated under the common law of contracts, except to suggest that the problem should be, or already is, dealt with elsewhere.<sup>27</sup>

Contrary to the standard legal and philosophical view, this Article argues that the justifiability of the common law of contracts turns on its treatment of racial discrimination. Statutory antidiscrimination law's narrow focus

---

<sup>21</sup> See Penningroth, *supra* note 12, at 1223-24 (citation omitted) (detailing how recently freed people in the South were given relief from ostensibly exploitative contracts formed with white people on the basis that they were “wards ‘under the guardianship of the Nation’”).

<sup>22</sup> See *infra* section III.D.1.

<sup>23</sup> See *infra* section III.D.1.

<sup>24</sup> See *infra* section III.D.2.; U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2022) (explaining that unconscionability aims to prevent “oppression and unfair surprise,” not to “disturb[] the allocation of risks because of superior bargaining power”).

<sup>25</sup> See Sabine Tsuruda, *Substantive Equality and Its Remedial Consequences*, 73.2 U. TORONTO L.J. 189, 190-96 (2023) (explaining how Canadian jurisprudence has tended to conceptualize equality “substantively” and “contextually,” determining whether an act, policy, or practice is discriminatory on the basis of its effects on the status of the complainant, in contrast to the conduct and comparator-focused approach in U.S. antidiscrimination law).

<sup>26</sup> See *Uber Techs. Inc. v. Heller*, [2020] 2 S.C.R. 118, paras. 85, 93 (Can.) (finding a mandatory arbitration clause unconscionable in part because the “weaker” party, a food delivery worker, “could not be expected to appreciate the financial and legal implications” of the clause).

<sup>27</sup> For example, Peter Benson explains that most “promissory and other autonomy-based theories standardly . . . assume that it is inherently problematic” for courts to pass on the substantive fairness of contractual terms. PETER BENSON, *JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW* 169 (2019). These theories hold that evaluating the fairness of contractual terms would “rest . . . on considerations of distributive injustice that cannot fairly be deemed the responsibility of any given individual.” *Id.* (citing CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 106 (2d ed. 2015)). Racially discriminatory contracts are unfair contracts. Such theories thus implicitly assume that racial discrimination falls within the exclusive dominion of policies targeting distributive justice. Indeed, it is possible that Benson himself makes this assumption because he holds that unconscionability is primarily, if not exclusively, concerned with the “transactional fairness” involved in ensuring that exchanges that are unequal in value can be accounted for by either donative intent, the voluntary assumption of risk, or some other like basis. See *id.* at 176-84. This seems to bear little direct relation to an inquiry into whether a contract is racially discriminatory. For a contrary view that discrimination falls within the concern of liberal contract law, see Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and the Law of Work*, 24.1 *THEORETICAL INQUIRIES* L. 49, 66 (2023) (arguing that employment discrimination law should be viewed as a “necessary . . . reform entailed by the idea of liberal contract” and required to ensure that contract law lives up to its own ideals).

on classifications and comparators is underinclusive.<sup>28</sup> Even if that could be remedied, the enforceability of discriminatory contracts at common law problematically suggests that exploiting racial inequality is a suitable form of bargaining, and that racial discrimination is objectionable merely because of the negative externalities it produces. Failure to interpret the unconscionability doctrine to reach discriminatory contracts is thus directly at odds with contract's emancipatory promise and obscures the morally objectionable character of racial discrimination.

Racial discrimination is not unique in exhibiting such problems with contract law. Contract law's problematic treatment of racial inequality is a consequence of the unconscionability doctrine's core focus on unusual disadvantages in the contracting process and its agnosticism about commercial norms. As a result, other paradigmatically objectionable social inequalities, such as gender discrimination and poverty, are likely to fare similarly because they produce widespread disadvantages, can be normalized in markets, and yet often take an interpersonal form.<sup>29</sup> The problematic treatment of racial inequality under the unconscionability doctrine is thus emblematic of a broader problem with contract law's relationship to social inequalities.

Drawing on lessons from this critique, this Article develops an alternative interpretation of the unconscionability doctrine. How would the unconscionability doctrine change if racially discriminatory contracts were paradigmatically unconscionable? The unconscionability doctrine would abandon its classical emphasis on party decision-making abilities and its assumption that market norms are fair. Instead, the doctrine would ask whether contract enforcement is consistent with treating the parties as equals—not just with respect to their capacities for choice, but with respect to their basic interests and inalienable rights. Such basic interests and rights include, but are by no means limited to, antidiscrimination rights, as well as familiar interests in having certain forms of privacy, having a home, and accessing justice.

Judges are not without resources to develop this “basic interests” approach to unconscionability. In fact, the law of unconscionable arbitration agreements has already started to implement a similar approach, albeit in a more circumscribed way.<sup>30</sup> A common but partial ground for finding mandatory arbitration agreements unconscionable is that the agreements would

---

<sup>28</sup> See *infra* section III.A. For a discussion of the limited utility of the public policy defense to contract enforcement, see *infra* section III.B.

<sup>29</sup> See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 836 (1991) (explaining that retail car dealerships discriminate against women by “systematically” offering them higher prices than men); Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor,”* 102 GEO. L.J. 1383, 1392-98 (2014) (documenting how credit markets reflected and reinforced the disadvantage of low-income consumers in the 1950s and 1960s); Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 CARDOZO J.L. & GENDER 437, 443-70 (2013) (discussing the pervasive character and uncertain legal status of gender discrimination in consumer contracting).

<sup>30</sup> See *infra* section IV.B.

thwart the disadvantaged party's ability to vindicate an inalienable right, such as the right against employment discrimination under Title VII,<sup>31</sup> or a basic interest, such as the interest in accessing justice.<sup>32</sup> A basic interests approach extends this conception of contractual unfairness beyond arbitration, directing courts to consider whether a contract, because of its terms or its formation process, advantages one party to the detriment of the other party's basic interests.

A basic interests approach would thus establish a right to resist enforcement of discriminatory contracts as well as other forms of contractual subordination made possible by objectionable social inequalities. The unconscionability doctrine could thereby play a central role in vindicating the emancipatory promise of contract law, and help to bridge the traditional legal and philosophical divide between contract law and civil rights law.<sup>33</sup>

Examining racial discrimination through the lens of contract law thus challenges liberal and libertarian contract theories' tendency to assimilate norms of social equality under norms of distributive justice.<sup>34</sup> This Article's extended case study on the unconscionability doctrine's treatment of racial discrimination reveals that racial inequality is not a merely structural phenomenon. It often takes an interpersonal and profoundly subordinating form. Racial discrimination and racial inequality more broadly are accordingly not matters that we can disregard in the pursuit of our private interests, "secure . . . in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made."<sup>35</sup> Exploiting racial inequality is a choice, and discriminatory contracts offer

---

<sup>31</sup> See, e.g., *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 208 (3d Cir. 2010).

<sup>32</sup> See, e.g., *Narayan v. Ritz-Carlton Dev. Co., Inc.*, 400 P.3d 544, 555 (Haw. 2017).

<sup>33</sup> See *Cont. Buyers League v. F & F Inv.*, 300 F. Supp. 210, 227-28 (N.D. Ill. 1969), *aff'd sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970) (holding that contracts for the sale of real estate that exploited racial residential segregation could violate Section 1982 of the Civil Rights Act of 1866, but could not be unconscionable); *infra* sections II.A., III.A. Dylan Penningroth makes a similar but distinct point, arguing that by failing to see how Black people in the United States have long used contract law to pursue meaningful lives and relationships, we have overlooked how, for many Black people throughout U.S. history, "contract law was civil rights law." Penningroth, *supra* note 12, at 1216. Penningroth concludes that "by removing civil rights from contract law and conflating it with nondiscrimination . . . , we have missed an enormous part of Black people's experiences and ideas about the law." *Id.* This Article's primary arguments complement Penningroth's position, holding that by failing to incorporate nondiscrimination into contract law, we have overlooked contract law's emancipatory potential.

<sup>34</sup> See *supra* note 27 and accompanying text. As Seana Shiffrin has argued, it is not even clear that racial equality is a central concern of liberal theories of distributive justice. See generally Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *FORDHAM L. REV.* 1643 (2004) (critiquing John Rawls's theory of justice on the ground that it lacks the equivalent of an equal protection clause). Charles Mills has further argued that liberal theories of distributive justice operate as ideological cover for white supremacy. See generally CHARLES W. MILLS, *THE RACIAL CONTRACT* (25th anniversary ed., 2022). For an account of how the tools of liberal distributive justice can be developed to theorize and address racial inequality, see generally TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* (2016).

<sup>35</sup> BENSON, *supra* note 27, at 455 (quoting JOHN RAWLS, *POLITICAL LIBERALISM* 269 (1996)).

paradigmatic examples of how people fail to treat each other as equals in their private law relationships.<sup>36</sup>

In advancing these arguments, I use the term “discrimination” to refer to wrongful, unjust, or otherwise morally objectionable discrimination in order to remain somewhat agnostic about what makes discrimination sufficiently objectionable to be the target of legal prohibition.<sup>37</sup> But although this Article does not advance a complete theory of discrimination, it has implications for discrimination theory. Examining racial inequality through the lens of the unconscionability doctrine reveals that the current statutory emphasis on classifications and comparators produces an underinclusive category of discrimination. Attending to the potential centrality of antidiscrimination norms in contract law could, in turn, offer a fruitful context for further theorizing the interpersonal character of discrimination.

This Article proceeds in four parts. Part I describes the basic operation of the classical unconscionability doctrine and its underpinning conception of contractual equality. Part II examines *Contract Buyers League v. F & F Investment*<sup>38</sup> and the often-taught case of *Williams v. Walker-Thomas Furniture Co.*<sup>39</sup> to illustrate classical unconscionability’s problematic treatment of racial inequality. Part III argues that this problematic treatment cannot be resolved by statutory antidiscrimination law and requires fundamental changes to the unconscionability doctrine. Part IV advances an alternative “basic interests” approach to unconscionability and closes by considering how that approach points to an attractive conception of contractual equality.

## I. CLASSICAL UNCONSCIONABILITY

The unconscionability doctrine permits a court to refuse to enforce an unfair contract resulting from a bargaining power inequality between the parties to that contract.<sup>40</sup> But not just any bargaining power inequality suffices. Instead, the doctrine traditionally targets “peculiar”<sup>41</sup> disadvantages that “impair[]” a person’s ability to advance their interests in the contracting

---

<sup>36</sup> See Dagan & Heller, *supra* note 27, at 65 (arguing that antidiscrimination norms are a proper part of the ideal of “relational justice” that would govern a liberal institution of contract law); HANOCH DAGAN & AVIHAY DORFMAN, *RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW 177-99* (2024) (arguing for a tort of discrimination on similar grounds).

<sup>37</sup> If this Article’s use of the label of discrimination is at times unintuitive, it will often suffice to substitute “racially subordinating” or some like equivalent. For a philosophical discussion of the various moral dimensions of discrimination, see generally SOPHIA MOREAU, *FACES OF INEQUALITY: A THEORY OF WRONGFUL DISCRIMINATION* (2020).

<sup>38</sup> 300 F. Supp. 210 (N.D. Ill. 1969), *aff’d sub nom.* Baker v. F & F Inv., 420 F.2d 1191 (7th Cir. 1970).

<sup>39</sup> 350 F.2d 445 (D.C. Cir. 1965).

<sup>40</sup> See RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981).

<sup>41</sup> STEPHEN A. SMITH, *CONTRACT THEORY* 343-44 (2004); see also U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM’N 2022) (explaining that the unconscionability doctrine is not meant to “disturb[]” the “allocation of risks because of superior bargaining power”).

process.<sup>42</sup> Paradigmatic examples include being stranded at sea,<sup>43</sup> lacking the ability to understand nonstandard and oppressive contractual provisions,<sup>44</sup> and fraud-like situations where such provisions are effectively hidden from the disadvantaged party.<sup>45</sup> These examples are not exhaustive, but they represent an important core of the unconscionability doctrine and accordingly reflect a classical justification for the doctrine: namely, that the doctrine applies only when “the law’s ordinary assumptions” about the contracting process do not apply.<sup>46</sup> To clarify what these assumptions are and how they interact with the unconscionability doctrine, this Part begins by briefly discussing what I refer to as contract’s “classical autonomy ideal.” I then explain how that ideal’s conception of free and equal contractors requires that the unconscionability doctrine target only unusual and practically incapacitating disadvantages in the contracting process and remain agnostic about the morality of market norms.

The classical interpretation is, to be sure, not the only interpretation of the unconscionability doctrine (or of contract law). But the classical interpretation remains highly influential,<sup>47</sup> and helps to explain why, as a matter of law (and not merely as a matter of judicial prejudice), racial discrimination traditionally falls outside of the concern of the unconscionability doctrine.<sup>48</sup> Attending to the basic features of the classical interpretation is thus an important step in determining how the unconscionability doctrine’s treatment of racial discrimination is problematic and how the doctrine should be rethought accordingly.

---

<sup>42</sup> *Lloyds Bank Ltd. v. Bundy* [1975] 1 QB 326 at 339 (Eng.) (explaining that the unconscionability doctrine applies when one of the party’s “bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity”); see also Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 748-85 (1982) (describing inequalities targeted by the unconscionability doctrine as ones in which the less “competent” party was unable to advance their interests in the contracting process, whether due to “exploitation of distress, transactional incapacity, susceptibility to unfair persuasion, and price-ignorance”).

<sup>43</sup> See, e.g., *The Mark Lane* [1890] 15 PD 135 (Eng.).

<sup>44</sup> See, e.g., *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971); RESTATEMENT (SECOND) OF CONTS. § 208 cmt. d, illus. 3 (AM. L. INST. 1981).

<sup>45</sup> See, e.g., *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370, 1377 (1980) (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)).

<sup>46</sup> *Uber Techs. Inc. v. Heller*, [2020] 2 S.C.R. 118, para. 86 (Can.); see also *Williams*, 350 F.2d at 449-50 (explaining that “the usual rule that the terms of the agreement are not to be questioned should be abandoned” when “a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms”); P. S. ATIYAH, *ESSAYS ON CONTRACT* 148 (1986) (explaining that the unconscionability doctrine applies where the law’s assumption that “a person is . . . the best judge of his own interests” does not apply due to a lack of skill or understanding of the transaction); Fleming, *supra* note 29, at 1421 (explaining that the unconscionability doctrine traditionally exists “comfortably within the centuries-old framework of the common law of contracts”).

<sup>47</sup> See *infra* section III.D.

<sup>48</sup> See *infra* section II.A.

A. *Contract Law's Classical Autonomy Ideal*

Contract law traditionally assumes that contracting parties are free and equal, and ought to be treated accordingly. People are free in virtue of being able to choose what kind of relationships to form and projects and ends to undertake through their contracts, and equal in virtue of possessing this decision-making ability. Contract law thus presumes that individuals, rather than judges or the state, are the ultimate authorities over what ends and interests to pursue in the contracting process and how best to pursue them.<sup>49</sup> This presumption is reflected in a number of core contract law doctrines. For example, whether a contract has been formed does not generally depend on the content of its terms or on the social status or identity of the parties.<sup>50</sup> Instead, the primary ground for enforceability is the parties' mutual agreement.<sup>51</sup> Hence the "usual rule" in contract law "that the terms of the agreement are not to be questioned."<sup>52</sup>

The assumption of free and equal contractors is in turn reflected in traditional common law defenses to contract formation, such as incapacity,<sup>53</sup> duress,<sup>54</sup> and misrepresentation.<sup>55</sup> Such defenses target various circumstances that preclude effectively "manifest[ing] assent" and therefore indicate that the parties did not freely choose the agreement at issue.<sup>56</sup> Incapacity, duress, and misrepresentation thus capture circumstances in which the law's assumptions about free and equal contractors do not apply, either because one of the parties actually lacked the ability to identify or advance their interests in the contracting process, or was not able to exercise that ability properly due to threats or misrepresentation.

By making people's free choices the foundation for the enforceability of their agreements, contract law thus purports to treat people as possessing the ability and basic moral authority to determine how to pursue their interests and ends by contracting with one another. Contract law accordingly

<sup>49</sup> See *Williams*, 350 F.2d at 449-50; ATIYAH, *supra* note 46, at 148.

<sup>50</sup> See *In re Clark*, 1 Blackf. 122, 123 (Ind. 1821); see also RESTATEMENT (SECOND) OF CONTS. § 79 cmt. c (AM. L. INST. 1981) (explaining that contract formation does not require an exchange of equivalent values).

<sup>51</sup> See RESTATEMENT (SECOND) OF CONTS. § 17(1) (AM. L. INST. 1981) (explaining that, in general, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent").

<sup>52</sup> *Williams*, 350 F.2d at 450.

<sup>53</sup> See RESTATEMENT (SECOND) OF CONTS. § 12 cmt. c (AM. L. INST. 1981).

<sup>54</sup> See *id.* §§ 174-75.

<sup>55</sup> See *id.* § 164.

<sup>56</sup> *Id.* § 12 cmt. c (explaining that an inability to "manifest assent to a bargain" is a basis for lacking the capacity to contract); *id.* § 174 (explaining that "conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct" is "not effective as a manifestation of assent" if "physically compelled by duress"); *id.* § 163 (explaining that conduct manifesting assent to an agreement that is induced by a misrepresentation about "the character or essential terms of a proposed contract . . . is not effective as a manifestation of assent" for purposes of contract formation).

“give[s] equal validity” to people’s agreements irrespective of their social status, wealth, particular goals and ends, and other individual characteristics.<sup>57</sup> Thus interpreted, contract law is guided by an ostensibly egalitarian ideal of individual autonomy: as contractors, we are able and entitled to engage in “creative commerce” with one another and can thereby be “seen as equal.”<sup>58</sup>

### B. *Unusual and Severe Bargaining Disadvantages*

The assumption of free and equal contractors explains and supports the traditionally narrow role that the unconscionability doctrine plays in contract law. The unconscionability doctrine permits a court to refuse to enforce a contract or contractual term that unduly favors one party as a result of a bargaining power inequality between the parties.<sup>59</sup> The doctrine operates at the election of the weaker party,<sup>60</sup> and traditionally targets unusual bargaining disadvantages that are so severe as to prevent the disadvantaged party from advancing their interests in the contracting process.<sup>61</sup> Paradigmatic examples of such disadvantages include “dire” need for something supplied only by the other party,<sup>62</sup> the inability to understand a key contractual term due to a lack of relevant commercial experience,<sup>63</sup> and mental or emotional states

---

<sup>57</sup> *In re Clark*, 1 Blackf. 122, 123 (Ind. 1821) (holding that a contract for a twenty-year indenture could not be specifically enforced because such enforcement would constitute involuntary servitude in contravention of the Indiana state constitution); see also Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 304-05 (1975) (arguing that using the unconscionability doctrine to protect “those who are poor, unemployed, on welfare, or members of disadvantaged racial or ethnic groups” comes at “great” “perils” because “it is difficult, if not impossible, to assert that the persons who fall into any or all of these classes are not in general competent to fend for themselves in most market situations”).

<sup>58</sup> WILLIAMS, *supra* note 1, at 148.

<sup>59</sup> RESTATEMENT (SECOND) OF CONTS. § 208 cmt. d (AM. L. INST. 1981).

<sup>60</sup> See *id.* § 208; WILLISTON ON CONTRACTS § 18:1 (4th ed. 1993).

<sup>61</sup> See SMITH, *supra* note 41, at 343-44 (2004); Daniel Markovits, *Promise as an Arm’s-length Relation*, in PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS 295, 316 n.36 (Hanoeh Sheinman ed., 2011) (explaining that, like duress and fraud, unconscionability’s requirement of “procedural defects in contract formation” is “designed to ensure that contracting parties’ intentions are free rather than the product of manipulation”).

<sup>62</sup> Compare *Howard v. Diolosa*, 574 A.2d 995, 1000 (N.J. Super. Ct. App. Div. 1990) (holding that a “foolish and ruinous sale” and lease agreement was unconscionable in part because the disadvantaged party thought the agreement would be their “financial salvation”); *Weidman v. Tomaselli*, 365 N.Y.S.2d 681, 687 (Rockland Cnty. Ct. 1975), *aff’d*, 386 N.Y.S.2d 276 (N.Y. App. Term 1975) (finding a lease agreement unconscionable in part because the lessors and their infant child had “no alternative of foregoing shelter,” including no “natural shelter, such as a cave, available to them”), with *Cont. Buyers League v. F & F Inv.*, 300 F. Supp. 210, 227-28 (N.D. Ill. 1969), *aff’d sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970) (finding that onerous installment contracts for the purchase of homes were not unconscionable because the Black buyers were not in sufficiently “dire” need to enter into those contracts, even though racial residential segregation left the buyers with few alternatives for purchasing a home).

<sup>63</sup> See, e.g., *Uber Techs. Inc. v. Heller*, [2020] 2 S.C.R. 118, paras. 85, 93 (Can.) (finding a mandatory arbitration clause unconscionable in part because the “weaker” party, a food delivery worker, “could not be expected to appreciate the financial and legal implications” of the clause); RESTATEMENT (SECOND) OF CONTS. § 208 cmt. d (AM. L. INST. 1981).

that seriously compromise the affected party's judgment about whether to agree to a contract or contractual term.<sup>64</sup>

Such unconscionability paradigms accordingly capture situations where "the usual rule" in favor of enforcement "should be abandoned."<sup>65</sup> Under contract law's classical autonomy ideal, enforcement of contracts characterized by such deficiencies in the formation process would fail to treat the disadvantaged party as the equal of their co-contractor. Because the disadvantaged party was unable to properly exercise their decision-making abilities during formation, enforcing the resulting contract would be subordinating, placing the weaker party under the unchosen legal authority of the stronger party. In turn, the high threshold for disadvantage helps to guard against the risk that mere social disadvantage will operate as a marker for impaired capacity to contract.<sup>66</sup>

Under the classical assumption of free and equal contractors, the kinds of bargaining disadvantages that ground a claim for unconscionability will thus necessarily be unusual and specific to the particular transactional setting, thereby preventing the exception from becoming the rule.

### C. *Agnosticism About the Morality of Market Norms*

To be sure, the unconscionability doctrine, even in its classically narrow role, does require substantive review of contractual terms. In order to be found unenforceable, the contract or term must unduly advantage the stronger party.<sup>67</sup> Such substantive review might seem to permit a judge to refuse enforcement of a contract because it is against the interests of the disadvantaged party. This aspect of the unconscionability doctrine might therefore seem to be at odds with the classical ideal's commitment to leaving it to individuals to determine what contractual terms are in their best interests. Indeed, a common concern raised about the unconscionability doctrine is that it is paternalistic.<sup>68</sup>

---

<sup>64</sup> See RESTATEMENT (SECOND) OF CONTS. § 208 cmt. d (AM. L. INST. 1981).

<sup>65</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965).

<sup>66</sup> See *id.* at 450 (Danaher, J., dissenting) (arguing that the unconscionability doctrine should be developed and applied cautiously to prevent the doctrine from operating as a form of "public oversight" over welfare recipients); *supra* note 57.

<sup>67</sup> See RESTATEMENT (SECOND) OF CONTS. § 208 cmt. d (AM. L. INST. 1981).

<sup>68</sup> See, e.g., FRIED, *supra* note 27, at 105 (explaining that it is paternalistic to suggest that "poor people do not understand contractual provisions or are unable to calculate risks rationally"). For an overview of scholarship that takes the unconscionability doctrine to "exemplify paternalism in the law," see Seana Valentine Shffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFFS. 205, 206 (2000). For arguments that the unconscionability doctrine can be interpreted in a way that is not paternalistic, see, for example, Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131 (2016) (arguing that the unconscionability doctrine applies when and because the party seeking enforcement has lost their legal standing to complain about the other party's breach); Shffrin, *supra*, at 229-30 (arguing that judges need not act paternalistically when they apply the unconscionability doctrine in order to "avoid complicity with exploitation").

In response to this worry, classical unconscionability tends to branch out into two interpretations. According to strict classicalists, substantive review serves a merely verificatory function.<sup>69</sup> The market baseline supplies the traditional benchmark for undue advantage—judges must look to the “commercial mores” and “business practices of the time and place” to determine whether the terms of the contract deviate from the norm in such an “extreme” way as to “shock the conscience.”<sup>70</sup> For example, a judge might look to fair market value to assess an allegedly unconscionable price term.<sup>71</sup> Similarly, a court might look to common lending practices to determine whether an allegedly unconscionable loan agreement unduly advantaged the lender. Application of such standards need not entail any judgment that they are just, good, or even reasonable. Rather, such deviations can indicate that the weaker party’s bargaining disadvantage was actually salient in the bargaining process and was thus “realized” in the resulting terms.<sup>72</sup>

Unlike defenses to formation, the kinds of bargaining disadvantages targeted by the unconscionability doctrine do not necessarily constitute a general or complete inability to advance interests and ends in the contracting process. For example, many defendants seeking to avoid enforcement on the ground of unconscionability lack formal education or live under conditions of poverty.<sup>73</sup> Such personal characteristics can operate as disadvantages in the contracting process, sometimes to such an extent that a person has no meaningful choice but to accept the terms presented to them, whatever they may be.<sup>74</sup> Yet such individuals are not, merely by virtue of their educational status or poverty, always unable to understand and advance their interests in all contracting processes.<sup>75</sup> Such characteristics may also have no bearing whatsoever on what terms are offered—more privileged parties do not have

---

<sup>69</sup> See Epstein, *supra* note 57, at 293-98; FRIED, *supra* note 27, at 103-11.

<sup>70</sup> Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965); see also RESTATEMENT (SECOND) OF CONTS. § 208 rep.’s note cmt. d (AM. L. INST. 1981); U.C.C. §§ 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM’N 2022); 1 CORBIN ON CONTRACTS § 128 (1963).

<sup>71</sup> See, e.g., Osage Nation of Indians v. United States, 97 F. Supp. 381, 421-22 (Ct. Cl. 1951) (finding that a land purchase agreement was unconscionable in part because it was “impossible to seriously suggest that [the contract price] was a fair price” for the land in light of its fair market value at the time of the transaction).

<sup>72</sup> Uber Techs. Inc. v. Heller, [2020] 2 S.C.R. 118, 122 (Can.); see also Epstein, *supra* note 57, at 293-98.

<sup>73</sup> See, e.g., Alexander v. Anthony Int’l, L.P., 341 F.3d 256, 266 (3d Cir. 2003) (crane operators with “limited educational backgrounds and, at best, very narrow options for other employment”); De La Torre v. CashCall, Inc., 422 P.3d 1004, 1009 (Cal. 2018) (low-income borrowers “living ‘under financial stress’”); Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 264 (N.Y. Sup. Ct. 1969) (“welfare recipients”).

<sup>74</sup> See, e.g., Weidman v. Tomaselli, 365 N.Y.S.2d 681, 687 (Rockland Cnty. Ct. 1975), *aff’d*, 386 N.Y.S.2d 276 (N.Y. App. Term 1975) (finding a lease agreement unconscionable because lessors and their infant had no alternative shelter).

<sup>75</sup> See Epstein, *supra* note 57, at 304-05 (explaining that social disadvantage does not imply a lack of competence to contract); FRIED, *supra* note 27, at 105 (explaining that it is “patronizing” and “paternalistic” to hold that “poor people” cannot understand contractual terms).

to press their relative advantage—and can be consistent with the existence of alternative options for contracting. Substantive review can thus ensure that the alleged bargaining disadvantage actually precluded the disadvantaged party from properly exercising their decision-making abilities.

According to a second, less strictly classical, interpretation, unconscionability requires reviewing terms to determine whether they are unfair in their own right.<sup>76</sup> But, according to this interpretation, no serious paternalism worry is raised by substantive review because the unconscionability doctrine applies when the disadvantaged party was unable to exercise their decision-making abilities to begin with. As P. S. Atiyah explains, the “moral argument, that to prevent a person, even in his own interests, from binding himself is to show disrespect for his moral autonomy, can ring very hollow when used to defend a grossly unfair contract secured at the expense of a person of little understanding or bargaining skill.”<sup>77</sup> I will refer to this interpretation as the traditionalist interpretation, as it more closely tracks the doctrine’s equitable roots than the strict classical interpretation.<sup>78</sup>

But like strict classicalists, traditionalists still deploy the same market-based test to determine undue advantage.<sup>79</sup> Although interpretations of classical unconscionability may differ about why certain deviations from market norms are unfair, strict classicalists and traditionalists alike hold that unconscionable contracts fall well beyond the conceptual boundaries of the run-of-the-mill “bad bargain.”<sup>80</sup> Traditionalist interpretations are thus still classical interpretations of unconscionability because they deploy the same presupposition and conception of free and equal contractors and accordingly give unconscionability a narrow role of targeting unfair aberrations in contracting. Both interpretations similarly take no position on the morality of market and commercial norms, leaving it to competent individuals to determine what is in their best interests. And because individuals are typically sufficiently competent, market norms are not open for evaluation under classical unconscionability.

---

<sup>76</sup> See *Lloyds Bank Ltd. v. Bundy* [1975] 1 QB 326 at 339 (Eng.) (“English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”); RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981).

<sup>77</sup> ATIYAH, *supra* note 46, at 148.

<sup>78</sup> See *Hume v. United States*, 132 U.S. 406, 415 (1889) (explaining that an unconscionable contract is one “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other”).

<sup>79</sup> See RESTATEMENT (SECOND) OF CONTS. § 208 rep.’s note cmt. d (AM. L. INST. 1981); WILLISTON ON CONTRACTS § 18:15 (4th ed. 1993).

<sup>80</sup> *Schnuerle v. Insight Commc’ns Co., L.P.*, 376 S.W.3d 561, 575 (Ky. 2012); *Baltazar v. Forever 21, Inc.*, 367 P.3d 6, 11, 14 (Cal. 2016) (explaining that “[c]ommercer depends on the enforceability” of contracts and that enforcement accordingly cannot be avoided “merely by complaining that the deal, in retrospect, was unfair or a bad bargain”).

Finally, under both interpretations, substantive review by no means precludes parties from binding themselves to extremely nonstandard terms. By operating only at the election of the disadvantaged party, the unconscionability doctrine ultimately leaves it to the disadvantaged party's judgment whether they were able to advance their interests in the contracting process. By thus preserving space for even the most disadvantaged people to bind themselves to nonstandard terms, the unconscionability doctrine purports to remain faithful to the idea that social status and personal idiosyncrasies do not diminish a person's authority over how to advance their interests through contracts.

#### D. Contractual Equality

Classical unconscionability accordingly establishes a narrow category of contractual unfairness. Here, a party's contractual advantage is undue only when it is secured through means that circumvent the other party's decision-making abilities. A court can accordingly refuse to enforce the contract only when and because the contract does not reflect the disadvantaged party's judgment. Thus described, classical unconscionability is not truly an exception to the general rule that contracts will be enforced independent of their content. Rather, classical unconscionability helps to ensure that contract enforcement is consistent with the underlying autonomy values that justify the general rule.

The classical unconscionability doctrine in turn points to a similarly narrow conception of contractual equality. Classical contract law draws a distinction between social equality writ large and bilateral equality between the parties to a contract.<sup>81</sup> Under the ideal of classical contractual equality, people are equals in virtue of possessing the ability to advance their ends and interests in the contracting process, and in being treated as having such an ability, but not necessarily in virtue of being able to exercise that ability equally. Some individuals may be more or less persuasive, or have wealth, opportunity, social status, or other resources or characteristics that give them a relative bargaining advantage. As the unconscionability doctrine makes clear, the common law of contracts typically leaves such sources of bargaining power inequalities intact, taking individuals and markets as it finds them.<sup>82</sup>

---

<sup>81</sup> This way of distinguishing contract law, and perhaps private law more broadly, is not restricted to classical interpretations of contract law. For critics of classical contract law that nonetheless maintain this distinction, see DAGAN & DORFMAN, *supra* note 36, at 43 (arguing that private law aims to promote "relational justice," understood as "reciprocal respect for self-determination and substantive equality"). Similar to the position advanced here, Dagan and Dorfman argue that the private law cannot be "agnostic" with respect to broader social inequality and its instantiation in interpersonal relationships. *Id.* at 44-45.

<sup>82</sup> See U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2022) (explaining that "the principle" of unconscionability is not meant to "disturb[] [the] allocation of risks because of superior bargaining power").

By defining contractual equality in abstraction from people's social status and personal characteristics, classical contract law purports to create a distinctly contractual and necessarily equal status: the status of a contractor with the ability and basic authority to determine what ends and interests to pursue through contracts. Classical contract law, undergirded by the unconscionability doctrine, might thus enable us to engage in the "creative commerce" involved in pursuing our own interests through contracts, and to thereby be "seen as equal," notwithstanding our unequal social positions.<sup>83</sup>

## II. THE FALSE PROMISE OF CONTRACTUAL EQUALITY

Classical contract law promises an attractive and potentially emancipatory ideal of relating as equals in commercial and collaborative life. Part I explained that contract enforcement under classical contract law aims to "give equal validity" to people's agreements irrespective of their social status, wealth, particular goals and ends, and other individual characteristics.<sup>84</sup> People are generally presumed to possess the decision-making abilities to determine how best to advance their interests in the contracting process, and ought to be treated accordingly. The unconscionability doctrine tests and illustrates the extent of this commitment. Classically interpreted, the doctrine permits judges to refuse to enforce a contract only when one of the parties was not able to properly exercise their decision-making abilities in forming the contract. The narrow focus of the unconscionability doctrine helps to ensure that judges will not use the doctrine to exercise paternalistic oversight over people who occupy positions of social disadvantage. Classical contract law, supported by the unconscionability doctrine, accordingly holds out the promise of relating as equals through a scheme of contract enforcement that shows equal respect for people's decision-making abilities.

But the egalitarian promise of contract law is belied by the unconscionability doctrine's operation under conditions of racial inequality. This Part argues that the unconscionability doctrine permits, and its underpinning classical values require, enforcing racially discriminatory contracts. Using *Contract Buyers League v. F & F Investment*<sup>85</sup> to illustrate, I explain that racial discrimination creates widespread bargaining disadvantages that, though significant, can still leave room for the thoughtful exercise of decision-making abilities. Further, some of the most egregious forms of racial discrimination are also the market norm. Racially discriminatory contracts

---

<sup>83</sup> WILLIAMS, *supra* note 1, at 147-48.

<sup>84</sup> *In re Clark*, 1 Blackf. 122, 123 (Ind. 1821).

<sup>85</sup> 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd sub nom.* *Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970).

will thus often, if not characteristically, fall outside of contract law's core category of unfair contracts—namely, unconscionable contracts.

As a result, in order for the unconscionability doctrine to reach racially discriminatory contracts, disadvantaged parties must highlight their powerlessness in contract formation and the atypicality of the resulting contract. Such an emphasis risks rendering racial inequality invisible and imposing a white perspective on contracting, thereby misconstruing the fundamental unfairness in the contractual relationship. To illustrate, this Part argues that the often-taught litigation between Ora Lee Williams and Walker-Thomas Furniture Co. exemplifies these features of the doctrine.

The classical unconscionability doctrine thus leaves people with uncertain legal rights to resist enforcement of contracts that are racially discriminatory or otherwise racially subordinating. These are contracts that one might have hoped would instead be paradigmatic examples of exploitative and extremely unfair contracts.

#### A. Contract Buyers League v. F & F Investment

To illustrate how the unconscionability doctrine can permit enforcement of racially discriminatory contracts, consider the situation and result in *Contract Buyers League v. F & F Investment*.<sup>86</sup> During the 1950s and 1960s, Chicago was in a condition of racial residential segregation.<sup>87</sup> Racially restrictive covenants were the norm due to a combination of private discrimination and prior federal recommendations to include such covenants to “retain [neighborhood] stability.”<sup>88</sup> Even when Black people could purchase homes, credit was typically unavailable.<sup>89</sup> Homes in Black neighborhoods were disqualified for Fair Housing Administration (“FHA”) mortgage insurance and marked as high credit risks through, among other things, FHA redlining practices.<sup>90</sup> Black buyers could therefore rarely purchase a home through financing.<sup>91</sup> They also often did not want to move

---

<sup>86</sup> *Id.*

<sup>87</sup> See John R. MacNamara, *The Contract Buyers League: A View from the Inside*, 1 YALE REV. L. & SOC. ACTION 70, 73-75 (1971); see also MARISA NOVARA & AMY KHARE, TWO EXTREMES OF RESIDENTIAL SEGREGATION: CHICAGO'S SEPARATE WORLDS & POLICY STRATEGIES FOR INTEGRATION 3 (2017), [https://www.jchs.harvard.edu/sites/default/files/a\\_shared\\_future\\_two\\_extremes\\_residential\\_segregation.pdf](https://www.jchs.harvard.edu/sites/default/files/a_shared_future_two_extremes_residential_segregation.pdf) [<https://perma.cc/R7NY-KW56>] (explaining that racial residential and economic segregation in Chicago persists today).

<sup>88</sup> See MacNamara, *supra* note 87, at 73 (quoting FED. HOUS. ADMIN., U.S. DEP'T OF HOUS. & URB. DEV., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT, para. 937 (1938) [hereinafter 1938 UNDERWRITING MANUAL]).

<sup>89</sup> See *id.* at 73-75.

<sup>90</sup> See *id.*; 1938 UNDERWRITING MANUAL, *supra* note 88, at paras. 1360, 1412(3) (explaining that property ratings based on location can be low due to the “threatening or probable infiltration of inharmonious racial groups” and that the “presence of . . . racially inharmonious groups in a neighborhood tends to lessen or destroy owner-occupancy appeal”).

<sup>91</sup> See MacNamara, *supra* note 87, at 73-75.

to white neighborhoods, fearing “overt prejudice and violence from white neighbors.”<sup>92</sup>

Instead, Black buyers typically purchased homes “on contract”—that is, through installment contracts—from real estate investors who had either built new houses or purchased them, often at “panic prices,” from white sellers who feared that Black people were moving into their neighborhoods.<sup>93</sup> The installment contracts offered Black buyers a needed alternative to financing. But the total price paid by Black buyers for homes on contract far exceeded the prices paid by white buyers for comparable homes, sometimes even for the same home.<sup>94</sup> The contracts essentially locked the buyers into this installment relationship, often for decades.<sup>95</sup> Because title would pass only upon paying all installments, the buyers usually “could not sell their properties without suffering a grave financial loss.”<sup>96</sup> Many Black buyers accordingly felt that the contracts amounted to a form of financial “involuntary servitude.”<sup>97</sup> Meanwhile, the sellers had a right to evict upon late payment.<sup>98</sup>

Suspecting that their experiences were common and discriminatory, many of the contract buyers formed an association, the Contract Buyers League (“CBL”).<sup>99</sup> The CBL initially sought to renegotiate contracts with the real estate investors but was mostly unsuccessful.<sup>100</sup> After public demonstrations, the members of the CBL stopped making installment payments to

<sup>92</sup> *Id.* at 74; see also BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA 37-47 (2009) (detailing the extensive private and state violence that Black residents of Chicago often confronted upon moving into white neighborhoods, along with decades of efforts by private and public entities alike to keep Black people confined to neighborhoods following the First and Second Great Migrations). Cf. SHELBY, *supra* note 34, at 49-79 (arguing that Black people in America “should neither be pushed into residential integration nor condemned for not integrating”).

<sup>93</sup> *Cont. Buyers League v. F & F Inv.*, 300 F. Supp. 210, 214 (N.D. Ill. 1969), *aff’d sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970); see also MacNamara, *supra* note 87, at 72-73. Beryl Satter explains that FHA redlining “further inflamed white resistance to black neighbors” by giving white people a “powerful economic incentive to keep [Black] families out.” SATTER, *supra* note 92, at 45.

<sup>94</sup> See *Cont. Buyers League*, 300 F. Supp. at 214; see also MacNamara, *supra* note 87, at 72-73 (reporting numerous examples where investors purchased a home from a white seller and sold within months to a Black buyer for almost twice the price, not including interest).

<sup>95</sup> See MacNamara, *supra* note 87, at 72-73.

<sup>96</sup> SATTER, *supra* note 92, at 281.

<sup>97</sup> MacNamara, *supra* note 87, at 76; see also *id.*

<sup>98</sup> See MacNamara, *supra* note 87, at 76; Jeffrey M. Fitzgerald, *The Contract Buyers League and the Courts: A Case Study of Poverty Litigation*, 9 LAW & SOC’Y REV. 165, 168 (1975) (explaining that contract buyers who defaulted were subject to eviction under the Illinois Forcible Entry and Detainer Act if payment was not made after 35 days).

<sup>99</sup> See MacNamara, *supra* note 87, at 74-75. The CBL was also formed to deal more broadly with common concerns in Black neighborhoods, such as high rents and poor public services. See *id.* at 71-72. The CBL was initially called “the Contract Buyers of Lawndale.” SATTER, *supra* note 92, at 244.

<sup>100</sup> See MacNamara, *supra* note 87, at 75-76.

the investors and sued the investors for relief.<sup>101</sup> The buyers claimed that the contracts were, inter alia, unlawfully discriminatory under Section 1982 of the Civil Rights Act of 1866 and unconscionable.<sup>102</sup>

The District Court for the Northern District of Illinois found that the plaintiffs had stated a claim for discrimination under Section 1982, but that the contracts could not be deemed unconscionable.<sup>103</sup> According to the plaintiffs, the defendants “exploited” residential racial segregation and the associated housing shortage for Black buyers to sell houses “at higher prices and on more burdensome terms than similar property . . . sold to whites.”<sup>104</sup> The court agreed that such a practice could constitute unlawful discrimination under Section 1982.<sup>105</sup> “[T]he existence of a black market distinct from a white market was the de facto vestige of what the Congress in 1866 intended to abolish as a critical means of making the black man a free man.”<sup>106</sup> The court explained that Section 1982 thus prohibits “profits based on the color of a man’s skin,” precisely what the defendants had allegedly extracted from the plaintiffs through their selling practices.<sup>107</sup>

The common law of contracts, however, could offer no relief. For the court, the problem was not that the contracts were insufficiently inequitable. Indeed, the court’s Section 1982 analysis condemned the contracts as a “vestige” of slavery.<sup>108</sup> The court also acknowledged that the plaintiffs were at a serious disadvantage relative to the defendants, and that the disadvantage was realized in the resulting contract in the form of excessive price, uncertain title, and highly limited alienability.<sup>109</sup> But, for the court, the problem was one of “misfit” with contract law.<sup>110</sup> The plaintiffs’ disadvantage was neither relevantly impairing nor sufficiently unusual.<sup>111</sup> The plaintiffs were not bargaining from a position of “absolute need” under conditions of “dire shortage.”<sup>112</sup> Consonant with the classical interpretation of the unconscionability doctrine, constraints, even significant constraints, on choice are

---

<sup>101</sup> *See id.*

<sup>102</sup> *Cont. Buyers League v. F & F Inv.*, 300 F. Supp. 210, 213, 227 (N.D. Ill. 1969), *aff’d sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970).

<sup>103</sup> *Id.* at 216, 228.

<sup>104</sup> *Id.* at 214-15; *see also Clark v. Universal Builders, Inc.*, 501 F.2d 324, 327 (7th Cir. 1974) (describing the plaintiff’s “exploitation theory of discrimination” under § 1982, accepted by the court in *Contract Buyers League v. F & F Investment*).

<sup>105</sup> *See Cont. Buyers League*, 300 F. Supp. at 216.

<sup>106</sup> *Id.* at 215 (summarizing part of the Supreme Court’s opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)).

<sup>107</sup> *Id.* at 216.

<sup>108</sup> *Id.* at 215.

<sup>109</sup> *See id.* at 214-18.

<sup>110</sup> *Id.* at 228.

<sup>111</sup> *Id.* at 227. The court also recognized that, under Illinois law, in rare circumstances, an extreme “disparity in values exchanged” can be sufficient for showing unconscionability. *Id.* But the court concluded, without explanation, that, whatever that standard is (the court did not elaborate), it was not met in the present case. *Id.*

<sup>112</sup> *Id.* at 228.

insufficient. Constraints on choice must be so severe as to effectively impair the party's capacity for decision-making. Hence the court's conclusion that the lack of an alternative to purchasing a home "on contract" did not rise to the level of "absolute need,"<sup>113</sup> in contrast to, say, a situation where someone lacked an alternative option for shelter.<sup>114</sup>

Nor could the plaintiffs' "lack of education and lack of experience . . . relative to [the] defendants" constitute the requisite bargaining disadvantage.<sup>115</sup> According to the court, such disadvantage "can obviously not in itself independently constitute a significant factor of unconscionability in a free market system where such relationships are the inevitable day-to-day matter of the functioning economy."<sup>116</sup> The court thus concluded that the unconscionability doctrine was simply not meant to "extend to situations resulting from artificially contrived market conditions,"<sup>117</sup> even if it was assumed that such conditions were clearly and objectionably discriminatory.<sup>118</sup> Extending the unconscionability doctrine to the contracts in the case would therefore "necessarily create a misfit in the law."<sup>119</sup>

The court did not engage in any substantive analysis of the terms of the contracts. That is not surprising given its conclusion that the buyers were not subject to an unusual and sufficiently severe disadvantage in the contracting process. But we can speculate how such an analysis would probably have gone. Because buying "on contract" was the standard practice in the market for homes available to Black buyers, it is hard to see how the terms could count as unduly advantaging the white investors. To be sure, the buyers could have argued that the relevant market was the market available to white buyers, or a hypothetical market where racial equality prevails. But, in contrast to Section 1982, the classical unconscionability doctrine lacks the resources to make this moral distinction between markets. The doctrine is not meant to reform markets or bring them into line with more idealized versions of themselves, whether with respect to racial equality, efficiency, or some other social value. Rather, much like the doctrines of fraud and duress, the unconscionability doctrine, classically understood, is supposed to help ensure that contract law enforces only chosen obligations.<sup>120</sup> And, as *Contract Buyers League* illustrates, that goal can be compatible with enforcing racially discriminatory contractual obligations.

---

<sup>113</sup> *Id.*

<sup>114</sup> See *Weidman v. Tomaselli*, 365 N.Y.S.2d 681, 687 (Rockland Cnty. Ct. 1975), *aff'd*, 386 N.Y.S.2d 276 (N.Y. App. Term 1975).

<sup>115</sup> *Cont. Buyers League*, 300 F. Supp. at 227.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 228.

<sup>118</sup> See *id.* at 214-18.

<sup>119</sup> *Id.* at 228.

<sup>120</sup> See *supra* Part I.

### B. Williams v. Walker-Thomas Furniture Co.

This is not to suggest that the classical unconscionability doctrine cannot reach cases of racial discrimination. This section explains that the oft-taught case of *Williams v. Walker-Thomas Furniture Co.*<sup>121</sup> bears striking parallels to *Contract Buyers League v. F & F Investment*.<sup>122</sup> The type of installment contract at issue in *Williams* exploited racial residential segregation and discriminatory credit markets.<sup>123</sup> The contract in turn locked Black consumers into an impoverishing cycle of purchasing, defaulting, and repossession that was arguably part of the legacy of slavery.<sup>124</sup> And yet no court throughout the litigation ever mentioned any of these facts, or even the race of the party seeking to avoid enforcement. *Williams* thus illustrates some of the great costs associated with extending classical unconscionability to racially discriminatory contracts—for example, that the doctrine renders racial inequality invisible, that it deploys a white perspective on contracting, and that it requires ignoring the active and thoughtful agency often exercised in navigating social inequality.

#### I. Litigating Williams

In *Williams*, the party seeking to avoid contract enforcement on grounds of unconscionability was Ora Lee Williams,<sup>125</sup> a mother of seven living below the poverty line on “public assistance” in the District of Columbia.<sup>126</sup> She was also a Black woman—a fact that no court mentioned but that is commonly assumed.<sup>127</sup>

Over the course of five years, Williams purchased household goods on installment credit from Walker-Thomas Furniture Co., including “sheets, curtains, rugs, chairs, a chest of drawers, beds, mattresses, a washing machine, and a stereo set.”<sup>128</sup> Under the standard form contract for each transaction, Walker-Thomas Furniture retained title in each item until all

<sup>121</sup> 350 F.2d 445 (D.C. Cir. 1965).

<sup>122</sup> 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970).

<sup>123</sup> See *infra* section II.B.2.

<sup>124</sup> See *infra* sections III.B.3-4.

<sup>125</sup> *Williams*, 350 F.2d at 447.

<sup>126</sup> See *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 915-16 (D.C. 1964) (noting that Williams was a mother of seven and supported her family by means of \$218 per month in “public assistance”); Fleming, *supra* note 29, at 1392 n.42 (explaining that the federal government at the time had “set the poverty line at \$3,000 in 1962 dollars for all families, regardless of size”).

<sup>127</sup> See Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 926 n.208 (1997). For a discussion of how this assumption tends to reflect pernicious stereotypes about race, gender, and poverty, see, for example, Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & C.R. L. REV. 89, 92-98 (1994).

<sup>128</sup> *Williams*, 198 A.2d at 915; see also *Williams*, 350 F.2d at 447.

payments were completed.<sup>129</sup> But payments were not applied to each item in the order that they were purchased. Under an “obscure”<sup>130</sup> provision buried in “extremely fine print,”<sup>131</sup> Walker-Thomas Furniture kept a running balance on all purchases and payments were “credited pro rata on all outstanding” balances.<sup>132</sup> So if Williams defaulted on a payment while a balance on any previous purchases remained, Walker-Thomas Furniture could repossess all those purchases with no obligation to refund any previous payments.<sup>133</sup> This is precisely what occurred. After years of timely payments, Williams purchased a stereo for \$514 and subsequently defaulted.<sup>134</sup> Because she owed \$164 from the running balance on her prior purchases,<sup>135</sup> Walker-Thomas Furniture sued to repossess all the items she had previously purchased and subsequently recovered “a bed, chest of drawers, washing machine, and the stereo set” from Williams’s home.<sup>136</sup> By then, Williams had already paid \$1,400 toward \$1,800 worth of items.<sup>137</sup>

Williams had no chance to contest the trial court’s finding for Walker-Thomas Furniture before the items were repossessed.<sup>138</sup> The U.S. Marshals were ordered to repossess the items on the same day that the lawsuit was filed.<sup>139</sup> But Williams appealed to the D.C. Court of Appeals, claiming that the contract with Walker-Thomas Furniture was unenforceable either because there was no mutual agreement on key terms or because the contract was against public policy.<sup>140</sup> Like Williams’s previous contracts with Walker-Thomas Furniture, the contract for the stereo was presented and signed “in blank” at her front door, and was therefore very likely missing a price term.<sup>141</sup> She was also not given a copy.<sup>142</sup> She was accordingly unaware of the existence and effect of the pro rata provision, and similarly very likely unaware of the cost of the stereo.<sup>143</sup> Moreover, because Williams

---

<sup>129</sup> *Williams*, 350 F.2d at 447.

<sup>130</sup> *Id.*

<sup>131</sup> Fleming, *supra* note 29, at 1396.

<sup>132</sup> *Williams*, 350 F.2d at 447.

<sup>133</sup> *See id.*

<sup>134</sup> *Id.* at 447-48.

<sup>135</sup> *Id.* at 448.

<sup>136</sup> *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 915 (D.C. 1964).

<sup>137</sup> *See Williams* 350 F.2d at 447 n.1.

<sup>138</sup> *See Fleming*, *supra* note 29, at 1397 (citing Transcript of Record at 107, *Williams*, 198 A.2d 914 (No. 3389)).

<sup>139</sup> *See id.*

<sup>140</sup> *See Williams*, 198 A.2d at 915.

<sup>141</sup> *See id.*; Fleming, *supra* note 29, at 1395-96; Duncan Kennedy, *The Bitter Ironies of Williams v. Walker-Thomas Furniture Co. in the First Year Law School Curriculum*, 71 *BUFF. L. REV.* 225, 264-65 (2023) (explaining that “it is highly likely that Williams hadn’t seen [the stereo] and didn’t know the price when she signed the form contract,” and suggesting that the salesman likely “abused her trust built up over prior years of dealing”).

<sup>142</sup> *See Williams*, 198 A.2d at 915; Fleming, *supra* note 29, at 1395-96.

<sup>143</sup> *See Williams*, 198 A.2d at 915.

was living “on public assistance,” her lawyers argued that she was “*a ward of the state*.”<sup>144</sup> Williams thus “labor[ed] under a handicap of necessity” and it would be “against public policy to allow the crafty to take unfair advantage of that necessity.”<sup>145</sup>

The Court of Appeals rejected both arguments.<sup>146</sup> Because Williams’s “assent was not obtained by fraud or even misrepresentation,” she failed to show the absence of a mutual agreement with Walker-Thomas Furniture.<sup>147</sup> The court also thought there was no basis in law to protect Williams from Walker-Thomas Furniture’s conduct.<sup>148</sup> Instead, the court encouraged Congress to “consider corrective legislation to protect the public from such exploitative contracts.”<sup>149</sup>

Williams appealed to the D.C. Circuit, this time alleging that the contract was unconscionable and therefore unenforceable.<sup>150</sup> As Anne Fleming details, Williams’s attorneys emphasized not only the fine print in which the pro rata provision appeared, but also that she possessed “mental weakness” and was of “limited educational achievement.”<sup>151</sup> It was accordingly an “outrage” to sell the stereo to Williams, especially in view of the high likelihood that she would default.<sup>152</sup>

At the time, Congress had only recently enacted Section 2-302 of the Uniform Commercial Code (“UCC”), providing that a court can refuse to enforce an unconscionable contract for the sale of goods.<sup>153</sup> But in briefing this defense, Williams’s lawyers noted that the UCC’s unconscionability provision was “a restatement of the law, founded upon the common law.”<sup>154</sup> Williams and her lawyers thus invoked the long history of using unconscionability to avoid contracts formed outside of the classical paradigm of contracts.<sup>155</sup>

The D.C. Circuit agreed that the Court of Appeals should have considered unconscionability as a possible defense to enforcement, but did not reach the merits of Williams’s case, instead remanding the case to the trial court.<sup>156</sup> In order to prevail at trial, Williams would need to show that she had lacked a “meaningful choice” about whether to agree to the contract,

---

<sup>144</sup> Fleming, *supra* note 29, at 1412 (quoting Brief of Appellant at 9, *Williams*, 198 A.2d 914 (No. 3389) (emphasis added) (internal quotation marks omitted)).

<sup>145</sup> *Id.*; see *Williams*, 198 A.2d at 915.

<sup>146</sup> See *Williams*, 198 A.2d at 916.

<sup>147</sup> *Id.* (internal quotation marks and citation omitted).

<sup>148</sup> See *id.*

<sup>149</sup> *Id.*

<sup>150</sup> See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447-48 (D.C. Cir. 1965).

<sup>151</sup> Fleming, *supra* note 29, at 1414 (internal quotation marks and citations omitted).

<sup>152</sup> *Id.*

<sup>153</sup> See *Williams*, 350 F.2d at 448-49 (citing 28 D.C. CODE § 2-302 (Supp. IV 1965)).

<sup>154</sup> Fleming, *supra* note 29, at 1414 (internal quotation marks and citations omitted).

<sup>155</sup> *Id.* at 1415, 1417.

<sup>156</sup> *Williams*, 350 F.2d at 450.

and that the terms of the contract deviated in an “extreme” way from “the mores and business practices of the time and place.”<sup>157</sup> While on remand, the parties settled and Walker-Thomas Furniture agreed to pay Williams \$200 for the items seized from her home<sup>158</sup>—a small fraction of the total of \$1,400 that she had already paid.<sup>159</sup> As a result, no court ever reached the merits of Williams’s case.

But the D.C. Circuit’s opinion strongly suggests that Williams’s contract with Walker-Thomas Furniture was unconscionable. Judge Skelly Wright, writing for the D.C. Circuit, seemed to invoke the same classical theory advanced by Williams and her lawyers. Williams could show that she lacked a meaningful choice on the basis of factors such as a lack of education, whether important terms were hidden or otherwise obscured in the contract, whether Williams understood those terms, and whether Williams’s bargaining position was so weak as to leave her with “little real choice” but to agree.<sup>160</sup> Such a list of factors matched how Williams’s attorneys had described her throughout the litigation: that she did not understand what she was agreeing to as a result of her “limited education,” that she had little bargaining power due to her “mental weakness” and “below average intelligence,” and that she was in no position to bargain about household goods as a mother of seven living on “public assistance.”<sup>161</sup>

The D.C. Circuit thus placed the formation process in *Williams* squarely within the classical unconscionability paradigm.<sup>162</sup> The meaningfulness of Williams’s choice would depend, not on whether her choices were unfairly constrained, but simply on whether they were sufficiently constrained so as to prevent her from exercising her decision-making abilities.<sup>163</sup> Such constraints would in turn need to be specific to Williams or the particular transaction—a matter of Williams’s educational profile in relation to the subject matter of the contract or the other party, whether Williams understood the contract, how material terms were presented to Williams, the relative bargaining power of the parties, and so forth.<sup>164</sup> Interpreting “meaningful choice” through this lens would thus treat Williams’s choice situation as aberrational—as the product of personal idiosyncrasies or unusually “sharp” bargaining.<sup>165</sup> Much like the district court’s analysis in *Contract Buyers*

---

<sup>157</sup> *Id.* at 449-50 (quoting 1 CORBIN ON CONTRACTS § 128 (1963)).

<sup>158</sup> See Fleming, *supra* note 29, at 1432 (citing Paul Richard, *Installment-Plan Law Will Shield the Needy*, WASH. POST, Mar. 28, 1966, at B1).

<sup>159</sup> *Williams*, 350 F.2d at 447 n.1.

<sup>160</sup> *Id.* at 449.

<sup>161</sup> Fleming, *supra* note 29, at 1409-15; see also *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 915 (D.C. 1964) (acknowledging such a characterization of Williams’s bargaining disadvantages).

<sup>162</sup> See *supra* section I.B.

<sup>163</sup> See *Williams*, 350 F.2d at 449-50.

<sup>164</sup> See *id.*

<sup>165</sup> See *Williams*, 198 A.2d at 916.

*League v. F & F Investment*,<sup>166</sup> it would accordingly be irrelevant whether the contracting process involved exploitation of broader social inequality.<sup>167</sup>

## 2. *Racial Inequality in the Contracting Process*

Thus analyzed, the contracting process in *Williams* would seem to bear little relationship to racial inequality. But racial inequality was present in practically every dimension of the contracting process.

Much like Chicago at the time, the District of Columbia was in a state of racial residential segregation (and still is today).<sup>168</sup> Poverty was concentrated in Black neighborhoods,<sup>169</sup> and Black low-income consumers had “virtually no access to credit outside of the low-income retail market” in their neighborhoods.<sup>170</sup> Alternative retailers, such as “downtown department stores,” were geographically distant and had high and typically discriminatory qualifying loan requirements.<sup>171</sup> As Duncan Kennedy elaborates, even if such barriers could be overcome, downtown retailers were “none too friendly to poor Black visitors.”<sup>172</sup>

Racial residential segregation and discriminatory lending practices thus combined to economically isolate the members of the Black working class in the District of Columbia.<sup>173</sup> Consequently, someone like *Williams* very likely had no practical alternative to furnishing her home apart from acquiring goods from a retailer servicing her neighborhood, such as Walker-Thomas Furniture.<sup>174</sup>

Thus positioned, Walker-Thomas Furniture purported to offer goods that would enable people like *Williams* to meet their profound need for and basic interests in creating a home, in having more than a mere shelter

---

<sup>166</sup> 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd sub nom.* *Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970).

<sup>167</sup> See *supra* section II.A.

<sup>168</sup> See Kennedy, *supra* note 141, at 229, 230 n.11 (explaining that “[p]oor Black neighborhoods” in the District of Columbia are today still “characterized by a combination of racial segregation and concentrated poverty”).

<sup>169</sup> *Id.* at 252.

<sup>170</sup> *Id.*

<sup>171</sup> See *id.* at 252-53. The terms of consumer loans themselves were often racially discriminatory, and discriminatory on the basis of welfare status, prompting the passage of Equal Credit Opportunity Act of 1974, ultimately prohibiting discrimination against borrowers on the basis of race, gender, and welfare status, among other things. See Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (2012); see also Fleming, *supra* note 29, at 1427-28 (discussing the context for such legislation and its limited capacity to “help poor borrowers like *Williams*”); 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, 306-07 (1994) (explaining that the “high prices and . . . harsh collection techniques” of low-income retailers were “enabled in part by racist barriers” to accessing alternative retailers).

<sup>172</sup> See Kennedy, *supra* note 141, at 252-53.

<sup>173</sup> See *id.* at 229.

<sup>174</sup> See Fleming, *supra* note 29, at 1394-95; Kennedy, *supra* note 141, at 252.

in which to live.<sup>175</sup> For Williams, and doubtless many parents, a washing machine could help alleviate the burden of cleaning clothes and linens for a family of eight, freeing up time to care for young children or otherwise support her family. A bed could give her and/or her children a comfortable place to sleep. A stereo would enable Williams to access the outside world and to bring music and other aspects of the broader culture into her home.<sup>176</sup>

The goods offered for purchase by Walker-Thomas Furniture were therefore not merely consumer goods. Walker-Thomas Furniture promised material and legal conditions for creating a home. Such conditions included the items needed to support and engage with family, to share and transmit values and culture, and to no doubt engage in other valued activities, as well as the legal property rights for concretely engaging in such activities free from supervision and overlordship by others.<sup>177</sup>

Getting someone like Williams to agree to the contract proposed by Walker-Thomas Furniture would therefore likely not have required trickery or quasi-fraud, as the D.C. Circuit's opinion might suggest. Even if Williams fully understood the legal effect of contracting with Walker-Thomas Furniture, her position in the market for consumer goods, alongside her need to create a home for her children, could have made it rational for her to purchase on installment credit, just as it was likely rational for the Black buyers in *Contract Buyers League* to purchase "on contract" in view of the similarly discriminatory market for homes.<sup>178</sup>

But none of these facts about discriminatory market conditions are relevant under classical unconscionability. As Judge Danaher reminds us in his dissent in *Williams*, even extreme social disadvantage does not preclude a person from exercising their decision-making abilities in meaningful ways.<sup>179</sup>

---

<sup>175</sup> See MOREAU, *supra* note 37, at 133 (arguing that having a home, as opposed to merely a place to shelter, can be a basic good required for full and equal membership in society in view of "the significant number of people" who have homes and "the number of social activities that depend on one's having a home").

<sup>176</sup> This is not to suggest that someone would necessarily need a relatively expensive stereo for this purpose. But, as Kennedy points out, it is highly likely that the contract presented to Williams for the stereo did not contain a price term, and that she did not see the stereo before purchasing it and was therefore likely unaware of its price and quality. See Kennedy, *supra* note 141, at 264-65. Even if she had been aware of the price and quality, she might have believed it was the only stereo available to her, and it would have no doubt been difficult to take the hours likely required to shop around as a mother of seven, as suggested by the fact that her contracts with Walker-Thomas Furniture were mostly, if not all, signed at her front door. See *id.*; Fleming, *supra* note 29, at 1395-96. Moreover, even if she had known that less expensive alternatives were available, she might have had reasons of her own to choose the more expensive stereo—perhaps she wanted something nice for herself or her children, the quality of the sound was better, and so forth. And, in any case, who are we to judge what makes a home a home?

<sup>177</sup> Cf. Christopher Essert, *Property and Homelessness*, 44 PHIL. & PUB. AFFS. 266, 266 (2016) (arguing that homelessness involves being "under the power of others—to be dominated by them or dependent on them—in respect of where one may be").

<sup>178</sup> See *supra* section II.A.

<sup>179</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965) (Danaher, J., dissenting) (suggesting that "public oversight . . . of relief funds" should not be required and that "relief clients" are capable of making rational albeit economically risky purchases).

Although the need that motivates consumer purchases can be extreme, taking on the risk of repossession can still reflect a meaningful choice—for example, that creating a family home through purchasing on installment credit rather than, say, relying on donations and hand-me-downs would be preferable in view of the buyer's aims and values.

Instead, what matters is whether the party seeking to avoid enforcement was able to exercise their decision-making abilities at all. Hence the D.C. Circuit's—and Williams's attorneys'—decision to highlight Williams's personal limitations, such as whether she could understand the basic operation of the contract due to, among other things, an “obvious . . . lack of [education].”<sup>180</sup>

In Williams's case, this shift from systemic to personal bargaining disadvantages also obscures further ways in which her contractual situation was shaped by racial discrimination. That Williams possessed only a grade eight education is unsurprising because she grew up in the Jim Crow South.<sup>181</sup> Given the state of education for Black children at the time, it would also not be idiosyncratic to possess that amount of formal education. Moreover, although neither the D.C. Court of Appeals nor the D.C. Circuit specified that Williams had little *formal* education, this very likely must be inferred for their description to be true. As Muriel Morisey Spence points out, Williams's “long experience with such stores [could have left] her acutely ‘street wise’ about how such stores work. She might [have] even know[n] people who . . . had their belongings repossessed by the same store.”<sup>182</sup> Dylan Penningroth also notes that Williams grew up in the rural South where the use of contracts and “working legal knowledge . . . had long been part of Black life.”<sup>183</sup>

But, again, none of this is relevant under classical unconscionability. (Or, if it is relevant, it would undermine Williams's case.) Williams's limited formal education can be viewed as an unusual and impairing bargaining disadvantage under the circumstances only by ignoring her race and associated experiences, along with the wealth of Black people's experiences with contracting under centuries of oppression. Williams's contracting experience can thus satisfy the procedural requirements for classical unconscionability only by engaging in the “magical thinking” that her bargaining disadvantages were not the widespread product of extensive racial discrimination.<sup>184</sup>

---

<sup>180</sup> *Id.* at 449 (majority opinion).

<sup>181</sup> *See* Fleming, *supra* note 29, at 1392.

<sup>182</sup> Spence, *supra* note 127, at 96.

<sup>183</sup> Penningroth, *supra* note 12, at 1268; *see also id.* at 1211-16 (citation omitted) (describing how recently emancipated Black people commonly used contracts and contract law in ways that evinced a “wary faith” that contract law could “uplift the race”).

<sup>184</sup> *Id.* at 1220-21 (describing how “newly-freed Black people” in the South were “so poor, so cut off from alternatives, and so obviously the weaker parties in transactions that only magical thinking could” support holding that “freedpeople were free and equal bargainers”).

### 3. *Whose Commercial Norms?*

It is less obvious how the terms of Williams's contract could have satisfied the court's substantive requirements for unconscionability. The terms of the contract would have needed to be so "extreme" in view of the "general commercial background" as to appear "unconscionable according to the mores and business practices of the time and place."<sup>185</sup> Walker-Thomas Furniture would therefore need to have been a "uniquely greedy" retailer that secured extremely nonstandard and commercially unreasonable terms.<sup>186</sup> But there is ample reason to believe that the type of contract in *Williams* was widespread. Low-income retailers like Walker-Thomas Furniture typically could not sell their consumer debts to financial institutions.<sup>187</sup> As a result, the retailers had to bear the risk of default on their own.<sup>188</sup> Retailers like Walker-Thomas Furniture chose to manage that risk by offering items for purchase on installment credit, and prorated payments appear to have been the norm.<sup>189</sup>

As a result, it is far from clear that Walker-Thomas Furniture was uniquely exploitative. To the contrary, buying on installment credit was typical in Williams's neighborhood and for members of the Black working class in the District of Columbia,<sup>190</sup> much like buying "on contract" was the norm for Black buyers in Chicago.<sup>191</sup>

Instead, the only path open to finding that the terms deviated significantly from commercial norms would be to hold that the relevant commercial norms are those of the white middle class. In contrast to low-income retailers, retailers catering to white middle class buyers offered loans to help with costly purchases.<sup>192</sup> Title was immediately transferred to the buyer, and the buyer had some control over when to make payments and how much.<sup>193</sup>

Viewed from the perspective of the white middle class, the contract in *Williams* may have thus shocked the conscience. Although defaulting was not an appealing possibility for middle-class buyers, it did not typically result in the devastating violation of home and privacy involved in having law enforcement seize your bed (or your children's bed), drawers, and the like. Nor were

---

<sup>185</sup> *Williams*, 350 F.2d at 450 (citations and internal quotation marks omitted).

<sup>186</sup> Penningroth, *supra* note 12, at 1268 (describing the D.C. Circuit's framework for unconscionability as one of "uniquely greedy sellers bilking especially vulnerable and ignorant buyers").

<sup>187</sup> See Fleming, *supra* note 29, at 1394.

<sup>188</sup> See *id.* at 1395.

<sup>189</sup> See *id.* at 1429 (explaining how consumer protection legislation subsequently banned the kind of pro rata repayment structure in *Williams*); Kennedy, *supra* note 141, at 279-80.

<sup>190</sup> See FED. TRADE COMM'N, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS, at XIII-XIV (1968); *supra* section II.B.2.

<sup>191</sup> See *supra* section II.A.

<sup>192</sup> See Fleming, *supra* note 29, at 1394-95.

<sup>193</sup> See *id.*

middle class retail sales practices predicated on default. Low-income retailers like Walker-Thomas Furniture would sell (often previously repossessed) goods at a markup to consumers who were likely to default.<sup>194</sup> Repossession would then, as Duncan Kennedy has documented, “feed the supply of used goods for resale in the captive market conditions of the poor Black neighborhoods.”<sup>195</sup> Low-income retailers therefore sought to profit not simply from the great need for such goods but from repossession itself.

Judge Skelly Wright seems to have been aware of all of this.<sup>196</sup> The systematic cycle of repossession was precisely part of what led Wright, in earlier drafts of his opinion in *Williams*, to conclude that if findings at trial indicated that Walker-Thomas Furniture’s contracting practices fit this model, the contract would be unconscionable.<sup>197</sup> But, as Fleming recounts, Wright revised his opinion in response to feedback from other D.C. Circuit judges, ultimately focusing on Williams’s personal weaknesses and removing any mention of the systematic character of Walker-Thomas Furniture’s business practices and the broader practices of low-income retailers.<sup>198</sup>

By excluding such facts and analysis, the contract in *Williams* can thus appear “unusually exploitative.”<sup>199</sup> From the perspective of many white and likely middle-class readers of the case, the contract would deviate in an “extreme” way from the “business practices” to which they were accustomed.<sup>200</sup> It is thus only by engaging in this perspectival shift that the contract in *Williams* can be interpreted as unconscionable under the classical test articulated by the D.C. Circuit.

#### 4. *Racially Subordinating Terms*

Classical unconscionability’s narrow focus on the typicality of contractual terms also leaves the doctrine without any resources to identify how the contractual relationship in *Williams* might have itself been characterized by racial inequality.

Much like buying a home on contract, buying on installment credit typically kept ownership just out of reach. The pro rata structure of the payments ensured that debts would be prolonged for as long as possible, while the high price for basic goods practically ensured default.<sup>201</sup> And, like

---

<sup>194</sup> See *id.* at 1418.

<sup>195</sup> Kennedy, *supra* note 141, at 279-80. Kennedy notes that, under the law at the time, Walker-Thomas Furniture “could have kept and resold the goods keeping the proceeds even if they exceeded her debt.” *Id.* at 258 n.98 (citations omitted).

<sup>196</sup> See Fleming, *supra* note 29, at 1416-18.

<sup>197</sup> See *id.*

<sup>198</sup> See *id.* at 1418-20.

<sup>199</sup> *Id.* at 1419.

<sup>200</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965) (quoting 1 CORBIN ON CONTRACTS § 128 (1963)).

<sup>201</sup> See Kennedy, *supra* note 141, at 249-50.

the contract buyers, low-income consumers like Williams did not build up equity through payments. Default therefore not only triggered the seller's right to repossess—a right that was frequently exercised immediately upon default—but also forfeiture of the value of all previous payments. For buyers engaged in remunerative labor, the financial loss associated with repossession was, in turn, often compounded by wage garnishment.<sup>202</sup>

For someone like Williams, contracting with Walker-Thomas Furniture would therefore practically guarantee becoming locked into an impoverishing cycle of need, dependence, and devastating violations of home and privacy involved in repossession of basic home goods, like beds and drawers. Such a cycle would likely strike anyone as cruel. Viewed in the context of anti-Black racism and oppression, the contracts with Walker-Thomas Furniture were also discriminatory.<sup>203</sup> The contracts exploited and reinforced the racially unequal status of consumers like Williams in the broader discriminatory market for consumer goods and thereby exacerbated the nexus between poverty and racial inequality. The contracts thus helped to keep people like Williams “trapped at the bottom”<sup>204</sup> and with uncertain access to the material and legal conditions for creating a home.<sup>205</sup>

Further, Black women in particular have often faced challenges to maintaining personal boundaries over both their person and families, especially in their capacity as mothers. Although I cannot fully explain such challenges here, it may help to note some of the links scholars have made between these challenges and the legacy of slavery. For example, Patricia Hill Collins explains,

African-American women's experiences as mothers have been shaped by the dominant group's efforts to harness Black women's sexuality and fertility to a system of capitalist exploitation. Efforts to control Black women's reproduction were important to the maintenance of the race, class, and gender inequality characterizing the slave order . . . .<sup>206</sup>

The commodification of Black people under slavery additionally meant that family units were in flux, subject to dissolution and control on the basis of the putatively economic needs and private aims of white owners.<sup>207</sup>

<sup>202</sup> *Id.* at 280.

<sup>203</sup> See MOREAU, *supra* note 37, at 121-51 (arguing that it can sometimes be wrongfully discriminatory for someone to lack access to goods needed for full and equal participation in society, and that whether such a good plays this role must be in part evaluated from the perspective of the discriminated).

<sup>204</sup> Fleming, *supra* note 29, at 1395.

<sup>205</sup> See *supra* section II.B.2. (discussing how access to stable control over basic home goods can be part of having a home versus merely having a place in which to shelter).

<sup>206</sup> See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 50 (2d ed. 2000).

<sup>207</sup> See *id.* at 50-51. Such commodification was not limited to the literal trading of bodies. As Cheryl Harris and other scholars have argued, North American capitalism more broadly

Following emancipation and Reconstruction, the transgression of personal boundaries has remained a wide-spread feature of Black women's experiences. For example, Collins details how domestic workers in America, who have at various times been disproportionately Black, were pervasively subject to sexual harassment in their workplaces, and required to engage in infantilizing and overly personal practices of "linguistic deference":<sup>208</sup>

Techniques of linguistic deference included addressing [predominantly Black] domestics by their first names, calling them "girls," and requiring that the domestic call the employer "ma'am." Employers routinely questioned domestics about their lifestyle, questions they would hesitate to ask members of their own social circle.<sup>209</sup>

Meanwhile, the long hours and exhaustion typically associated with Black working class women's work have posed serious challenges to Black women's ability to create and maintain a "private" family "sphere."<sup>210</sup> For Black women, "motherhood as an institution" can thus "occup[y] a special space in transmitting values to children about their proper place,"<sup>211</sup> given the long-standing difficulty in creating such space and the hostility that the broader economy has tended to show Black women and Black people.<sup>212</sup>

This is not to suggest that Black women's experiences are uniform, but rather, that "motherhood and racism [have been] symbolically intertwined" in America, and that the difficulty of maintaining boundaries over one's person and family is an important and longstanding dimension of that relationship.<sup>213</sup> Hence, Patricia Williams explains that, in her experiences transacting with others, "As black, I have been given by this society a strong sense of myself as already too familiar, personal, subordinate to white people."<sup>214</sup>

---

has its roots in the transatlantic slave trade. *See, e.g.*, CALVIN SCHERMERHORN, *THE BUSINESS OF SLAVERY AND THE RISE OF AMERICAN CAPITALISM, 1815-1860* (2015); ERIC EUSTACE WILLIAMS, *CAPITALISM AND SLAVERY* (1994); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). "Black bodies were cast as living currency around which were built valuation systems, insurance, financial products, banking institutions, and other forms of financialization central to the development of racial capitalism." Cheryl I. Harris, *Reflections on Whiteness as Property*, 134 HARV. L. REV. 1, 1 n.1 (2020). "Through violence, the land and the people are transformed into property, into commodities, abstracted into investments, financial products, and debt instruments." *Id.* at 1.

<sup>208</sup> COLLINS, *supra* note 206, at 56-57.

<sup>209</sup> *Id.* at 57.

<sup>210</sup> *Id.* at 51; *see also* SHELBY, *supra* note 34, at 199 (2016) (explaining that often the work available to poor Black women is "domestic service in the homes of affluent white families" that reinforce the "ideological image of the 'mammy' . . . used to justify the exploitation and subordination of black women under slavery").

<sup>211</sup> COLLINS, *supra* note 206, at 50.

<sup>212</sup> *See* SHELBY, *supra* note 34, at 178 (arguing that Black people in America may reasonably refuse to "accept the jobs available because they believe that *the basic structure of U.S. society is deeply unfair and thus, on grounds of justice and self-respect, refuse to accommodate themselves to their low position in this stratified social order*").

<sup>213</sup> COLLINS, *supra* note 206, at 50.

<sup>214</sup> WILLIAMS, *supra* note 1, at 147.

For Patricia Williams and other Black Americans, the “formality” of contract promises a way to “clarify boundary” and to establish oneself as a “bargainer of separate worth, distinct power, [and] sufficient *rights* to manipulate commerce.”<sup>215</sup> The contract in *Williams v. Walker-Thomas Furniture Co.* subverts this purpose. It enabled Ora Williams to acquire a right to use certain items to create a home for her and her children. But the contract enabled her to create a home only under terms that, by design, left her vulnerable not only to financial loss, but to physical and destructive state-sanctioned intrusion of that intimate space—all in the name of securing the financial interests of another party.

The contractual relationship was thus very likely subordinating in ways that instantiated the precarity of status, family, and personal boundaries associated with the legacy of exploitation of Black women and Black motherhood.<sup>216</sup> And yet the unconscionability doctrine—contract law’s core doctrine concerned with exploitation and interpersonal unfairness—could have nothing to say about it.

### C. *The Invisibility of Racial Inequality*

As *Williams v. Walker-Thomas Furniture Co.* suggests, classical unconscionability can accordingly reach contracting processes that are infused with racial inequality. But it can do so only incidentally and by superimposing a white perspective on the contracting process and resulting terms. Exploitation of discriminatory barriers to consumer credit becomes unusually sneaky bargaining. The effects of Jim Crow on schooling become personal idiosyncrasies. The only salient bargaining disadvantages are highly personalized and divorced from any broader social inequality, except perhaps poverty. The only basis for finding that a contract is unfair is finding that it is an extremely unusual bad deal. Through this exercise, the reality of racial discrimination in contracting is thus analyzed away.

It is therefore no wonder that neither the D.C. Court of Appeals nor the D.C. Circuit mention Ora Williams’s race.<sup>217</sup> The only experience of race that matters for classical unconscionability is apparently the experience of being white.

To be clear, none of this is to suggest that Williams was dishonest or that she and her lawyers incorrectly characterized her contracting situation.<sup>218</sup> It might well have been that Williams felt unfairly tricked and surprised by

---

<sup>215</sup> *Id.* at 146-48.

<sup>216</sup> *Cf.* *Balikama obo others v. Khaira Enters.*, [2014] BCHRT 107 (Can. B.C.) (explaining that poor sanitation conditions for migrant agricultural workers were a part of the legacy of the trans-Atlantic slave trade and therefore constituted unlawful employment discrimination on the basis of race and national origin).

<sup>217</sup> *See* *Morant*, *supra* note 127, at 926 n.208.

<sup>218</sup> *See supra* section II.B.1.

the harsh consequences of the prorated repayment scheme. She might also not have felt any significant link between the contract and racial inequality.

But acknowledging these possibilities is consistent with criticizing the narrowness of classical unconscionability. As *Contract Buyers League* and *Williams* illustrate, it leaves victims of racial inequality in contracting without the legal resources to articulate that a course of bargaining was exploitative because it was discriminatory, or that enforcing a contract is inconsistent with treating the parties as equals because its terms are discriminatory, or otherwise subordinating on the basis of race. Classical unconscionability thus leaves people with uncertain legal rights to resist exploitation and subordination made possibly by, and constitutive of, racial inequality.

Instead, to prevail, victims of racial inequality in contracting must argue that they were powerless—that, due to their purely personal limitations or the quirks of the transactional setting, they were unable to sufficiently exercise their decision-making abilities to vest their co-contractor with full contractual rights. As Patricia Williams explains, “[i]t is this experience of having, for survival, to argue for our own invisibility in the passive, unthreatening rhetoric of ‘no rights’ which . . . is both paradoxical and difficult for minorities to accept.”<sup>219</sup>

### III. THE NEED FOR AN ALTERNATIVE THEORY OF UNCONSCIONABILITY

Classical contract law thus holds out the promise of relating as equals through contracts, notwithstanding people’s vastly unequal social positions. But that promise breaks down precisely where it is most needed. Part II argued that the unconscionability doctrine classically permits, and its underlying values sometimes require, enforcement of racially discriminatory contracts. Even when the doctrine reaches such contracts, it does so only incidentally and in ways that render racial inequality legally irrelevant and invisible. Disadvantaged parties must highlight how they were unable to exercise their decision-making abilities due to happenstance or personal idiosyncrasies. Rather than claim a right to resist enforcement of racially discriminatory contracts, victims of racial discrimination can only claim that they were powerless to vest others with full contractual rights.<sup>220</sup> Classical unconscionability thus deals with racial discrimination in contracts either by denying its interpersonally unfair character or holding that the unfairness resides in some other aspect of the contracts.

This Part argues that the problematic treatment of racial inequality under classical unconscionability requires an alternative interpretation of the doctrine that can incorporate the value of racial equality into contract law. Although statutory antidiscrimination law plays a central role in regulating discriminatory contracting, it offers uncertain protection and can

---

<sup>219</sup> WILLIAMS, *supra* note 1, at 158.

<sup>220</sup> *See id.*

range far more narrowly than the moral category of objectionable racial subordination. Even if antidiscrimination law reliably did apply to racially subordinating contracts, the justifiability of contract law itself depends on appropriately incorporating the value of racial equality. Contract law is an institution that supplies a society's public principles for interpersonal collaboration and should therefore not operate at cross purposes with the value of racial equality. This Part then explains that although many U.S. jurisdictions have loosened the requirements of classical unconscionability, an attractive alternative has not taken hold.

### A. *The Limits of Statutory Antidiscrimination Law*

Rather than view the problematic treatment of racial discrimination under the unconscionability doctrine as a problem for contract law, it can be tempting to conclude that the problem is best dealt with, and perhaps is even already dealt with, by statutory antidiscrimination law. After all, the court held in *Contract Buyers League v. F & F Investment* that the plaintiffs had stated a claim for unlawful discrimination under Section 1982.<sup>221</sup> If statutory antidiscrimination law prohibits racial discrimination in contracting, then why should it matter whether the common law of contracts, let alone the unconscionability doctrine in particular, applies as well?

#### 1. *The Fate of the Contract Buyers League Litigation*

But success in cases such as *Contract Buyers League* is far from certain. Although the plaintiffs in *Contract Buyers League* were initially successful in stating a claim for racial discrimination, they lost at trial on remand.<sup>222</sup> The reasons for the jury's conclusion are unclear, but there is some reason to believe that changing attitudes about racial discrimination might have played an important role. For example, Beryl Satter explains that "white attitudes toward racial justice had hardened by the 1970s, with many now believing that, far from suffering discrimination, blacks were getting too much 'special treatment.'"<sup>223</sup> As one juror reportedly said, he had hoped that finding for the defendants would help to reverse "the mess Earl Warren made with *Brown v. Board of Education* and all that nonsense."<sup>224</sup> The lengthy trial and extensive discussions about competing property appraisals might have

---

<sup>221</sup> 300 F. Supp. 210, 216 (N.D. Ill. 1969), *aff'd sub nom.* Baker v. F & F Inv., 420 F.2d 1191 (7th Cir. 1970).

<sup>222</sup> See SATTER, *supra* note 92, at 347, 366-68 (citation omitted). At that point, many of the plaintiffs and most "notorious" sellers were no longer parties to the case. See *id.* at 347.

<sup>223</sup> *Id.* at 367.

<sup>224</sup> *Id.* at 368.

also caused some jurors to “tune[] out.”<sup>225</sup> The plaintiffs appealed but were unsuccessful.<sup>226</sup>

A parallel case brought by CBL members against builders of new homes was also unsuccessful. In *Clark v. Universal Builders, Inc.*,<sup>227</sup> CBL members brought a Section 1982 claim against builders of new homes under a “traditional theory of discrimination” as well as the same exploitation theory of discrimination as under *Contract Buyers League*.<sup>228</sup> Although the Seventh Circuit initially affirmed both theories, the plaintiffs lost on remand and the Seventh Circuit subsequently affirmed.<sup>229</sup>

The Seventh Circuit agreed with the trial court’s conclusion that the plaintiffs had failed to show that the defendants had sold comparable homes to white buyers.<sup>230</sup> The houses in Deerfield, Illinois, a white suburb where the defendants built and sold houses, were new rancher-style homes.<sup>231</sup> In contrast, the homes that the defendants sold to the Black buyers “on the south side of Chicago” were in “mature and urban” neighborhoods.<sup>232</sup> The homes on the south side were also “generally brick,” multilevel, and typically possessed basements.<sup>233</sup> The fact that homes in poor Black neighborhoods looked different than in the new white suburbs was thus a key factor precluding a showing of discrimination under the traditional theory.

The plaintiffs’ exploitation theory also failed. The district court found, and the Seventh Circuit agreed, that the plaintiffs did not show that the defendants were charging the Black buyers more than competitors for comparable housing.<sup>234</sup> Because the defendants had not done anything unusual in the way that they exploited Black buyers, the plaintiffs could not show that the defendants unlawfully exploited racial residential segregation.<sup>235</sup>

## 2. *The Narrow Scope of Statutory Discrimination*

It is therefore not a hypothetical worry that racially discriminatory contracts, and contracts that otherwise objectionably exploit and instantiate racial inequality, will be enforced by contract law. That is precisely the

---

<sup>225</sup> *Id.* at 367.

<sup>226</sup> *See id.* at 368 n.132.

<sup>227</sup> 501 F.2d 324 (7th Cir. 1974).

<sup>228</sup> *Id.* at 328.

<sup>229</sup> *Clark v. Universal Builders, Inc.*, 706 F.2d 204, 208, 212 (7th Cir. 1983).

<sup>230</sup> *See id.* at 208.

<sup>231</sup> *Id.* at 207.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *See id.* at 212.

<sup>235</sup> *See id.*

situation in which the CBL members found themselves. And eventually, the CBL members' "core arguments faded."<sup>236</sup> As Dylan Penningroth explains,

Few courts were willing to use the Civil Rights Act of 1866 to go after land sellers who "merely took advantage of a discriminatory situation created by others." As much as judges were willing to believe that some sellers were racist, they were not ready to believe that the market itself was racist, much less that duly executed sale contracts had anything to do with slavery.<sup>237</sup>

Nor is the current trajectory of antidiscrimination law in the United States especially promising. If anything, the emphasis on comparators and formal classifications has become entrenched.<sup>238</sup> It therefore seems unlikely that contracts like those in *Contract Buyers League*, let alone *Williams v. Walker-Thomas Furniture Co.*, will be adequately regulated by statutory antidiscrimination law.

The conception of objectionable discrimination under antidiscrimination law can accordingly range more narrowly than the moral concept of objectionable discrimination,<sup>239</sup> and juries can sometimes reflect and implement discriminatory majoritarian views. This gives judges a potentially important role in developing the common law in a way responsive to our basic interests in racial equality.

<sup>236</sup> Penningroth, *supra* note 12, at 1267.

<sup>237</sup> *Id.* (quoting *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 331 (7th Cir. 1974)).

<sup>238</sup> See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (holding that treating race as a factor in university admissions in order to secure a diverse student body violates the Equal Protection Clause of the Fourteenth Amendment); *Ricci v. DeStefano*, 557 U.S. 557, 580-85 (2009) (suggesting that the avoidance of intentional discrimination is legally more important than the avoidance of disparate impact discrimination).

<sup>239</sup> See Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 *Geo. Wash. L. Rev.* 183, 228 (1993) (similarly arguing that unlawful discrimination under statutes is narrower than the range of morally objectionable discrimination). To underscore this aspect of antidiscrimination law, a comparative example might help. In contrast to the Seventh Circuit's fixation on comparators, Canadian antidiscrimination law is focused primarily on whether the act, policy, practice, or contract at issue reflects and reinforces social inequality. See, e.g., *Fraser v. Canada (Attorney General)*, [2020] 3 S.C.R. 113 (Can.). Such an analysis need not depend on whether similarly situated white people are treated differently, precisely because racial inequality can make it the case that there are no similarly situated white people. See, e.g., *Balikama obo others v. Khaira Enters.*, [2014] BCHRT 107 (Can. B.C.) ("The Supreme Court of Canada . . . and this Tribunal . . . have essentially indicated that it is through the lens of a black African that the facts need to be considered and the analysis of whether or not adverse treatment amounts to discrimination must be considered. It is axiomatic that a person who has never been subjected to [regular and extensive racism] may have quite a different slant on whether any particular activity amounts to discrimination than a person who has been subjected to such treatment as an everyday occurrence or even an occasional occurrence."). And even if there were such comparators, what makes something discriminatory under Canadian law depends on its relationship to racial oppression and subordination—whether it, for instance, involves treatment reminiscent of the Trans-Atlantic Slave Trade, see *id.*, reflects racial stereotypes or biases, see, e.g., *Peel Law Ass'n v. Pieters*, [2013] 116 O.R. 3d 396 (Can. Ont. C.A.) (anti-Black unconscious bias), and so forth. For an overview of how Canadian equality jurisprudence diverges from U.S. antidiscrimination jurisprudence, see Tsuruda, *supra* note 25, at 189-97.

B. *Unconscionability as Contract's Core Fairness Principle*

Even if contracts such as those in *Contract Buyers League v. F & F Investment* and *Williams v. Walker-Thomas Furniture Co.* were reliably unlawful under statutory antidiscrimination law, the unconscionability doctrine should still be able to reach such contracts, and for the right kinds of reasons. The common law of contracts is one of the main bodies of law that sets the terms for interpersonal transactions and collaboration. The common law thus supplies many of our basic public principles for how to enlist one another's help and cooperation, and when, as a society, we provide security for such joint projects and activity.<sup>240</sup>

For example, the mandatory contractual duty of good faith in performance guides how the parties interact with one another—compliance with the spirit of the contract rather than mere compliance with its express requirements, cooperation rather than brute indifference to the conditions of a co-contractor's performance, governance by the parties' shared understanding of the agreement rather than by one party's unilateral perspective and interests.<sup>241</sup> Similarly, defenses such as “misrepresentation, duress and undue influence, serve to insure that bargaining has taken place in a suitable climate.”<sup>242</sup> Such defenses also make clear that the law will not assist a promisee in obtaining the benefit of their bargain when that bargain was obtained by deception, threats, and other forms of improper influence. And the unconscionability doctrine, even classically understood, plays a core role in defining what forms of interpersonal exploitation and subordination are similarly disqualified from public support.<sup>243</sup>

In view of these central features of contract law, it is deeply problematic for courts to find that racially discriminatory contracts, and other contracts that are subordinating on the basis of race, are not unconscionable. For example, the contracts in *Contract Buyers League* exploited the disadvantaged position of Black buyers under racial residential segregation.<sup>244</sup> The terms of the contracts then created a relationship of financial “involuntary servitude” that perpetuated housing inequalities associated with the

---

<sup>240</sup> See Shiffrin, *supra* note 68, at 221 (explaining that contract law is “an institution in which the community assists people who make agreements by providing a measure of security in those agreements,” and that the decision of when to provide such assistance can reflect a variety of aims and values). To be clear, I do not mean to suggest that statutory antidiscrimination law is not a part of contract law. For an argument that statutory antidiscrimination law is part of contract law, see, for example, Erik Encarnacion, Section 1981 as Contract Law (Oct. 15, 2024) (unpublished manuscript) (on file with author). This Article aims to remain neutral on this point, arguing instead that antidiscrimination norms should be part of the common law of contracts.

<sup>241</sup> See RESTATEMENT (SECOND) OF CONTS. § 205 cmts. a, b, d (AM. L. INST. 1981).

<sup>242</sup> *Id.* ch. 8 intro. note.

<sup>243</sup> See *supra* Part I.

<sup>244</sup> See *supra* section II.A.

legacy of slavery.<sup>245</sup> Holding that the unconscionability doctrine does not reach such contracts suggests that exploiting racial residential segregation is a “suitable climate” for bargaining,<sup>246</sup> and that widespread “exploitation for profit” can justify perpetuating racial inequality.<sup>247</sup> It also suggests that the authority of the investors over the buyers’ financial wellbeing and stability of home is not objectionably subordinating, or otherwise unfair. So even if antidiscrimination law prohibits the contracts in *Contract Buyers League*, holding that the unconscionability doctrine permits enforcement, and that the common law of contracts otherwise requires enforcement, is both directly at odds with the purposes of antidiscrimination law and obscures the morally objectionable character of the contracts.

These independent concerns about contract law supply reasons for concluding that, in legislating antidiscrimination law, Congress has not occupied the field, and that courts have an important role to play in incorporating values of racial equality into the common law of contracts.<sup>248</sup> Courts are not without experience in developing legal conceptions of discrimination, and already deploy different conceptions of discrimination depending on the legal context.<sup>249</sup> Courts also have a long history of developing the common law of contract in light of statutory and, on rare occasions, even constitutional objectives and values.<sup>250</sup> This is, for example, precisely what courts do when they apply the public policy defense to contract enforcement.<sup>251</sup> Through development and application of the public policy defense, courts develop a private law perspective on such objectives and values. This can be immensely valuable for ensuring that our quotidian interactions and relationships do not render our basic legal rights and political objectives illusory.

Incorporating the value of racial equality into the public policy defense would thus be a welcome evolution in the law.<sup>252</sup> But it would be a mistake

---

<sup>245</sup> See *Cont. Buyers League v. F & F Inv.*, 300 F. Supp. 210, 215 (N.D. Ill. 1969), *aff'd sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970); MacNamara, *supra* note 87, at 76.

<sup>246</sup> See *supra* text accompanying notes 242-243.

<sup>247</sup> *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 327 (7th Cir. 1974) (describing how the lower court suggested that “exploitation for profit” and racial discrimination are mutually exclusive).

<sup>248</sup> See Williams, *supra* note 239, at 223-26 (explaining how “a legislature’s adoption of statutes aimed at implementing the national policy against racial discrimination is a greater, not lesser, reason to spur the development of the common law to reflect this important community value”).

<sup>249</sup> Compare *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that equal protection violations under the Fourteenth Amendment require intentional discrimination), with *Griggs v. Duke Power Co.*, 401 U.S. 424, 432-33 (1971) (holding that discriminatory intent is not required for violations of Title VII of the Civil Rights Act of 1964).

<sup>250</sup> See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (holding that judicial enforcement of racially restrictive covenants violates the Equal Protection Clause of the Fourteenth Amendment).

<sup>251</sup> See RESTATEMENT (SECOND) OF CONTS. §§ 178-84 (AM. L. INST. 1981).

<sup>252</sup> *Cf. Williams, supra* note 239, at 223-25 (arguing that antidiscrimination statutes can be a source of “national policy” against racial discrimination warranting protection and further development in the common law of contracts). For an example of how the public policy defense

to rely exclusively on that defense. The public policy defense is traditionally understood to protect primarily society's broader interest in nonenforcement.<sup>253</sup> Exclusive reliance on the public policy defense would accordingly leave it unclear whether racial inequality is simply a negative externality of contracting, and, as a result, whether racial inequality in contracting is compatible with our fundamental individual interests in relating as equals in our contractual relationships.<sup>254</sup> The unconscionability doctrine should accordingly be a central context for incorporating the value of racial equality in contract law.

### C. *Rethinking Contract Law's Relationship to Social Inequality*

This critique has so far centered on the relationship between the unconscionability doctrine and racial discrimination. But these concerns are not limited to this context. Gender discrimination, poverty, and likely numerous other paradigmatically objectionable social inequalities also typically produce widespread disadvantages in bargaining that can in turn be reflected in common market practices.<sup>255</sup> These other forms of social inequality cannot be adequately addressed here. But a brief discussion of colonialism might help to illustrate how the unconscionability doctrine's problematic treatment of racial discrimination is indicative of contract law's relationship to social inequalities.

For example, contracts for the sale of land and fishing licenses from Indigenous peoples to the government and white people can instantiate forms of colonial exploitation both in the dynamics of the contracting process and the resulting terms.<sup>256</sup> What, for a judge, may appear to be a

---

could be developed to integrate concerns about sexual harassment, see David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019) (arguing that the public policy defense should be used to refuse enforcement of nondisclosure agreements covering sexual misconduct).

<sup>253</sup> See RESTATEMENT (SECOND) OF CONTS. ch. 8 intro. note (AM. L. INST. 1981). As David Hoffman and Erik Lampmann put it, "public policy is best thought of as primarily a doctrine about limiting the externalities that result from private contracts." Hoffman & Lampmann, *supra* note 252, at 199.

<sup>254</sup> Erik Encarnacion is similarly reluctant to rely exclusively on the public policy defense to refuse enforcement of mandatory arbitration agreements covering employment discrimination. See Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 900 (2020). Encarnacion argues that bringing employment discrimination claims before courts is required to vindicate a victim's individual status as an equal, and that refusing enforcement on grounds of public policy would risk "sidelin[ing] how *individuals* are wronged in a distinctive way" by discrimination. *Id.* Instead, Encarnacion argues for reforming the Federal Arbitration Act to preclude enforcing such arbitration agreements. See *id.* at 889-904.

<sup>255</sup> See *supra* note 29.

<sup>256</sup> The loss of land is commonly associated with colonialism. But state control over fishing and other parts of the natural world is also a central way in which governments in North America have undermined Indigenous communities and cultures. For example, Sarah Morales explains that fishing and "the laws and practices surrounding it, are integral to the Musqueam Nation's self-identity and self-preservation." Sarah Morales, *'a 'lha'tham: The Re-Transformation of s. 35 through a Coast Salish Legal Methodology*, 37 NAT'L J. CONST. L. 145, 164 (2017). As the Supreme Court of Canada concluded based on expert testimony supported by the Musqueam

“lack of commercial sophistication”<sup>257</sup> can, in reality, reflect a refusal to attend residential schools or different culturally rooted understandings of how an agreement is formed.<sup>258</sup> The extensive violence committed against Indigenous peoples in the course of colonial exploitation can also give an Indigenous person reason to interpret aggressive negotiation tactics as threatening.<sup>259</sup> Anti-Indigenous discrimination can additionally create economic isolation precluding an Indigenous person from obtaining what might strike a white person as the prevailing market price.<sup>260</sup>

Failure to consider how colonialism can systematically disadvantage an Indigenous person in bargaining—or, perhaps more aptly, systematically *advantage* certain white people and the government—can thus lead a court either to fail to see how a contracting process was exploitative or to characterize it as such for the wrong reasons. Examples of such problematic reasons noted by courts include that the Indigenous person was “inarticulate” and lacked formal education,<sup>261</sup> or that an Indigenous nation was insufficiently “versed in the ways of civilization.”<sup>262</sup> Viewed in this contracting context, a vast disparity in values exchanged in the resulting contract is not merely a deviation from fair market value or evidence of some kind of trickery. The resulting contract can itself be an interpersonal instance of colonial exploitation and subordination.<sup>263</sup>

---

Indian Band, “the Musqueam have lived in the area as an organized society long before the coming of European settlers, and . . . the taking of salmon was an integral part of their lives and remains so to this day.” *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1094 (Can.). Further, restricting commercial fishing rights, and associated rights with respect to the sale of fish, can, as John Borrows argues, leave Indigenous peoples unable to “compet[e] on an equal footing within Canadian society” and can “extinguish[] their contemporary vigor as dynamic, competitive communities.” John Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster*, 22 *AM. INDIAN L. REV.* 37, 59 (1997).

<sup>257</sup> *Harry v. Kreutziger*, [1978] 95 D.L.R. 3d 231 (Can. B.C. C.A.).

<sup>258</sup> See JOHN J. BORROWS & LEONARD I. ROTMAN, *INDIGENOUS LEGAL ISSUES: CASES, MATERIALS & COMMENTARY* 262-63 (6th ed. 2023) (describing the varied conceptions of agreement within Indigenous and European traditions and how those differences were sometimes harmonized upon Europeans’ arrival to North America, but explaining that “European dominance from the 1870s forward put a significant strain on the ability of Indigenous peoples to arrive at or enforce meaningful agreements”).

<sup>259</sup> *Cf. Harry*, 95 D.L.R. 3d at paras. 2, 17 (holding that a contract for the sale of a fishing boat and license for one quarter of its fair market value between an Indigenous man and a white man formed through the latter’s “aggressive[]” and “harass[ing]” negotiation tactics was unconscionable); Penningroth, *supra* note 12, at 1254 (explaining how the objective theory of duress developed through judicial rejection of “Black people’s fears” of criminal prosecution and violence as “a basis for assessing threat”).

<sup>260</sup> See *Harry*, 95 D.L.R. 3d at paras. 7, 16 (finding that a contract for the sale of a fishing boat and associated license was for a price that was nearly one-quarter of its market value, even though the Indigenous seller had previously only received either lower or comparable offers, and noting that the white buyer had regretted “not acquir[ing] three or four more licenses” because “they were so valuable”).

<sup>261</sup> *Harry*, 95 D.L.R. 3d at paras. 2, 17.

<sup>262</sup> *Osage Nation of Indians v. United States*, 97 F. Supp. 381, 422 (Ct. Cl. 1951).

<sup>263</sup> See *id.* at 421-22 (explaining that the low price at which the government purchased Osage land was meant to enable the government to offer the land to settlers at “bargain” prices).

So while my critique has focused on racial inequality, racial inequality is a context that exhibits general problems with the unconscionability doctrine's relationship to social inequalities. The kinds of problems identified thus far—enforcement of status-based subordination, distortion of the reality of contracting under conditions of social inequality, and condemning objectionable contractual subordination for the wrong reasons—are basic problems with the doctrine itself and its underlying conception of contractual equality. These problems thus call not simply for adjusting the unconscionability doctrine's treatment of racial inequality, but for an alternative interpretation of the doctrine and its underpinning values.

#### D. *The Lasting Influence of Classical Unconscionability*

The law of unconscionability has of course evolved since *Contract Buyers League v. F & F Investment* and *Williams v. Walker-Thomas Furniture Co.* This section explains that many U.S. jurisdictions have loosened the classical emphasis on the decision-making abilities of disadvantaged parties, some eliminating that emphasis all together, indicating judicial openness to moving away from classical unconscionability. But the idea that an unconscionable contract is an unusually unfair contract still predominates. It is also not clear what standard has come to replace market norms as the measure of unfairness. As a result, although some of the ways in which the unconscionability doctrine has developed signal openness to reform, those developments do not supply a stable foundation for incorporating the value of racial equality, and social equality more broadly, into the unconscionability doctrine.

##### I. *Defective Formation Requirements*

Recall that under classical contract law, the unconscionability doctrine only applies when one of the parties to the contract was not able to properly exercise their decision-making abilities.<sup>264</sup> Under such circumstances, the “usual rule” that the contracts will be enforced, independent of their content, does not apply because the parties are not both relevantly free and equal.<sup>265</sup> Many states have loosened this formation requirement by adopting a “sliding scale” approach to evaluating unconscionability.<sup>266</sup> According to

---

<sup>264</sup> See *supra* section I.B.

<sup>265</sup> See *supra* section I.B.

<sup>266</sup> See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (“[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”); Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 812 (2020) (explaining that, based on an empirical study of all unconscionability cases decided from 2013-2017, “[t]he sliding scale approach is not typically announced in most cases, but it appears more often in successful claims”); Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*,

the sliding scale approach, the more unfair the substance of the contract, the less severe the bargaining disadvantage needs to be.<sup>267</sup>

Further, in adopting the sliding scale approach, at least one state court has also explicitly said that the requisite bargaining disadvantage can be widespread and systemic. In *Fuentes v. Empire Nissan, Inc.*,<sup>268</sup> a California Court of Appeal examined whether a standard form mandatory employment arbitration agreement was unconscionable.<sup>269</sup> The court explained that “[n]early every form employment contract can be perceived as having some procedural unfairness. Employees may lack power to bargain at all. Sometimes employers insist, ‘sign it or no job.’”<sup>270</sup> As a result, when evaluating whether an employment contract, or some provision thereof, is unconscionable, “the real fight [typically] boils down to whether the substance of the final terms are fair.”<sup>271</sup>

The sliding scale approach could thus create legal space for acknowledging that objectionable exploitation is not limited to exploitation of impaired decision-making capacities, and might also include exploitation of unfairly constrained choices. It might not therefore create a “misfit in the law” to hold that exploitation of residential racial segregation, or of discriminatory credit markets, is unconscionable.<sup>272</sup>

But an important limitation of the sliding scale approach is that it still evaluates constraints on choice in terms of severity, rather than in terms of substance or kind. If the sliding scale approach can capture exploitation of unfairly constrained choices, such as choices constrained by segregation, it accordingly still offers no normative resources to distinguish unfair from morally neutral constraints on choice. Racial segregation can thus be legally

---

44 Loy. U. CHI. L.J. 1, 6 (2012) (identifying at least twelve jurisdictions that had, at the time, adopted the sliding scale approach).

<sup>267</sup> See, e.g., *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1014 (Cal. 2018) (“Some measure of both procedural and substantive unconscionability must be present—although given the sliding-scale nature of the doctrine, more of one kind mitigates how much of the other kind is needed.”).

<sup>268</sup> 307 Cal. Rptr. 3d 512 (Cal. Ct. App. 2023).

<sup>269</sup> *Id.* at 518-19.

<sup>270</sup> *Id.* at 518 (quoting *Baltazar v. Forever 21, Inc.*, 367 P.3d 6. (Cal. 2016)). The court thus gestured at a point that has long underpinned labor policy in the United States: that, in the absence of protected rights to the contrary, “[a] single employee [is generally] helpless in dealing with an employer.” *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921) (holding that an injunction forbidding former employees from persuading current employees to strike was unlawful under the Clayton Act); see also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1937) (explaining that legally protected and collective employee action is needed to ensure that employees are not left “helpless” in their dealings with their employers (quoting *Am. Steel Foundries*, 257 U.S. at 209), and holding that Congress had the authority to pass the National Labor Relations Act in order to “safeguard” a right to engage in such collective action).

<sup>271</sup> *Fuentes*, 307 Cal. Rptr. 3d at 518. *But see* *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 977 (6th Cir. 2007) (explaining that the mere inequality of bargaining power between an employee and an employer is insufficient for establishing procedural unconscionability).

<sup>272</sup> *Cont. Buyers League v. F & F Inv.*, 300 F. Supp. 210, 228 (N.D. Ill. 1969), *aff’d sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970).

on a par with the scarcity of Ritz Carlton condos in Maui.<sup>273</sup> Without further development, the sliding-scale approach thus risks diagnosing exploitation of racial inequality as unconscionable in ways that obscure its moral character.

Whether the sliding scale approach can reach racially discriminatory contracts, and other contracts that similarly create objectionable social inequality, also depends on what standard is used to evaluate the unfairness of the resulting contractual terms. For example, if unfairness is still in large part a matter of deviating from market norms, then discriminatory contractual terms that are the market norm will fail to be unconscionable.

Much similarly depends on the standard for substantive unfairness in the minority of states that have eliminated any requirement of procedural unconscionability, holding instead that a contract can be unconscionable merely because of the “apparent injustice and oppression” in the terms of the contract itself, rather than in the process through which it was formed.<sup>274</sup>

## 2. *The Limits of a Reasonableness Standard for Unconscionability*

Market price and other commercial norms are still a common, though not always exclusive, basis for evaluating the substance of an allegedly unconscionable contract.<sup>275</sup> But under a popular alternative formulation, a contract is unconscionable when its terms “unreasonably favor” one party.<sup>276</sup> What makes a term or contract “unreasonably” favorable to one party is somewhat open-ended, intended to capture “the central idea that the unconscionability doctrine is concerned not with ‘a simple old-fashioned

---

<sup>273</sup> Cf. *Narayan v. Ritz-Carlton Dev. Co., Inc.*, 400 P.3d 544, 552-53 (Haw. 2017) (holding that the “take-it-or-leave it” character of arbitration agreement drafted by the condominium seller “with superior bargaining strength” rendered the agreement procedurally unconscionable).

<sup>274</sup> See, e.g., *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59-60 (Ariz. 1995) (holding that a contract for the sale of a water heater for \$15,000 inclusive of financing for a home worth approximately \$40,000 could be found to be merely substantively unconscionable and therefore unenforceable, and remanding this issue to be decided by the trial court); see also *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 254 (N.Y. 1998) (finding that an arbitration clause in consumer contracts for the sale of computers and software was not procedurally unconscionable, but nevertheless substantively unconscionable and therefore unenforceable because the costs of arbitrating were so high as to “deter the individual consumer from invoking the process”); *McCall*, *supra* note 266, at 815 (reporting that of seventy-five successful state court unconscionability cases, “5 (6.67%) specifically found that the contract was substantively unconscionable but not procedurally unconscionable”).

<sup>275</sup> See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965); see also RESTATEMENT (SECOND) OF CONTS. § 208 rep.’s note cmt. d (AM. L. INST. 1981); U.C.C. §§ 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM’N 2022); 1 CORBIN ON CONTRACTS § 128 (1963).

<sup>276</sup> *Eva v. Midwest Nat’l Mortg. Bank, Inc.*, 143 F. Supp. 2d 862, 895 (N.D. Ohio 2001) (citing *Lake Ridge Acad. v. Carney*, 613 N.E.2d 183 (Ohio 1993)); see also *Kelker v. Geneva-Roth Ventures, Inc.*, 303 P.3d 777, 782 (Mont. 2013) (explaining that the test for unconscionability asks whether the contract “unreasonably favored the drafter”); RESTATEMENT (SECOND) OF CONTS. § 208 cmt. d (AM. L. INST. 1981); WILLISTON ON CONTRACTS § 18:10 (4th ed. 1993).

bad bargain,”<sup>277</sup> but rather an agreement that is “overly harsh” or “unduly oppressive.”<sup>278</sup> Such an unreasonableness standard seems to have the benefit of allowing judges to rely on values in addition to market norms to determine whether a contract or contractual term is unconscionable. It therefore does not necessarily foreclose relying on the value of racial equality to see how the contracts at issue in *Contract Buyers League*, for example, might be viewed as grossly unfair.

But there are at least three difficulties with an unreasonableness standard. First, deploying the idea of an “old-fashioned bad bargain” to identify unconscionable contracts leaves unclear whether the fact that a type of contractual term is common precludes it from being grossly unfair for purposes of the unconscionability doctrine. Such an approach risks implementing at the level of content (rather than procedure) the idea that typical disadvantages in contracting cannot be grossly or extremely unfair, or otherwise unconscionable. As a result, to the extent that the unreasonableness is a matter of atypicality, an unreasonableness standard will, like classical unconscionability, exclude racially discriminatory contracts when they are the market norm.

Second, an unreasonableness standard also risks being problematically unbounded. Part of the problem with failing to reach cases such as *Contract Buyers League* is that the unconscionability doctrine, and contract law more broadly, leaves people disadvantaged by racial inequality and other social inequalities dependent on the willingness of others to refrain from exploiting their advantage. For the unconscionability doctrine to respond fully to this problematic form of dependency, it cannot leave victims of racial discrimination similarly reliant on the moral proclivities of judges for relief. In either case, victims of racially discriminatory contracts are still left “dependent ‘on the uncertain and fitful protection of a world conscience.’”<sup>279</sup> A standard that simply directs judges to look for unreasonable advantages would thus be vulnerable to this worry.

Finally, the more general idea that contractual terms must be reasonable in order to be enforceable is itself troubling. A valuable feature of contract law is that it is largely up to the parties what projects and ends to pursue through their contractual relationships. Taken to a certain extreme, such content-insensitivity can, of course, result in enforcement of contracts such as those in *Contract Buyers League*. But requiring that agreements be reasonable to be enforceable risks disqualifying from public support numerous unobjectionable relationships that simply reflect idiosyncratic preferences or idiosyncratic conceptions of what is reasonable to begin with. Much therefore depends on what standards are used for reasonableness. For example, must an agreement approximate an economically reasonable

---

<sup>277</sup> *Baltazar v. Forever 21, Inc.*, 367 P.3d 6, 11 (Cal. 2016) (quoting *Schnuerle v. Insight Communications Co.*, 376 S.W.3d 561, 575 (Ky. 2012)).

<sup>278</sup> *Id.* at 13 (citations omitted).

<sup>279</sup> WILLIAMS, *supra* note 1, at 153 (quoting MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* 53 (1984)).

distribution of value? Must the agreement be instrumentally reasonable relative to the purposes of the parties?

A reasonableness standard might thus conflict with the goal of enabling contract law to support free, creative, and privately determined collaboration. Whether or not one agrees with the classical autonomy ideal, this is a goal worth keeping in any society committed to enabling its members to determine and implement a plurality of values and ends in collaboration with each other.

These interpretations of unreasonable advantage are, to be clear, not exhaustive. In fact, in Part IV, I explain that a promising interpretation of unreasonable advantage has emerged in the context of unconscionable arbitration agreements.<sup>280</sup> But the interpretations discussed here illustrate the lasting influence of classical unconscionability's emphasis on atypicality, and the problematic character of common alternatives that have developed alongside classical unconscionability.

#### IV. TOWARD A BASIC INTERESTS APPROACH TO UNCONSCIONABILITY

The unconscionability doctrine thus has an essential role to play in responding to racial discrimination, and it has failed in that role. Part III argued that the unconscionability doctrine supplies core public principles for bargaining and determining the character of our contractual relationships. The failure to incorporate the value of racial equality into the unconscionability doctrine overlooks the pervasively interpersonal character of racial discrimination and suggests that racial advantage is a legitimate advantage to press in bargaining with others. Because this problematic treatment of racial inequality emanates from fundamental features of the classical unconscionability doctrine, similar problems are likely exhibited in contract law's treatment of gender discrimination, poverty, colonialism, and other objectionable social inequalities. While classical unconscionability is not the only interpretation of unconscionability, alternative interpretations have yet to fully break ties with the features of classical unconscionability that render its treatment of racial discrimination so problematic.

This Part draws on lessons from this extended critique to outline and motivate an alternative interpretation of the unconscionability doctrine. In doing so, it asks how the unconscionability doctrine would need to change in order for racially discriminatory contracts to be among our unconscionability paradigms. The unconscionability doctrine would need to abandon its classical emphasis on party decision-making abilities and its assumption that market norms are fair. Instead, the doctrine would ask whether contract enforcement is consistent with treating the parties as equals—not just with respect to their capacities for choice, but with respect to their basic interests and inalienable rights. Such basic interests and rights include, but are not

---

<sup>280</sup> See *infra* section IV.B.1.

limited to, antidiscrimination rights, as well as familiar basic interests in having certain forms of privacy, having a home, and accessing justice.

Judges are not without resources to develop this “basic interests” approach to unconscionability. To illustrate, I explain that the law of unconscionable arbitration agreements has already started to implement such an approach, albeit in a more circumscribed way. This Part then closes by considering how a basic interests approach to unconscionability could vindicate contract law’s role in enabling people to transact and collaborate as equals, notwithstanding their unequal social positions.

### A. *General Features of a Basic Interests Approach*

The problematic treatment of racial inequality under classical unconscionability is instructive for identifying some general features of an alternative interpretation of the unconscionability doctrine. This case study indicates that contract formation is not just a matter of creating an agreement or binding obligations. A further morally salient feature of contract formation is that it involves creating legal authority relations between the parties. Such authority can include a party’s authority over the other party’s performance, as well as authority over whether to enforce the contract or one of its terms.

For example, the contracts in *Contract Buyers League v. F & F Investment* gave the investors authority over whether—and, to some extent, how—to enforce the buyers’ obligation to pay installments.<sup>281</sup> The nature of the investors’ contractual rights to payment and ongoing possession of title gave them the authority to determine whether to immediately pursue an eviction action upon a late or missed payment, or to seek a compromise or otherwise be more accommodating by declining to exercise their enforcement rights to their fullest extent.<sup>282</sup> For instance, the investors could accept lower payments or only use eviction as a last resort.<sup>283</sup>

Similarly, the contract in *Williams v. Walker-Thomas Furniture Co.* purported to vest the company with the authority to repossess all of the items Williams had purchased on credit in the event a balance remained upon default.<sup>284</sup> Such authority did not need to be exercised immediately following one missed payment. The company could have waited another month, requested partial payment in the interim or as satisfaction of the small remaining balance, or could have otherwise worked with Williams

---

<sup>281</sup> See MacNamara, *supra* note 87, at 77-79.

<sup>282</sup> *Id.* at 76-77.

<sup>283</sup> Cf. Penningroth, *supra* note 12, at 1267 (explaining that hundreds of contract buyers ultimately “won concessions from sellers” through private negotiations).

<sup>284</sup> 350 F.2d 445, 447 (D.C. Cir. 1965).

toward an equitable solution instead of calling in the U.S. Marshals to effectively clear out her home.<sup>285</sup>

The contracts in *Contract Buyers League* and *Williams* thus created a set of authority relationships over performance and enforcement. And these relationships left the contract buyers' and Williams' basic interests—in having a home, in being free from abject poverty, in maintaining personal and familial boundaries—dependent for their protection on the good will of their co-contractors. For the contract buyers and Williams, that kind of dependency was emblematic and partially constitutive of the subordinate position they occupied in an unjust and racially stratified society.

Attending to the various sites of racial inequality in *Contract Buyers League* and *Williams* and the role of contractual authority in constituting racial inequality points to general features that an alternative interpretation of unconscionability should possess.

### 1. *The Possibility of Pure Substantive Unconscionability*

First, this analysis indicates that incorporating the value of racial equality into the unconscionability doctrine requires abandoning the classical emphasis on decision-making abilities. Even meaningful exercises of such abilities can result in the formation of objectionably subordinating contractual authority because whether such authority is subordinating can turn purely on its scope and substance.<sup>286</sup> This supports recognizing a doctrine of pure substantive unconscionability, as a minority of states have already done.<sup>287</sup>

### 2. *Attentiveness to Inequality Between Co-contractors*

Second, an alternative interpretation of the unconscionability doctrine should be able to identify how racial inequality can reside in the contractual relationship itself. Contractual authority's role in constituting racial inequality is not limited to its broader social effects, such as the perpetuation of racial residential segregation. While significant and problematic, a common feature of the contracts in *Contract Buyers League* and *Williams*

---

<sup>285</sup> See *supra* section II.B.1. Seana Shiffrin has argued that, for related reasons, the assignment of debt to a third party should be subject to the more stringent treatment of duty transfers rather than treated merely as rights transfers. See generally Seana Valentine Shiffrin, *Hidden Delegations: The Assignment of Contractual Rights and Consumer Debt*, 86 MODERN L. REV. 1 (2023).

<sup>286</sup> This point is well-established in the adjacent fields of labor and employment law. See, e.g., HUGH COLLINS, *EMPLOYMENT LAW* 10 (2d ed. 2010) (explaining that the employment contract is a "relation of subordination" that the employee enters into); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1479 (2010) (quoting *Pollock v. Williams*, 322 U.S. 4, 18 (1944)) (arguing that the voluntariness of formation does not ensure that workers will have the "'power below' and employers 'the incentive above' to prevent 'a harsh overlordship or unwholesome conditions of work'").

<sup>287</sup> See cases cited *supra* note 274.

is that they established contractual authority relationships that treated the disadvantaged parties as subordinate *to the advantaged party*. By leaving the social conditions for securing the disadvantaged parties' basic interests contingent on the good will of the other parties, the authority relationships failed to treat the disadvantaged parties as fundamentally, and hence equally, entitled to the social conditions for securing their basic interests. This kind of unequal status under the terms of a contract can, in turn, crystallize into an unequal legal status if the advantaged party is permitted to exercise their contractual authority with the imprimatur and coercive power of the law.

An alternative approach to unconscionability should accordingly rest, at least in part, on a view of what it is to relate as equals in contractual relationships, beyond merely respecting one another's choices. Doing so is essential for appropriately locating and characterizing objectionable racial inequality (and other objectionable forms of inequality) in contracts, and thus avoiding the risk of treating racial inequality as if it were merely a negative externality of contracting.

### 3. *Equal Basic Interests*

An alternative interpretation of unconscionability should also have the normative resources to identify and appropriately circumscribe the plurality of ways that contractual relationships can be objectionably subordinating. Rather than rely on market norms as a seemingly neutral proxy for evaluating fairness, a judge might instead develop a common law of basic interests and inalienable rights. Such interests and rights might include, for example, people's interests in privacy, housing, and access to justice, and rights against racial and gender discrimination in contracting.

Such an approach, to be clear, would not exclude classical paradigms of unconscionability from the category of unconscionable contracts, nor would it render market norms entirely irrelevant. As the classical interpretation insists, deviations from market norms can sometimes reflect objectionable subordination of people's basic interests in choosing their contractual relationships. A basic interests approach to unconscionability thus still applies to classically unconscionable contracts, but reinterprets them as contracts that objectionably subordinate people's basic interests in freedom of contract.

A basic interests approach would thus leave ample space for people to contract for nonstandard terms that reflect their personal preferences and chosen ends—no matter how significantly they deviate from the market norm—so long as the contract is compatible with the equal basic interests of the parties.

### 4. *Not Simply Public Policy*

A basic interests approach to unconscionability is accordingly similar to, but distinct from, the public policy defense to contract enforcement.

Under the common law of contracts, a court can refuse to enforce a contract on the ground that enforcement would violate public policy.<sup>288</sup> Public policy includes both judge-made public policy, such as the policy against restraints on trade, but also public policy as expressed in legislation, such as a policy against performing certain kinds of work without an appropriate license.<sup>289</sup> Like the public policy defense, a basic interests approach to unconscionability draws on publicly recognized values rather than market norms or the judge's personal sense of fairness to evaluate enforceability, and is concerned with the substance of the contract. But the public policy defense is importantly different in that it refuses enforcement for the sake of public policy—that is, as the *Restatement (Second) of Contracts* explains, for the sake of the “overriding interest of society.”<sup>290</sup>

In contrast, a basic interests approach draws on public values not simply to make contract law consistent with other areas of law, but to define and safeguard a conception of our individual interests in being treated as equals in our contractual relationships. Under the basic interests approach, contractual fairness is not simply a matter of refraining from aggressive or sneaky bargaining, or from offering surprising terms (although that may be part of the story). Rather, contractual fairness is about the parties treating one another as equals in view of the basic interests they have as persons. Public values under the basic interests approach thus govern the contractual relationship “from within,” informing and guiding judges in developing an interpersonal conception of contractual equality,<sup>291</sup> rather than supplying external limits on contracting as under the public policy defense.

### 5. *A Duty to Bargain in Good Faith*

Under the basic interests approach, the unconscionability doctrine accordingly directs contracting parties to view and treat one another as equals. Such an attitude toward the contracting process requires that the parties be more attuned to each other's interests than under the classical approach. Under the basic interests approach, it is not enough to treat potential contractors as free to choose their contracts, as the classical unconscionability doctrine suggests.<sup>292</sup> Contracting parties must also refrain from advancing proposals through means or with terms that are at odds with their respective basic interests. For example, they must not press their racial or gender advantage in bargaining, propose terms designed to impoverish their co-contractor, or otherwise advance terms that are incompatible with treating their co-contractor's basic interests as anything less than basic.

---

<sup>288</sup> See RESTATEMENT (SECOND) OF CONTRS. §§ 178-84 (AM. L. INST. 1981).

<sup>289</sup> See *id.*

<sup>290</sup> *Id.* ch. 8 intro. note; see also sources cited *supra* notes 253-254.

<sup>291</sup> Barbara Herman, *Morality Unbounded*, 36 PHIL. & PUB. AFFS. 323, 335-36 (2008).

<sup>292</sup> See *supra* section I.A.

To act in accordance with these principles, it will not be enough simply to verify whether the process or proposed terms do not violate a clearly established legal right. Parties should think more broadly and purposively, considering whether the process and proposals cohere with the fundamental interests that underpin extant basic rights. For example, it would not have been enough for the investors in *Contract Buyers League v. F & F Investment* to verify that the installment contracts were not illegal under Section 1982. They would also have needed to consider whether, in buying the properties at “panic prices” from white buyers fearing integration and reselling them for substantially higher prices under uncertain possessory conditions, they were pressing their racial advantage. They would then need to have considered whether the payment, forfeiture, and eviction-related terms were consistent with the buyers’ basic interests in having and maintaining a home.

To be clear, I do not mean to suggest that a basic interests approach directly imposes requirements on contracting parties’ thoughts. Instead, it is that a contractor’s actions need to be responsive to a broader set of considerations than under the classical interpretation.

This is also not to suggest that a basic interests approach would have placed the investors in *Contract Buyers League* under an affirmative duty to *form* a contract with the buyers. Nothing in the basic interests approach places individuals under general a duty to contract with one another. Rather, the basic interests approach holds that the law will enforce agreements only when they are consistent with the parties’ equal basic interests. So to the extent that people seek to contract with one another, the basic interests approach requires that their actions conform with this standard. Whether such a standard is met will, of course, not always be a straightforward matter. While it will often be clear what our basic interests are—such as basic interests against housing discrimination—whether they are implicated in a particular contract will sometimes depend on context and argument.

A basic interests approach thus does not eliminate the open-textured character of the unconscionability doctrine as it currently stands. But that is not necessarily a bad thing. The basic interests approach encourages private individuals to evaluate their contractual activity not simply as moves in a competitive game or as means in the pursuit of private ends, but as collaborations between equals. It thus discourages the kind of tunnel vision associated with the exclusive pursuit of self-interest and the view, now long rejected by antidiscrimination law, consumer protection law, and the like, that the market occupies a sphere outside of morality.

Thus, while the basic interests approach is perfectly compatible with the pursuit of self-interest in contracting,<sup>293</sup> the approach recommends

---

<sup>293</sup> Indeed, classical contract law itself offers ample resources for concluding that we have a publicly recognized basic interest in being able to pursue our own, individually defined, interests through contracts. For a liberal egalitarian argument for this position in the context of employment contracts, see Sabine Tsuruda, *Good Faith in Employment*, 24.1 THEORETICAL INQUIRIES L. 206, 211-13 (2023).

attentiveness to how the contracting process, including the proposed terms, implicates a co-contractor's basic interests. Such attentiveness does not require thinking and acting as a fiduciary but rather treating potential co-contractors in accordance with their fundamental and hence equal rights and interests.

Under the basic interests approach, the unconscionability doctrine would therefore bring something akin to the ethos of collaboration required by the duty of good faith performance into the context of bargaining.<sup>294</sup> The duty of good faith performance directs parties to be attentive to one another's shared contractual purposes and legitimate expectations.<sup>295</sup> The basic interests approach similarly directs prospective contractors to be attentive to each other's legitimate expectations, where their legitimate expectations include being treated in ways that cohere with their basic interests as free and equal persons.

### *B. Developing a Basic Interests Interpretation of Unconscionability*

Adopting a basic interests approach to unconscionability would thus mark a significant departure from the classical interpretation, eliminating the requirement of formation defects and supplying a new standard for evaluating fairness in both the process and resulting terms as needed. But a judge would not be without legal resources for interpreting and developing the doctrine along these lines. While a full treatment of how to anchor and develop a basic interests approach in law is not possible here, a brief discussion of a common approach to unconscionable arbitration agreements might offer some insight as to how such a project might be successfully undertaken.

#### *1. Arbitration and Inalienability*

The idea that a contract can be objectionably subordinating because of the way it compromises a party's basic interests is not foreign to the unconscionability doctrine. Indeed, as I have suggested, that idea is implicitly at work in the classical interpretation of unconscionability. It is just that the interpretation takes a narrower view of what basic interests are relevant for purposes of contract law.

The jurisprudence on unconscionable arbitration agreements offers a second, potentially more generative, example of how a basic interests

---

<sup>294</sup> Linking the unconscionability doctrine to good faith bargaining thus coheres with the *Restatement (Second) of Contract's* remark that the unconscionability doctrine might be thought of as partially defining bad faith bargaining, and the *Restatement's* placement of the unconscionability doctrine in the same chapter as the duty of good faith performance, rather than alongside the duress defense. See RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981).

<sup>295</sup> *Id.* § 205 cmt. a; U.C.C. §§ 1-201(b)(20), 2-103(1)(b) (AM. L. INST. & UNIF. L. COMM'N 2022).

approach might already be located and further developed in the law. A common category of “unreasonably favorable” terms includes terms that operate to the serious detriment of the disadvantaged party’s legal rights or other publicly recognized basic interests. This approach is exhibited in cases where courts have found that arbitration agreements are unconscionable. Here, courts will typically look to see whether the contracted-for arbitration process can vindicate the underlying legal right or basic interest. For example, a common basis for holding that an arbitration agreement is unconscionable is that the agreement erects financial and other similar barriers to vindicating consumer protection rights,<sup>296</sup> antidiscrimination rights,<sup>297</sup> and accessing justice more broadly.<sup>298</sup>

This approach to unconscionable arbitration agreements thus looks not to the judge’s moral sense or to market norms, but to a public conception of which rights and interests are inalienable. Such an approach can thus sidestep the worry, associated with reasonableness standards for fairness, that contractual fairness will depend on the judge’s personal sense of conscience or private views of what values contracts should implement, such as economic efficiency.<sup>299</sup> Instead, the approach to unconscionable contracts can be understood to rest on a more liberal and egalitarian conception of contract law, according to which contract law supplies not merely a framework for enforcing voluntary obligations, but more broadly supplies our public principles for legitimately collaborating with and enlisting the help of others in pursuing our own ends.

The approach to unconscionable arbitration agreements thus offers a promising starting point for developing a basic interests interpretation of the unconscionability doctrine. But this arbitration jurisprudence has two important, though not insurmountable, limitations. First, this jurisprudence still typically operates within unconscionability frameworks that require a defective formation process.<sup>300</sup> Implementing a basic interests approach to unconscionability would require abandoning that requirement. Second, to the extent that arbitration jurisprudence requires that the relevant basic interest is recognized as a legal right, it is likely too limited to deal with cases of racial subordination. This is in part because of the changing landscape

---

<sup>296</sup> See, e.g., *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (holding that a class action waiver in a mandatory arbitration agreement was unconscionable because the amount of individual recovery relative to the costs of arbitration would discourage individuals from seeking to vindicate any legal claims).

<sup>297</sup> See, e.g., *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 208 (3d Cir. 2010) (finding that an arbitration agreement’s fee splitting provisions, filing requirements, and arbitrator selection processes were at odds with Title VII’s remedial purposes and therefore substantively unconscionable).

<sup>298</sup> See, e.g., *Narayan v. Ritz-Carlton Dev. Co., Inc.*, 400 P.3d 544, 556 (Haw. 2017) (finding an arbitration agreement substantively unconscionable because the terms “impair[ed] the Homeowners’ ability to investigate and pursue their [legal] claims”).

<sup>299</sup> See *supra* section III.D.2.

<sup>300</sup> See *supra* section III.D.1.

of antidiscrimination law, and the increasing insistence on a colorblind and comparator-centered interpretation of antidiscrimination law that, as was evident on remand in *Clark v. Universal Builders* and recent U.S. Supreme Court jurisprudence, is underinclusive with respect to objectionable racial subordination.<sup>301</sup>

## 2. *A Common Law of Equal Basic Interests*

To be sure, if the range of relevant basic interests is to extend beyond recognized legal rights, then the standard for unconscionability will be in some respects open-ended. But that is not necessarily problematic. Just because a value has not been fully implemented in the law does not mean that it has no anchor in law. Nor does it mean that the value is unavoidably subjective. Consider, for example, the value of racial equality in contracting, which is not exhausted by statutes such as Section 1982.<sup>302</sup>

Further, specifying how values such as racial equality apply to contractual relationships through common law adjudication would help ensure that democracy's basic equality and autonomy commitments are appropriately identified and developed in interpersonal contexts. Developing a common law of equal basic interests might thus help to uncover ways in which extant statutory, and perhaps even constitutional, understandings of equality are needlessly narrow.

For example, it might help to uncover, as this Article has argued, that racial discrimination is not merely comparative—that it is not merely about members of one group being treated unjustifiably worse than the members of another group. Racial discrimination can also, perhaps even centrally, be a matter of whether one's basic interests are recognized as basic to begin with, and it might be a feature of racial discrimination that simply no group is similarly situated.<sup>303</sup> A common law of equal basic interests could thus enrich our understanding of discrimination and why it is wrong.

## 3. *Remaining Questions*

The basic interests approach outlined in this Part is by no means complete. As I have argued, the scope and content of our basic interests require additional argument and development. I have also not addressed whether a basic interests approach requires any changes to the remedial structure of unconscionability. For example, does (or should) the approach sometimes require not only refusing enforcement, but disgorging discriminatory or

---

<sup>301</sup> See *supra* section III.A.

<sup>302</sup> See *supra* section III.A.

<sup>303</sup> See *supra* section III.A. (explaining how differences between white and Black neighborhoods precluded Black buyers in Chicago from showing that their installment contracts were unconscionable).

otherwise unfairly gained profits? These are matters that require a more focused and extensive treatment than is possible here.

Even so, the fact that such inquiries are outstanding need not preclude a judge from extending the general approach to unconscionable arbitration agreements to other contractual contexts, as the basic interests approach recommends. The common law rarely, if ever, begins with a fully specified legal standard, instead giving that standard content and refining its broader purposes through case-by-case adjudication. In the particular context of the basic interests approach, that would likely be a good thing. Case-by-case development of a basic interests approach can provide an incremental way of charting a new doctrinal path. Such an approach can thus guard against the risk of circumscribing the doctrine too narrowly—or casting its net too widely—upfront. Attentiveness to people’s individual experiences of contracting can in turn help judges to see how basic interests can be implicated in ways that might not be evident from a position of privilege. For example, it might be hard for judges to see how purchasing on installment credit can implicate racially significant and basic interests in having a home without Ora Williams’s contracting experience.

In advancing a basic interests approach, my aim has thus been to offer a starting point for doctrinal evolution, not a map, consonant with the typical ways in which the common law develops over time.

### *C. Contractual Equality, Revisited*

The basic interests approach to unconscionability, and the problematic treatment of racial inequality that motivates the approach, thus indicate that contract law has an essential role to play in preventing and remedying objectionable social inequality. That is not just because contracts impact a society’s broader distribution of goods and wealth, but because contractual relationships are also sites for racial inequality and other types of objectionable inequality. In order for a society to recognize its members’ weighty claims to participating in commercial and collaborative life as equals—free from the encumbrances of discrimination—it must interpret the unconscionability doctrine to vest people with the means to resist racial discrimination and other like forms of subordination in their contractual relationships. Before closing, this section considers how the basic interests approach to unconscionability creates such rights and, in turn, reflects a more liberal and egalitarian conception of contractual equality than classical unconscionability.

#### *1. From Conscience to Right*

Unlike the classical unconscionability doctrine, a basic interests approach does not require victims of discrimination to highlight their powerlessness to obtain relief from racially subordinating contracts. While the approach does not preclude such a means of obtaining relief, it reinterprets

the unconscionability doctrine as establishing a right to being free from legally sanctioned interpersonal subordination. Under the basic interests approach, subordination is not limited to highly defective formation processes. Contractual subordination can also inhere purely in the ways in which the contract vests one party with authority over the other parties' ability to protect and vindicate their basic interests.

By relocating the locus and basis for a finding of unconscionability, a basic interests approach can avoid a common worry about the unconscionability doctrine: namely, that it is paternalistic.<sup>304</sup> The grounds for refusing enforcement under a basic interests approach do not include that the exploited party did not know what was in their best interests, or exercised faulty judgment in contract formation. Although such facts can be relevant, they are relevant when and because they indicate that enforcement would be incompatible with the equal basic interests of the parties.

For example, in holding that the contracts in *Williams* and *Contract Buyers League* are unconscionable, a court would communicate that enforcement is at odds with the buyers' and Williams's basic interests in having a home and in participating in commercial life as an equal. Such an approach thus does not create a new category of legal disadvantage, but rather a right to resist exploitation and subordination made possible by racial discrimination and other forms of inequality that are incompatible with democracy's commitment to the equality of persons.

This approach also avoids the related worry that acknowledging systemic disadvantage is incompatible with giving "equal validity" to contracts, irrespective of the parties' social positions.<sup>305</sup> The focus of the basic interests approach is not on bargaining power inequalities, but on the status of the co-contractors' basic interests under the contract. For example, in *Contract Buyers League*, it is not the fact that the buyers were Black or disadvantaged in the housing market due to racial residential segregation that would ground their claim of unconscionability under a basic interests approach.<sup>306</sup> Rather, it is that contract enforcement would thwart the contract buyers' basic interests in being free from housing discrimination.<sup>307</sup>

Thus, under a basic interests approach, it is false that racial inequality renders Black people less able to bind themselves legally. The approach instead holds that people are not entitled to the law's assistance in exploiting racial advantage, or in otherwise exercising legal authority over another person to the detriment of their basic interests.<sup>308</sup>

---

<sup>304</sup> See sources cited *supra* note 68.

<sup>305</sup> *In re Clark*, 1 Blackf. 122, 123 (Ind. 1821); see also Epstein, *supra* note 57, at 304-05; *supra* section I.B.

<sup>306</sup> See *supra* section II.A.

<sup>307</sup> See *supra* section II.A.

<sup>308</sup> I argue elsewhere that this project of realizing basic equality in legal and social institutions is a central project of liberal democracy. See Sabine Tsuruda, *Working as Equal Moral Agents*, 26 LEGAL THEORY 305, 309-13 (2020).

## 2. *The Assumption of Free and Equal Contractors*

A basic interests approach to unconscionability accordingly points to a different conception of free and equal contractors and the law's role in giving effect to that assumption. Like the classical interpretation, the basic interests approach creates extensive legal space to pursue a variety of privately determined projects, values, and ends through contracts. But the basic interests approach also requires that a person pursue those aims in ways consistent with people's fundamental and hence equal entitlements to doing so and their legitimate expectations in a democratic society.

Pressing one's racial advantage in a discriminatory society, and offering and later seeking to enforce discriminatory terms, are paradigmatic ways that a person can fail to meet these requirements. Pressing one's racial advantage is antithetical to the respect that is owed to an equal. Offering discriminatory terms is also inconsistent with our equal entitlement to engage in "creative commerce" and social life more broadly.<sup>309</sup> And seeking to enforce discriminatory terms is incompatible with our legitimate expectations to not occupy a legally subordinate status.

By deploying a basic interests approach to unconscionability, contract law would therefore not merely assume that people are free and equal in their possession of basic entitlements and abilities. The doctrine would also play a core role in actually making it the case that people relate as free and equal in contractual life.

## 3. *Contract Law as Civil Rights Law*

Deploying a basic interests approach to unconscionability can thus rescue the emancipatory promise of classical contract law from its anemic conception of unconscionably.<sup>310</sup> The basic interests approach elaborates and reaffirms our fundamental right to treatment as an equal in contexts where that right is most clearly imperiled—social conditions of racial inequality and other similarly objectionable social inequalities. Interpreted in accordance with the basic interests approach, the unconscionability doctrine would supply a principle that puts such perils at front of mind in bargaining. If the resulting contract is nonetheless discriminatory, or otherwise subordinating, the doctrine would supply a right to resist enforcement, and thus vindicate any basic interests undermined by the contract or contracting process. In both its ex-ante and ex-post functions, the unconscionability doctrine could thus help to make it the case that co-contractors relate as equals. Supported by such an unconscionability doctrine, contract law would therefore play a core role in interpreting and implementing civil rights in people's transactions and collaborations with each other.

---

<sup>309</sup> WILLIAMS, *supra* note 1, at 148.

<sup>310</sup> See *supra* Parts I-II.

## CONCLUSION

This Article has argued that the justifiability of contract law turns on its treatment of racial discrimination and other similarly objectionable social inequalities. The common law of contracts classically enforces discriminatory contracts, and statutory antidiscrimination law is currently an uncertain basis for regulating discrimination in contracting. Even if statutory law could be reformed, the common law of contracts is one of the main institutions that sets standards for interpersonal bargaining, transacting, and collaborating. The enforceability of discriminatory contracts at common law thus suggests that exploitation of racial inequality is a suitable form of bargaining, and that racial discrimination is objectionable merely because of the negative externalities it produces.

Classical contract law's interpretation of the unconscionability doctrine is the primary locus of this problematic treatment of racial inequality. The doctrine narrowly conceptualizes an unfair contract as an extremely nonstandard contract obtained through hoodwinking or by otherwise circumventing the disadvantaged party's decision-making abilities. But racial inequality in contractual relationships is often the market norm, and bargaining disadvantages occasioned by racial discrimination are not necessarily, or even typically, incapacitating. Although numerous states have loosened these classical requirements in various respects, the classical interpretation still supplies many of unconscionability's paradigms, and it is not clear whether a more attractive approach has fully emerged.

Drawing on lessons from this extended critique, this Article developed and proposed a "basic interests" approach to unconscionability. Under this approach, the unconscionability doctrine would ask whether contract enforcement is consistent with treating the parties as equals—not just with respect to their capacities for choice, but with respect to their basic interests and inalienable rights, including their antidiscrimination rights. This Article then closed by identifying how such an approach might be further developed in ways to enable co-contractors to relate as equals, notwithstanding their potentially unequal social positions.

