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Installment Housing Contracts: Presumptively Unconscionable

Megan S. Wright*

Using the case of the Contract Buyers League and the prevalence of colonias, where many homes are purchased on contract, this Article analyzes installment housing contracts with regard to the common law defense of unconscionability. Not only do the circumstances leading to such contracts, the terms of the contract, and the effects on buyers of the contract often meet the doctrinal definition of unconscionability, but these contracts are also implicated in racial-ethnic inequality. This Article thus argues that courts should view installment housing contracts as presumptively unconscionable.

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INTRODUCTION

In the 1960s, in some Chicago neighborhoods, buying houses on contracts was the default way of purchasing a home when working class, African-American families were excluded from traditional sources of financing with lending institutions. During this time, opportunistic, white sellers inflated initial housing prices, misled buyers about the extent of repairs the homes needed in order to be up to code, and offered interest rates on the contract that were higher than mortgage interest rates.¹ Contract buyers worked multiple jobs to keep up with the housing bills, and often were unable to meet their monthly contract obligations.² Because legal equity did not transfer until the completion of the contract, when the buyers breached—sometimes years into the contract—sellers used Illinois law, which had very favorable forfeiture provisions that permitted sellers to evict a buyer after even just one missed payment, to regain possession

1. For a journalist's detailed report from this time period, see James Alan McPherson, "In My Father's House There are Many Mansions—and I'm Going to Get Me Some of Them Too": *The Story of the Contract Buyers League*, THE ATL. MONTHLY: A MAG. OF LIT., SCI., ART, AND POL., January-June 1972. For first person accounts from students and activists involved in the social movement and subsequent litigation, see Alan Boles, *The Contract Buyers League: A Personal Evaluation*, 1 YALE REV. L. & SOC. ACTION 84 (1970-1971); Gregory L. Colvin, *The Contract Buyers League: The Legal Listening Process*, 1 YALE REV. L. & SOC. ACTION 88 (1970-1971); Jeffrey M. Fitzgerald, *The Contract Buyers League and the Courts: A Case Study of Poverty Litigation*, 9 LAW & SOC'Y REV. 165 (Winter 1975); John R. MacNamara, *The Contract Buyers League: A View from the Inside*, 1 YALE REV. L. & SOC. ACTION 70 (1970-1971). For a brief summary of the events, and how they matter for current racial inequality, see Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>. For a detailed historical analysis of the events, see Beryl Satter, *FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA* (2009).

2. McPherson, *supra* note 1, at 54; Satter, *supra* note 1, at 4-5.

of the property after 30 days.³ Sellers then sold to another family on contract, continuing the cycle of profit-seeking made possible by exploiting working poor minorities. Some sources cite annual returns to sellers of 30-40 percent.⁴

In the late 1960s through the mid 1970s, a group called the Contract Buyers League (CBL) brought class action lawsuits against installment housing contract sellers, several federal housing agencies, and savings and loans institutions, charging, among other claims, unconscionable contracts, fraud, and violation of civil rights.⁵ The CBL was comprised of African Americans in Chicago who had purchased their homes on installment contracts, at vastly inflated prices, from white sellers because there were no other housing options available to them because of racist lending policies and the existence of a dual housing market. Ultimately, the CBL lost their court battles, although they did have some extra-legal victories.

This Article revisits the case of the CBL, and for the first time in legal scholarship connects it to contemporary instances of racial-ethnic minorities' use of installment housing contracts to obtain housing. Through original data analysis, this Article demonstrates that over the last decade, buying homes on contract is more prevalent among minority homebuyers. Unlike in mid-twentieth century, however, now Hispanics are the group most likely to buy homes on contract. I argue that in both the historical and contemporary case of racial-ethnic minorities buying homes on contract, the conditions under which the contract is entered, the terms of the contract itself, and the effect of the contract meet the doctrinal definition of unconscionability. After careful analysis, I thus conclude that courts should view installment housing contracts as presumptively unconscionable, which is the first time in contemporary legal scholarship that an argument has been put forward for viewing a *category* of contracts as unconscionable. If courts viewed such contracts as presumptively unconscionable, racial-ethnic inequality in this domain may be mitigated.

The Article proceeds as follows. Part I of this Article examines the conditions that led to 85 percent of black Chicago homebuyers purchasing homes on contract in the middle part of the 20th century,⁶ and the subsequent legal fight against the sellers. I argue that the court hearing the CBL case was wrong to dismiss the claim of unconscionability given the circumstances that existed when these installment housing contracts were formed, the terms of the installment housing contracts, and the effect of enforcing the installment housing contracts. The court failed to properly apply the doctrine of unconscionability, and thus the CBL plaintiffs began trial in a slightly weaker position.

3. MacNamara, *supra* note 1, at 72; Satter, *supra* note 1, at 281.

4. See MacNamara, *supra* note 1, at 72-73.

5. For a full description of all claims, see Contract Buyers League v. F & F Inv., 300 F.Supp. 210 (N.D. Ill. 1969).

6. Satter, *supra* note 1, at 38.

This Article is not solely an historical analysis, however. In Part II of the Article, I argue that although legislatures and courts have modified how they treat installment housing contracts—a switch from enforcing forfeiture clauses to treating such contracts as mortgages and going through the foreclosure process⁷—there is still room for the common law defense of “unconscionability” to breach of these inherently inequitable contracts. I provide and analyze data that show that the purchasing of homes on contract is still a racialized phenomenon, and that in some parts of the United States, the practice resembles what occurred in mid-century Chicago. Given this, in Part III, I argue that installment housing contracts should be viewed by courts as *presumptively unconscionable*, a presumption that can be rebutted. Finally, I address objections to my argument that courts should treat installment housing contracts as presumptively unconscionable.

I. RACIALIZED HISTORY OF INSTALLMENT HOUSING CONTRACTS

A. *Installment Housing Contracts and Race in Mid-20th Century Chicago*

“*In a free economy a house is worth what anyone will pay for it.*” –Contract seller who paid \$14,000 for a home he sold to black buyers for \$25,500. He had 50 similar contracts.⁸

In mid-20th century Chicago, 85 percent of African Americans who purchased homes bought their homes “on contract” from white sellers.⁹ Known as “installment housing contracts,”¹⁰ this type of home purchase was a form of seller-based financing. A buyer would pay a down payment on the home, and then pay monthly installments until the contract price of the home was paid off, at which point the seller would transfer the title to the buyer. This arrangement made it possible for blacks, who were unable to obtain mortgages due to racist lending policies, to buy homes. In the words of one judge:

The contract is frequently called a “poor man’s mortgage” because the vendor, as with a mortgage, finances the purchaser’s acquisition of the property by accepting installment payments on the purchase price over a period of years, but the purchaser does not receive the benefit of those remedial statutes protecting the rights of mortgagors.¹¹

7. See, e.g., Grant S. Nelson, *The Contract for Deed as Mortgage: The Case for the Restatement Approach*, *BYU L. REV.* 1111 (1998).

8. Satter, *supra* note 1, at 258.

9. *Id.* at 38.

10. These contracts are also known as “contract for deed” or “land contracts” as well as a variety of other names.

11. *Ellis v. Butterfield*, 570 P.2d 1334, 1336-37 (1977).

1. *Injustice due to markups*

There were several problems for the buyers of installment housing contracts, however. First, the sellers priced the homes significantly higher than their appraised value¹² in order to maximize profit. It was common practice for speculators/mass installment housing contract sellers to approach a white homeowner in a “changing,” “integrated,” or “red-lined” neighborhood, and offer cash for their home.¹³ The offer was usually for less than the value of the home.¹⁴ The white homeowner, either out of fear of declining property values because of the presence of black neighbors or out of a racist dislike of black neighbors, would take the offer so they could move to white suburbs of Chicago.¹⁵ Then, the white speculator would immediately sell the home on contract to a black family for several thousand dollars more than the speculator’s purchase price.¹⁶

Typically, white seller-speculators would sell homes for “100 to 300 percent markups.”¹⁷ So, for example, a speculator may purchase a property from a white owner for \$4,300 and a week later sell to a black buyer for \$13,900.¹⁸ Or, a speculator would buy a property for \$14,000 from white homeowner, and three days after that sale, sell it to a black family for \$25,500.¹⁹ Both of these examples are drawn from actual transactions. In the latter example, immediate move-in was conditioned on a \$1,500 down payment, with monthly payments over 19 years at 7% interest.²⁰ This resulted in a final price of \$44,820 of which \$19,320 was interest.²¹ If the black family had been able to get a mortgage, they would have paid \$20,740 of which \$5,740 would be interest.²² The average profit for these seller-speculators was 75 percent.²³ The profit was immense because the speculators were buying low and selling high, and were doing so over and over and over again.²⁴ Often the black homebuyers were unaware of the difference between the appraised value of the home and the price for which

12. Satter, *supra* note 1, at 69.

13. *Id.* at 71-72. The speculators even introduced blacks to white neighborhoods to scare white homeowners into selling their homes for lower than the appraised value. This practice was known as “blockbusting.” See also Fitzgerald, *supra* note 1, at 166.

14. Satter, *supra* note 1, at 71-72.

15. *Id.*

16. This is well documented in all the sources cited in note 1.

17. Satter, *supra* note 1, at 44.

18. *Id.* at 3. Other examples: Buying for \$3,000 and selling for \$11,900; buying for \$3,500 and selling for \$9,950; buying for \$17,000 and selling for \$28,000. *Id.* at 10, 65, and 64.

19. MacNamara, *supra* note 1, at 72.

20. *Id.*

21. *Id.*

22. *Id.*

23. Satter, *supra* note 1, at 11. Also, an economist who took a sample of contracts for deed during this time period found that average price inflation was 69% or \$5,300 in 1957-59 dollars. Lynn Beyer Sagalyn, *Mortgage Lending in Older Urban Neighborhoods: Lessons from Past Experience*, 465 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 98, 102 (Jan. 1983).

24. Satter, *supra* note 1, at 6.

they were purchasing it.²⁵ Additionally, black buyers were not aware that the real estate agent brokering the sale of the home often was the recent owner of the home.²⁶

2. *Injustice due to forfeiture clauses*

Second, when buying a home on contract, the buyer did not build any equity in the home until the contract was paid in full.²⁷ Additionally, the contracts contained forfeiture clauses that meant if even one installment payment was missed, resulting in a buyer breach, the seller could use Illinois Forcible Detainer and Entry Law to quickly move for eviction and repossession.²⁸ The Forcible Detainer and Entry Law only provided buyers two defenses to breach of contract: that they had actually made their housing payment or that they had not received notice of the eviction proceedings.²⁹ While the buyer could appeal an eviction decision, they would have to post a bond of several thousand dollars in order to do so, which many could not afford.³⁰ If the buyer lost in court, the seller would then retain the buyer's down payment, and any payments that had been made—even if the buyer was years into the contract. The seller then repossessed the home, and could then immediately sell it to another black family, which resulted in great profit.³¹ In one case, a seller-speculator had twenty repossession actions at any given time.³² The Illinois Forcible Detainer and Entry Law streamlined the eviction and repossession process; coupled with the high likelihood of buyer breach, this law made the business of selling homes on contract very attractive to sellers. Profits were often in excess of three times the original investment by the seller.³³ As one seller stated, "If anyone who is well established in this business in Chicago doesn't earn \$100,000 a year, he is loafing."³⁴

25. *Contract Buyers League v. F & F Inv.*, 300 F.Supp. 210, 225 (N.D. Ill. 1969) (discussing allegations of sellers concealing appraisal values).

26. *See Satter*, *supra* note 1, at 3, 10.

27. *Id.* at 281; *MacNamara*, *supra* note 1, at 72.

28. *Fitzgerald*, *supra* note 1, at 168.

29. *Id.* at 174. At this time, an attorney built a case to challenge the Forcible Detainer and Entry Law as unconstitutional because it did not permit buyers to challenge the contracts using typical defenses to breach of contract. Ultimately, the Illinois Supreme Court held that the contract buyers should be able to raise equitable defenses. *Rosewood Corp. v. Fisher*, 263 N.E. 2d 833, 841 (1970) ("Should a contract purchaser not be permitted to defend upon the very contract upon which the seller relies, in our judgment the result could be, as argued, a direct denial of constitutional rights and an indirect denial of civil rights. We believe that contract buyers may plead equitable defenses and be given equitable relief if it is established that the contracts are unconscionable or in violation of civil rights as here contended."), This ruling did not help the majority of those involved in CBL, however. *Satter*, *supra* note 1, at 290, 307.

30. *Satter*, *supra* note 1, at 294-95. If the buyer wanted to appeal the court's decision in eviction proceedings, they had to pay a prohibitively expensive bond. For example, a \$600 delinquency may require \$7,500 to appeal. *MacNamara*, *supra* note 1, at 77-80.

31. *Satter*, *supra* note 1, at 4.

32. *Id.*

33. *See Satter*, *supra* note 1, at 6.

34. *Id.* at 5.

While reasonable people can disagree about how much profit is conscionable,³⁵ in the 1960s, white seller-speculators were getting returns of 30 to 40 percent a year from their installment housing contracts with black buyers.³⁶ As argued by the Chicago Sun-Times, “This kind of transaction goes well beyond the bounds of good business practice and reasonable return on investment.”³⁷ However, from the sellers’ perspective, this was smart capitalism. As one of the sellers in late 1960s Chicago said, “I couldn’t believe it when they said I had cheated people . . . Isn’t this the American system, where we make as much profit as we can?”³⁸

3. *Injustice due to hidden repair costs*

Third, the homes bought on contract were often old, and needed repairs in order to be up to city housing codes.³⁹ The sellers did not inform the buyers of the required repairs before selling,⁴⁰ and so buyers would find themselves stuck with extensive and expensive home repairs on top of their already high monthly installment payments.⁴¹ Although the buyers did not have legal title to the homes, they were still responsible for maintenance, and paying fines if the house was not up to code.⁴² Additionally, the sellers would sometimes tack on unexplained fees to the housing contracts, making them even more expensive.⁴³

One commentator has recently described the installment housing contract phenomenon of this time period as “a predatory agreement that combined all the responsibilities of homeownership with all the disadvantages of renting—while offering the benefits of neither.”⁴⁴ Another has described it by writing, “Like homeowners, they were responsible for insurance and upkeep—but like renters they could be thrown out if they missed a payment.”⁴⁵ The adults in black families often worked multiple jobs as they struggled to keep up with their

35. Lawyers representing the CBL proposed the following formulation for fair land contracts: “price paid by the seller for the property plus 15 percent of the cost.” McPherson, *supra* note 1, at 59.

36. *Id.* at 72.

37. *Id.* at 76.

38. McPherson, *supra* note 1, at 59.

39. Satter, *supra* note 1, at 3, 186.

40. *Contract Buyers League*, 300 F.Supp. at 225 (discussing allegations of sellers concealing building code violations); McPherson, *supra* note 1, at 54.

41. Satter, *supra* note 1, at 186.

42. Satter, *supra* note 1, at 186; McPherson, *supra* note 1, at 54.

43. *See, e.g.*, McPherson, *supra* note 1, at 54-55 (describing how in one case, a seller added a \$1,500 fee to the contract once half of the payments had been made and then later described it as “insurance” although the buyers already paid insurance as part of their contract; the buyers described it as “blackmail”).

44. Coates, *supra* note 1, at 57.

45. Satter, *supra* note 1, at 57. *See also* Nelson, *supra* note 7, at 1112 (buyers on contract were also responsible for property taxes).

monthly installments, which were often over half of their family income.⁴⁶ This meant there was less time to maintain the quality of homes. Additionally, many families had to take in tenants for extra income, leading to overcrowding in homes that were already physically decaying; some have argued that this led to the slow destruction of black communities.⁴⁷

If the problems were so numerous, and the benefits so few, why would so many African Americans enter into these contracts? The answer is simple: they had no other choice. If blacks wanted to be homeowners, buying on contract was the only way. While whites could obtain low-interest mortgages, the same opportunity was not available to blacks.⁴⁸ In fact, the Federal Housing Administration (FHA) actively discriminated against blacks by labeling any neighborhood in which African Americans lived “risky” and refusing to insure loans or mortgages a bank might otherwise be willing to make.⁴⁹ Furthermore, if African Americans wanted housing of any kind during this time period, buying on contract was often the only option because there was such a severe housing shortage in Chicago due to the mass black migration from the South and the racial restrictions on blacks living in the newly built suburbs.⁵⁰ As one economist described it, “Under these conditions, contract sellers had some monopoly power which allowed them to charge black families the higher, inflated prices.”⁵¹ In sum, blacks entered into these contracts with white sellers because there was no other option to obtain one of the most basic necessities of life: housing.

B. Contract Buyers League Formation and Subsequent Litigation

In the mid to late 1960s, some Jesuit Catholics in the Chicago area decided, as part of their commitment to community service, to determine the needs of local African-American communities, and then to organize the community to meet these needs.⁵² As they went from house to house talking to families, they discovered that one of the biggest problems facing the community was installment housing contracts.⁵³ As described above, black families were struggling to retain possession of their homes, given the burden of their monthly housing payments. At a series of community meetings, for the first time,

46. See Fitzgerald, *supra* note 1, at 168. Many buyers’ housing payments were between 35 and 45 percent of their earnings; at the time, the FHA viewed “payments of more than 25% to be excessive.” MacNamara, *supra* note 1, at 72.

47. Satter, *supra* note 1, at 5; Fitzgerald, *supra* note 1, at 168.

48. Satter, *supra* note 1, at 41-42.

49. *Id.*; MacNamara, *supra* note 1, at 74; McPherson, *supra* note 1, at 53-54. This was FHA policy prior to 1967. Many banks, lending organizations, and insurance providers also followed FHA policy.

50. Satter, *supra* note 1, at 36-37.

51. Sagalyn, *supra* note 23, at 102. The author also notes that “many of the risks to the contract buyer were neither negotiable nor subject to the laws of supply and demand.” *Id.* at 103. This again demonstrates how little choice the buyers actually had in these circumstances.

52. McPherson, *supra* note 1, at 55.

53. See, e.g., Satter, *supra* note 1, at 239.

neighbors spoke together about their experiences of buying homes on contract, the unfair practices of white seller-speculators, and the problems they were having because of it.⁵⁴

The community organized the Contract Buyers League (CBL) in the late 1960s in order to address the problems of installment housing contracts. This social movement was a coalition of socially progressive Catholics, black members of the Lawndale neighborhood in Chicago,⁵⁵ where fifty percent of the homes were purchased on installment contracts,⁵⁶ and white college students. The CBL engaged in collective action meant to pressure sellers to renegotiate the terms of the housing contracts so that they were not so unfavorable for African-American buyers.

The CBL engaged in activities like picketing and distributing literature at the homes and workplaces of the white sellers, in an attempt to humiliate the sellers into renegotiation; they also picketed banks and the Chicago FHA.⁵⁷ The buyers “proposed a ‘fair price’ formula, which consisted of his original purchase price plus an additional ‘fair profit’ of 15 percent. They wanted credit for what they had already paid on the principal and their interest rates lowered to what they would have been on a standard mortgage.”⁵⁸ The buyers wanted each contract debt reduced by at least \$10,000.⁵⁹ The buyers’ proposal would have cut sellers’ profit by at least half.⁶⁰

Additionally, the CBL organized payment strikes where a critical mass of contract buyers refused to make monthly payments to sellers.⁶¹ The first payment strike involved 600 of 2,000 eligible households.⁶² When the sellers responded by continuing the process of quick eviction and property possession, the CBL physically resisted evictions, making them difficult for the sheriff to carry out.⁶³ They also raised money to appeal evictions,⁶⁴ and moved evicted families back into their homes.⁶⁵

54. *Id.* at 242; McPherson, *supra* note 1, at 56-58.

55. MacNamara, *supra* note 1, at 70-71, 74-75; McPherson, *supra* note 1, at 55-58.

56. McPherson, *supra* note 1, at 54.

57. Satter, *supra* note 1, at 246, 253; McPherson, *supra* note 1, at 58; MacNamara, *supra* note 11, at 75.

58. Satter, *supra* note 1, at 245.

59. *Id.*

60. This is the case if the estimate of 30 to 40 percent profit is accurate.

61. Boles, *supra* note 1, at 84-86; MacNamara, *supra* note 1, at 75-76; McPherson, *supra* note 1, at 68; Satter, *supra* note 1, at 271.

62. Satter, *supra* note 1, at 274.

63. Satter, *supra* note 1, at 298, 304; MacNamara, *supra* note 1, at 81; McPherson, *supra* note 1, at 74-75.

64. MacNamara, *supra* note 1, at 79.

65. *Id.* at 80-81; McPherson, *supra* note 1, at 74-75.

While some sellers did renegotiate individual contracts, especially in response to media pressure,⁶⁶ because many sellers refused to renegotiate, the CBL pressed forward, and with the help of progressive Chicago lawyers, decided to try the courts for relief. The CBL engaged in two lawsuits, both certified as class actions, and each one represented a different black Chicago neighborhood: the West Side lawsuit and the South Side lawsuit.⁶⁷ The buyers sued the sellers for: violation of The Civil Rights Act of 1866; violation of Federal Antitrust Laws; violation of the Illinois Antitrust Laws; violation of Federal Securities Laws; unconscionability; fraud; usury; and breach of implied warranty.⁶⁸ The plaintiffs asked the court for about \$40 million in damages.⁶⁹ They wanted to:

[have] their installment contracts reformed to reflect fair market value; [have] them declared void, with the sellers compelled to return to the buyers all that they had paid, plus 6 percent interest and minus a fair market rental for the years that the buyers had lived in the property; a payment of \$25,000 in punitive damages for each plaintiff; or a payment to each contract buyer of twice the amount that the buyer had paid on his or her installment contract.⁷⁰

The buyers also sued the banks because they would lend to white sellers, but not to black buyers.⁷¹

After class certification, the next hurdle was to see if the court would permit all of the claims in their complaint to move forward or if the judge would grant defendants' motions to dismiss on all counts, including motions to dismiss the banks as defendants and the CBL as plaintiffs. Of the initial claims, the judge permitted the following to go forward: violation of The Civil Rights Act of 1866; violation of Federal Antitrust Laws; and, violation of the Illinois Antitrust Laws.⁷² Significantly, both for the CBL plaintiffs and for this Article, the judge would not allow the plaintiffs to argue that the installment housing contracts between white seller-speculators and black homebuyers were unconscionable. In the next section of this Article, I will argue that this was a wrong decision, given the doctrine of unconscionability.

66. Satter, *supra* note 1, at 63; McPherson, *supra* note 1, at 58-59. The Chicago Sun-Times editorial board wrote: "Although the holders of the contracts probably have the letter of the law on their side and could enforce their contracts in the courts, we urge them to negotiate. The buildings involved were often bought by speculators at low prices from white families fleeing changing neighborhoods, then immediately sold at tremendously inflated prices. Most of the speculators have already made a reasonable profit from these transactions, even though their contracts may have years to run. This kind of transaction goes well beyond the bounds of good business practice and reasonable return on investment." MacNamara, *supra* note 1, at 76

67. The West Side lawsuit was against sellers of used residential properties, and the South Side lawsuit was against sellers of new residential properties. MacNamara, *supra* note 1, at 75-76.

68. For a full description of all claims, see *Contract Buyers League*, 300 F. Supp. 210.

69. Satter, *supra* note 1, at 279.

70. *Id.*

71. *Id.* at 280.

72. *Contract Buyers League*, 300 F.Supp. at 216, 218. The class of plaintiffs was also redefined to account for the statute of limitations. *Id.* at 223.

The two lawsuits took years to result in a final judgment given multiple appeals. In both cases, however, the plaintiff buyers lost as they were unable to prove—to the satisfaction of a jury—that the sellers had violated The Civil Rights Act of 1866.⁷³ The West Side case, renamed *Wells v. F&F Investment*,⁷⁴ had an all-white jury, and by the time it went to trial, only 199 of the original 2,600 plaintiffs remained because many had settled with the sellers over time.⁷⁵ Additionally, the federal agencies were no longer defendants because there was no proof of discrimination for some agencies and because the statute of limitations had passed for others.⁷⁶ The South Side suit, called *Clark v. Universal Builders*,⁷⁷ also ended in a loss for the plaintiffs for similar reasons.

Despite the two court losses, the CBL was successful by other measures. Namely, between the start of the social movement and the end of the protracted litigation, and because of the public pressure the sellers faced, many did renegotiate the terms of the installment housing contracts with the buyers. CBL cites average buyer savings of \$14,000 after the renegotiations,⁷⁸ or an estimated total of two million 1970s dollars.⁷⁹ Additionally, because of public pressure, the FHA stopped “redlining” black or integrated neighborhoods, and some black families were able to convert their installment housing contracts into traditional mortgages.⁸⁰ Also, a fund was set up to pay for legal education of African Americans,⁸¹ and through the process, an entire community learned about mortgages, finance, contracts, and the legal process.⁸² Finally, the Illinois Forcible Detainer and Entry Law was declared unconstitutional, which meant that future buyers on contract would have more legal protections when facing eviction.⁸³

73. See Satter, *supra* note 1, at 321 for a discussion of these challenges. Direct evidence of discrimination was difficult to come by because some businesses only sold to blacks, so there was no white comparison group. Satter also hypothesizes that the jury was less sympathetic to the buyers because by the time they heard the case, \$25,000 seemed like a normal, rather than an inflated, price for a home. *Id.* at 367.

74. The case was previously named *Contract Buyers League v. F & F Inv.*, discussed *supra*.

75. Satter, *supra* note 1, at 346-47.

76. *Id.* at 348-50.

77. *Clark v. Universal Builders, Inc.*, 706 F.2d 204 (7th Cir. 1983).

78. Fitzgerald, *supra* note 1, at 170; Satter, *supra* note 1, at 376.

79. McPherson, *supra* note 1, at 80.

80. *Id.* However, as one scholar noted, when buyers got mortgages for the remainder of their contract balance, the sellers still profited because they got someone to pay for the entire price of the inflated contract. Satter, *supra* note 1, at 332.

81. McPherson, *supra* note 1, at 81.

82. *Id.*

83. Satter, *supra* note 1, at 287, 311-312 (describing how this legal victory permitted future buyers facing evictions to raise more defenses in court rather than the two the statute had permitted—lack of notice or evidence of payment).

C. Installment Housing Contracts and Unconscionability

1. Motion to Dismiss Unconscionability Claim in Contract Buyers League

When explaining why he granted the defendants' motion to dismiss the claim of unconscionability in the *Contract Buyers League* case, Judge Will failed to correctly apply the doctrine of unconscionability to the alleged facts. This section of the Article will examine the court's decision.

Judge Will wrote that "[t]he equitable concept of 'unconscionability' becomes meaningful always in the context of otherwise defined factors of inequality, deception and oppression."⁸⁴ He then cited Pomeroy as one authority to define unconscionability:

When the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentations, undue influence, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative.⁸⁵

His citation shows that the court was using the term "inequitable" in addition to "bad faith" in addition to "inadequacy of price" to define a contract as unconscionable. Thus, these three elements, when alleged in the plaintiff's complaint, should have been sufficient to deny a motion to dismiss the claim of unconscionability. Judge Will then continued to address the plaintiff's claim of unconscionability by writing:

Application of the doctrine requires extreme circumstances beyond what can be understood or implied from any of the allegations in this complaint. As already discussed, the complaint does not state the bare substance of a claim of fraud. Furthermore, plaintiffs' lack of education and lack of experience relative to defendants 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. Moreover, the general rule is that mere excessive price is not a sufficient circumstance to independently support a claim of unconscionability. Even the rare Illinois cases that consider a disparity in values exchanged as a sufficient independent circumstance involve egregious disparity well beyond what is alleged in this case.⁸⁶

However, as can be seen by this quotation, Judge Will did not conduct his analysis of unconscionability using Pomeroy's definition that he cited immediately prior. That is, he seems to focus on the lack of fraud (as legally defined) as evidence that there is an absence of bad faith, although the cited authority gives several other examples of bad faith that were present in this case

84. *Contract Buyers League*, 300 F.Supp. at 227.

85. *Id.* (quoting 3 Pomeroy, *Equity Jurisprudence*, 928, pp. 640-641 (1941)).

86. *Id.* (citation omitted).

by the judge's own findings (for example, concealment or misrepresentation of the appraisal value and building code violations).⁸⁷ Given the undeniable inequity plus the "excessive price" plus evidence of bad faith, these installment housing contracts were clearly—by Pomeroy's definition, which was partially relied upon by Judge Will—unconscionable.

Nevertheless, Judge Will dismissed the claim of unconscionability, without adequately analyzing the merit of this claim. Perhaps Judge Will thought the plaintiffs had a stronger claim under the Civil Rights Act.

Finally, plaintiffs have also alleged that due to the shortage of housing for negroes, plaintiffs were placed in a position of unequal bargaining power severe enough to render the contracts that resulted from defendants' exploitation of this situation unconscionable. But while the discriminatory exploitation of a system of de facto segregation is unlawful under the Civil Rights Act, the artificial shortage of housing for negroes does not constitute an appropriate foundation for application of the principle of unconscionability. As the principle is generally understood in the law of the State of Illinois, it does not normally extend to situations resulting from artificially contrived market conditions. By contrast, the economic substance of the injustice described in this complaint relates naturally to the concerns of the antitrust laws and the Civil Rights Act. While on the basis of some extreme situation of unequal bargaining power due to the conjunction of absolute need and dire shortage, a court might conceivably apply the doctrine of unconscionability, such circumstances are not described in the instant complaint and the necessarily awkward extension of the principle to support Count V of this cause would necessarily create a misfit in the law.⁸⁸

Judge Will did not seem to recognize that the description of the housing shortage due to racial discrimination, while a violation of the Civil Rights Act, is also a key element to the plaintiffs' claims of unconscionability. Understanding that "absolute need and dire shortage" create conditions where the buyers lacked choice, which is one aspect of unconscionability, requires both the correct application of Pomeroy and the examination of other sources that describe unconscionability.

2. *Definitions of Unconscionability*

Consulting other legal authorities can enrich our understanding of unconscionability.⁸⁹ One source of guidance for understanding

87. *Id.* at 225.

88. *Id.* at 227-28.

89. For a history of unconscionability doctrine prior to 1925 (the year the Federal Arbitration Act was passed), see David Horton, *Unconscionability Wars*, 106 N.W. U. L. COLLOQUY 13 (2011); Matthew S. Winings, *The Old, the Ignorant, and the Downright Shameful: A Study of the Parties and Circumstances of Early American Cases that Shaped the Legal Doctrine of Unconscionability*, 2005, available at

unconscionability is the Second Restatement of Contracts, which states the following:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.⁹⁰

From this Restatement, it is apparent that an entire contract can be unconscionable; a term in a contract can be unconscionable; or the effect of the contract can be unconscionable. The Restatement does not explicitly define unconscionability,⁹¹ however, and so examining the following notes and illustrations is helpful.

The first note adds some clarification. It directs an adjudicator to examine the:

contract or term . . . in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy.⁹²

This note suggests that examining the circumstances in which the contract in question is entered into and the effects of enforcing that contract is important when a decision maker is tasked with determining whether a contract or term is unconscionable. In other words, context matters.

The second note quotes from *Hume v. United States*,⁹³ to show that the historical conception of unconscionability is such that “a bargain was said to be unconscionable in an action at law if it was ‘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.’”⁹⁴ This conception of unconscionability calls to mind a “reasonable person” standard of assessing unconscionability, but such a standard

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=650822. For a general history of the doctrine, see Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor,”* 102 GEO. L. J. 1383 (2014); Carol B. Swanson, *Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359 (2001).

90. Restatement (Second) of Contracts, § 208 (1981). For a discussion of how judges should remedy unconscionable terms of a contract, see Omri Ben-Shahar, *How to Repair Unconscionable Contracts*, (University of Michigan Law School, Law & Economics Research Paper Series, Paper No. 07-023 and University of Chicago Law School, John M. Olin Law & Economics Research Paper Series, Paper No. 417), 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082926.

91. The lack of a clear definition, especially in the U.C.C., has been one of the biggest critiques of the unconscionability doctrine. Swanson, *supra* note 89, at 386-7.

92. Restatement (Second) of Contracts, § 208 (1981).

93. *Id.* (quoting *Hume v. United States*, 132 U.S. 406 (1889)).

94. *Id.*

does not provide much guidance when dealing with parties who deviate from the majority in important ways, such as by their race, social-class, or gender.

The third note discusses “imbalance” or “inadequacy of consideration.” It states: “Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable. Such a disparity may also corroborate indications of defects in the bargaining process.”⁹⁵ The fourth note discusses unequal bargaining power, noting that such inequality does not constitute unconscionability, but may be evidence of it.

A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But 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. Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.⁹⁶

This note spends the most time outlining what types of evidence may demonstrate unconscionability, providing more specific guidance to adjudicators evaluating a contract. While inequality of bargaining power may not be sufficient to demonstrate unconscionability, “gross inequality” may if it is combined with “terms unreasonably favorable to the stronger party.” This combination may demonstrate that “the weaker party had no meaningful choice, no real alternative,” which appears to be a necessary condition of unconscionability. However, a finding of “unreasonably favorable” terms seems rather subjective. But, this note outlines “red flags” that should warrant a closer look at a contract: stronger party **believes** weaker party will not perform contract; stronger party **believes** weaker party will not substantially benefit from the contract; and stronger party **knows** that weaker party cannot protect their interests.⁹⁷

95. *Id.*

96. *Id.*

97. Finally, the Restatement notes that whether a contract is unconscionable, some of its terms may be, such as those calling for penalty-like liquidated damages. “Other terms may be unconscionable in some contexts but not in others. Overall imbalance and weaknesses in the bargaining process are then important.” *Id.*

The Uniform Commercial Code, while not applicable to contracts that are not for sale of goods, is also a reference for determining whether a contract is unconscionable. As the Second Restatement on Contracts notes, the U.C.C. “. . . has many times been used either by analogy or because it was felt to embody a generally accepted social attitude of fairness going beyond its statutory application to sales of goods.”⁹⁸ While the U.C.C. Section 2-302 (Unconscionable Contract or Clause) contains a description of unconscionability very similar to that found in the Restatement, the comments following state the test of unconscionability as:

[W]hether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract The principle is one of the prevention of oppression and unfair surprise.⁹⁹

Both the U.C.C. and the Restatement emphasize that context matters when examining contracts for unconscionability.

Treatises on contracts also provide insight on what constitutes unconscionability. Corbin notes that “[u]nconscionable” is a word that defies lawyer-like definition.¹⁰⁰ In summarizing case law from a variety of jurisdictions that have been tasked with evaluating whether a contract is unconscionable, Corbin cites decisions that describe unconscionability as “gross one-sidedness,” “lack of meaningful choice,” and absence of good faith.¹⁰¹ One court Corbin cites asserts that to avoid a finding of unconscionability (or fraud), the deal between the parties must be fair, particularly when the contract is between those with business experience and those vulnerable to exploitation, and the court emphasized:

The standard of conduct contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing. The need for application of the standard is most acute when the professional seller is seeking the trade of those most subject to exploitation—the uneducated, the inexperienced and the people of low incomes. In such a context, a material departure from the standard puts a badge of fraud on the transaction and here the concept of fraud and unconscionability are interchangeable.¹⁰²

98. *Id.*

99. U.C.C. § 2-302 (amended 2003).

100. 7-29 Corbin on Contracts § 29.4. And indeed, this has been one of the strongest criticisms of the doctrine. Swanson, *supra* note 89, at 386-7.

101. 7-29 Corbin on Contracts § 29.4.

102. *Id.* (quoting *Kugler v. Romain*, 279 A.2d 640, 652 (1971)).

This statement highlights the disparity between sophisticated and unsophisticated parties, and implies that unfairness in transactions between such parties is unconscionable or fraudulent.¹⁰³

Because the context of the individual contract needs to be considered, a finding of unconscionability is fact-specific. However, the above-cited authorities give some general principles to guide a decision maker. Unconscionability may overlap with fraud, incapacity to contract, and contrariness to public policy. Additionally, unconscionable contracts may be those that no reasonable person would willingly make. Furthermore, imbalance of consideration and unequal bargaining power may be evidence of unconscionability, although neither is dispositive. Finally, one-sided contracts, contracts made without good faith, contracts made in the absence of choice, and contracts that depart from industry-standard, particularly when one party is vulnerable to exploitation, may be unconscionable.¹⁰⁴

3. *Unconscionability Analysis of CBL Members' Installment Housing*

103. Additionally, the Corbin treatise also cites the Uniform Consumer Sales Practice Act (1970), which although not widely followed, recommends the following factors when evaluating a contract for unconscionability.

“[T]hat the supplier has reason to know:

- (1) that he took advantage of the inability of the consumer reasonably to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors;
- (2) that when the consumer transaction was entered into the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers;
- (3) that when the consumer transaction was entered into the consumer was unable to receive a substantial benefit from the subject of the transaction;
- (4) that when the consumer transaction was entered into there was no reasonable probability of payment of the obligation in full by the consumer;
- (5) that the transaction he induced the consumer to enter was excessively one-sided in favor of the supplier; or
- (6) that he made a misleading statement of opinion on which the consumer was likely to rely to his detriment.” *Id.*

104. Much of the current unconscionability doctrine concerns adhesion contracts. Some scholars call this “modern unconscionability,” a doctrine meant to address the reality that most people do not read boilerplate. Horton, *supra* note 89. Modern unconscionability is divided into procedural and substantive unconscionability. “Procedural unconscionability hinges on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it-or-leave-it basis or buried in fine print. Substantive unconscionability arises when a term is ‘overly-harsh’ or ‘one-sided.’ By allowing courts to invalidate terms that suffer from these defects, modern unconscionability penalizes drafters for overreaching and maintains judicial integrity. But more importantly, it isolates terms to which adherents do not assent in any meaningful way. False Indeed, modern unconscionability empowers courts to strike down provisions that ‘fall outside the “circle of assent” which constitutes the actual agreement.’” Horton, *supra* note 89, at 18. For a discussion of pre-modern, modern, and postmodern unconscionability, see Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney’s Fees as a Remedy for Contract Overreaching*, 44 G.A. L. REV. 317 (2010).

Contracts

While I already discussed how according to Pomeroy's definition, cited by the court, the judge erred in dismissing the complaint of unconscionability,¹⁰⁵ it is even clearer that there was error when applying the definitions of unconscionability from the Restatement and other authorities. This section consists of a step-by-step analysis of how the selling of installment housing contracts to African Americans in the middle of last century was, with no doubt, unconscionable.

With reference to the first note in the Restatement, the overall context of the contract is important to this analysis. That is, it is necessary to consider the "setting, purpose and effect" of the contract and also whether there was "fraud."¹⁰⁶ Each installment housing contract was set against a backdrop of intense racial discrimination in the Chicago housing market whereby blacks were unable to obtain traditional mortgages. The purpose of these contracts, from the buyers' perspective, was to get an essential good—housing. But sellers' purpose was to obtain as much profit as possible. While the pursuit of profit, in itself, is not unconscionable in our capitalist society, the fact that the sellers were only able to obtain this much profit because of racial discrimination is "unconscionable," in the ordinary sense of the word. Finally, the effect of the contract was that African Americans paid far more for housing than whites, blacks often lost their homes after putting thousands of dollars into them, and white sellers grew rich. Again, according to the ordinary usage of the term, this is "unconscionable."

Judge Will granted a motion to dismiss the fraud complaint because the sellers' statements about the value of the homes sold were "opinion" rather than "material fact."¹⁰⁷ But by common usage of the term "fraud,"¹⁰⁸ when sellers marked up the price of the home by 75 percent without reference to the true value of the home,¹⁰⁹ represented themselves as a real estate agents rather than the owners of the home,¹¹⁰ and concealed the problems with the state of the house prior to sale,¹¹¹ this behavior can be labeled fraudulent. However, although some definitions of unconscionability equate it with fraud, others do not, so further analysis is necessary.

105. See *supra* Section C.1.

106. Restatement (Second) of Contracts, § 208 (1981).

107. *Contract Buyers League*, 300 F.Supp. at 225.

108. The dictionary definition of "fraud" is as follows: "(a) Deceit, trickery; specifically: intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right; (b) an act of deceiving or misrepresenting". Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/fraud> (last visited Aug. 21, 2016).

109. Satter, *supra* note 1, at 11.

110. *Id.* at 3, 10.

111. *Contract Buyers League*, 300 F.Supp. at 225 (discussing allegations of sellers concealing building code violations).

Would “no man in his senses and not under delusion” buy a home on contract? Would “no honest and fair man” sell a home on contract?¹¹² Given that eight-five percent of African-American homebuyers in Chicago were purchasing on contract in the middle of last century,¹¹³ it seems this historical standard of unconscionability is not met.¹¹⁴ Furthermore, given that many of Chicago’s esteemed professional class was involved in the selling of homes on contract,¹¹⁵ the second prong of this historical test of unconscionability is not met either. At this point in the unconscionability analysis, it seems as though the court could appropriately dismiss the complaint of unconscionability. However, this part of the definition of unconscionability presumes that a person will have multiple options; when options are severely limited, otherwise reasonable people may be forced into choosing the best of bad options. Thus, this historical definition of unconscionability is insufficient for determining whether a contract is unconscionable.

Delving further into the unconscionability analysis, it is clear that there was “gross disparity in the values exchanged” between sellers and buyers.¹¹⁶ The sellers sold an overpriced home in poor condition to buyers who often had to take on multiple jobs to keep up with their high monthly payments, at considerable cost to their family life.¹¹⁷ Additionally, when the buyers inevitably breached the contract, the seller retained the down payment and all installment payments to date.¹¹⁸ When the sellers reaped profit in excess of three times their investment,¹¹⁹ and the buyers—if lucky—completed the contract and paid double the value of the home,¹²⁰ or—if unlucky—lost their homes and money through forfeiture midway through the contract, this can be called gross disparity, evidence of an unconscionable contract.

Most important to this analysis, however, was the “gross inequality of bargaining power,” combined with “terms unreasonably favorable to the stronger party” that show that those buying homes on installment housing contracts during this time period “had no meaningful choice,” which is an element of unconscionability.¹²¹ As demonstrated from the review of the historical

112. See Restatement (Second) of Contracts, § 208 (1981) (quoting *Hume v. United States*, 132 U.S. 406 (1889)).

113. Satter, *supra* note 1, at 38.

114. The standard is not met, unless one refers to African Americans as “delusional” or “not in their senses.” This is not a stance I take. I view the situation as a structural problem: a housing shortage caused by racist policies and mass migration led people desperate for homes to enter bad contracts.

115. The standard is not met unless we are to call these sellers unfair and dishonest, which may be true.

116. See Restatement (Second) of Contracts, § 208 n.3 (1981).

117. MacNamara, *supra* note 1, at 72; Satter, *supra* note 1, at 5.

118. McPherson, *supra* note 1, at 53.

119. Satter, *supra* note 1, at 6.

120. See *supra* notes 18 and 23 for examples of home prices.

121. See Restatement (Second) of Contracts, § 208 n.4 (1981).

circumstances, there were no other housing options in Chicago for African Americans. In order to obtain housing, they had to enter into these contracts with the white sellers. In other words, they had no choice.

Furthermore, in addition to not having choice, the terms of the contract—including the price and the forfeiture clause—were unreasonably favorable to the sellers. Additionally, the sellers also knew that the buyers would have difficulty performing the contract and that the buyers could not protect their interests because of the presence of the dual racial housing market. The fact that sellers counted on buyers breaching their contract, so that the sellers could take advantage of the Illinois Forcible Entry and Detainer Law for quick eviction and repossession, and then sell the home to another black family and start the process of profit all over again, is another indication of an unconscionable contract.

Using the U.C.C. as the test of unconscionability of these installment housing contracts, it is also clear that they were “one-sided,” “oppressive,” and had elements of “unfair surprise.”¹²² First, the contracts were meant to favor the sellers, and the method of relief in case of buyer breach also favored the sellers.¹²³ Second, the buyers were oppressed prior to forming the contract in that housing was not widely available except for through contract with white sellers. The buyers were oppressed during the contract as they worked multiple jobs to keep up with inflated monthly payments.¹²⁴ The buyers were oppressed when they missed a payment and were subsequently evicted because they lost of all the money they had put into the house.¹²⁵ Third, when sellers were not forthright about their role in the speculative housing market, the price of the home, or the extent of repairs involved to get the home up to housing codes, this constituted “unfair surprise.”¹²⁶ In sum, again, by the standards of the U.C.C., these installment housing contracts were unconscionable.

Finally, given case law summarized by Corbin, other tests of unconscionability such as absence of good faith, especially with those vulnerable to exploitation, are met in the case of the installment housing contracts during this time period. These African-American homebuyers, who were denied traditional forms of low-interest financing and who were excluded from good quality housing in the Chicago suburbs because of racial restrictions, were definitely a marginalized group. The white seller-speculators took advantage of this group, departing from “observance of fair dealing.” As one court noted,

122. U.C.C. § 2-302 (amended 2003).

123. The Illinois Forcible Detainer and Entry Law promised sellers quick eviction and repossession.

124. MacNamara, *supra* note 1, at 72; Satter, *supra* note 1, at 5.

125. McPherson, *supra* note 1, at 53.

126. *Contract Buyers League*, 300 F.Supp. at 225 (discussing allegations of sellers’ concealments and misrepresentations).

when this occurs, “the concept of fraud and unconscionability are interchangeable.”¹²⁷

It is clear from this analysis that necessary conditions for unconscionability, such as lack of meaningful choice on the part of the buyers, were present. Additionally, factors that may be sufficient, such as excessively one-sided contracts, were also present. Even if there are disagreements about one particular part of the unconscionability analysis (e.g., one might argue that the price on these homes was not too high or that perhaps the sellers did not know for sure that the buyers would breach), the plaintiffs pleaded factors that would render a contract unconscionable. Thus, because Judge Will needed to accept the facts alleged in the complaint as true when considering the motion to dismiss, he was incorrect to grant the motion to dismiss the complaint of unconscionability. The plaintiffs thus went to trial in a weaker position than they may otherwise have if Judge Will had denied the defendants’ motion to dismiss the complaint of unconscionability.

II. RACIALIZED PRESENT OF INSTALLMENT HOUSING CONTRACTS

A. *Installment Housing Contracts Reform in Latter Half of 20th Century*

In the latter half of the 20th century, legal scholars, courts, and legislatures began to view installment contracts as problematic. Because the risks for purchasers on installment contracts are great, there have been some reforms to make these contracts less inequitable, although I argue that these reforms do not go far enough to mitigate the disadvantages of these contracts for buyers. In fact, despite common law and legislative reforms that have been made to protect contract buyers, “buyers are still losing their homes at an alarming rate and often do not recapture any of the money they have invested.”¹²⁸

The forfeiture clause of installment contracts is what most have identified as truly inequitable.¹²⁹ Many scholars have argued that contracts for deed should

127. 7-29 Corbin on Contracts § 29.4 (quoting *Kugler v. Romain*, 279 A.2d 640, 652 (1971)). Additionally, each of the six elements helpful to evaluating whether a contract is unconscionable according to the Uniform Consumer Sales Practice Act of 1970 are met in this case. That is, the sellers knew they were taking advantage of the buyers; “the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers” (i.e., white home buyers during the same time and in the same city); that the buyers were not going to receive substantial benefit (i.e., they were buying a poor quality home, and then were going to lose it anyway); that the buyers would likely be unable to complete the contract; that the terms were grossly one-sided in favor of the seller; and, that the buyer was relying on “misleading statement of opinion” of the seller in order to buy the home.

128. Genevieve Hebert Fajardo, “*Owner Finance! No Banks Needed!*” *Consumer Protection Analysis of Seller-Financed Home Sales: A Texas Case Study*, 20 GEO. J. L. & POVERTY 429 (Spring 2013).

129. Elizabeth M. Provencio, *Moving from Colonias to Comunidades: A Proposal for New Mexico to Revisit the Installment Land Contract Debate*, 3 MICH. J. RACE & L. 283, 298 (Fall 1997).

be treated like mortgages, and this is also the position of the Restatement.¹³⁰ Some courts have subsequently shifted to treating contracts for deed as mortgages.¹³¹ This means not enforcing forfeiture clauses, and instead going through foreclosure proceedings, which have more protections for the buyer and also have the possibility that the purchaser might retain some equity.¹³²

While this is a step in the right direction—removing the unconscionable forfeiture term of the installment housing contract—it is important to remember that the other aspects of unconscionability are still applicable. That is, it is still necessary for courts to examine whether these installment contracts are unconscionable in their entirety, or whether the effects of the contracts are unconscionable.

Additionally, some state legislatures have tackled the problems that arise in contracts for deed, and have passed laws meant to protect buyers when they enter into such a contract. For example, in Texas, if a buyer has paid 40% of the contract price or has made 48 monthly payments, their contract for deed is treated like a mortgage.¹³³ Anything less is forfeited to the seller.¹³⁴ More recently, after a newspaper investigation of contract for deed sales in Minnesota showed that many property sellers “tricked” buyers into a purchasing agreement that they did not understand and was against their interests, Minnesota passed legislation that mandates that sellers inform buyers of the risks of entering into a contract for deed and that sellers suggest a home appraisal and inspection prior to entering into the agreement; the penalty for noncompliance is up to \$7,500.¹³⁵

Statutory reforms are useless, however, if buyers are not aware they exist, do not know how to protect themselves, or have to take many complicated legal moves to receive benefits,¹³⁶ and sellers exploit this vulnerability. So even when the legislature attempts to aid contract buyers, the problems with installment housing contracts may persist because “many buyers . . . do not know about the disclosure and reporting requirements in the law,” so “[d]ishonest sellers continue to use contract for deed as a way to get a lump-sum down payment and

130. *Id.*

131. Nelson, *supra* note 7.

132. *Id.*

133. Fajardo, *supra* note 128, at 435.

134. *Id.* Additionally, sellers have to survey the property and notify the buyers of any covenants and easements; buyers are permitted to cancel the contract within two weeks; and buyers receive an annual accounting of their contract. More recent reforms include penalties for not producing annual accounting; penalties for not transferring title within a month of last payment; impermissibility of oral contracts; requiring sellers to keep the property lien-free; and requiring contracts to be in same language as oral negotiations. *Id.* at 436, 438. Also, “[i]n the event of default, the buyer is entitled to any money left after the land is resold and the amount due under the contract is paid off.” Provencio, *supra* note 129, at 287.

135. Jeffrey Meitrodt, *New Minnesota Law Puts Light on Contract for Deed*, STAR TRIBUNE (March 2, 2014), <http://www.startribune.com/business/214330131.html>.

136. See Fajardo, *supra* note 128, at 441-442 (describing how complicated it can be to convert a contract for deed into a mortgage in Texas).

engineer a quick eviction.”¹³⁷ In sum, statutory reform to installment housing contracts, in the absence of other changes such as community organizing and access to counsel, is unlikely to help large numbers of buyers who are disproportionately non-white and poor.¹³⁸

B. Installment Housing Contracts and Race-Ethnicity in Early 21st Century America

The discussion of installment housing contracts and unconscionability remains relevant as the practice of buying homes on contract continues, remains problematic for buyers, and continues to reflect racial inequality.

During odd-numbered years from 2001-2009, the U.S. Census Bureau’s American Housing Survey asked a representative sample of Americans living in owner-occupied homes whether their home was paid for on installment contract. At any given year in the first decade of the millennium, roughly five percent of all owner-occupied homes were purchased on an installment housing contract (see table below).¹³⁹ In 2009, for non-black, non-Hispanic owner-occupied homes, the percentage of installment land contracts was 4.1 percent.¹⁴⁰ The rate for African-American owner-occupied homes was 5.6 percent, and the rate for Hispanic owner-occupied homes was 8.4 percent.¹⁴¹ Non-black, non-Hispanic households always purchase homes on installment contract at rates lower than the national average. Blacks and Hispanics always purchase homes on installment contract at rates higher than the national average.

However, there is significant regional variation in this practice (see Table 1). Installment housing contracts are more common in the West and South than in the Northeast and Midwest. Some metropolitan areas have rates as high as 13.1% (Portland, OR) and others as low as 1.1% (Buffalo).¹⁴²

137. *Id.* at 440.

138. See *infra* II.B. Installment Housing Contracts and Race-Ethnicity in Early 21st Century America.

139. *AHS 2005 National Summary Report*, AMERICAN HOUSING SURVEY (March 2, 2014), <http://www.census.gov/programs-surveys/ahs/data/2005/h150-05.html>.

140. *Id.*

141. *Id.*

142. *Id.* Data on major metropolitan areas available from author by request.

Table 1. Percentage of Owner-Occupied Households with Contracts for Deed in U.S., 2001-2009

Household Type	Percentage with Contracts for Deed, by Year				
	2001	2003	2005	2007	2009
All owner-occupied	5.7	5.5	5	4.5	4.6
Non-black, non-Hispanic	5.3	4.9	4.4	4.1	4.1
Black	7.7	7.7	7.2	5.5	5.6
Hispanic	8.3	8.9	9.5	7.6	8.4
Northeast	4.5	4.4	3.7	3.5	3.9
Midwest	4.5	3.2	3.5	3.1	2.2
South	6.5	6.6	5.7	5.3	5.6
West	7	7.1	6.6	5.6	5.9

Installment housing contracts are still entered into by African Americans at higher rates than whites, but the rate is highest for Hispanics. Multiple authors have documented the prevalence of contract for deed among Mexican Americans living in *colonias*¹⁴³ in the Southwest. These *colonias* are often created through discriminatory practices such as zoning restrictions on mobile homes, which effectively push some farm workers of Mexican descent into unregulated semi-rural settlements that often lack basic physical infrastructure, such as potable water, sanitary sewage, and adequate roads;¹⁴⁴ this is similar to the conditions that made contract for deed so problematic in 1960s Chicago. That is, Hispanics in some areas of the country, faced with a housing need and very limited options, are forced to buy poor quality housing on contract or be without a home.¹⁴⁵

Once in *colonias*, these impoverished Latinos are subject to predatory developers, many of whom make deceptive promises, such as that water will be

143. See, e.g., Fajardo, *supra* note 128; Provencio, *supra* note 129; Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137 (2002). "The term *colonias* includes both incorporated and unincorporated rural subdivisions lacking basic infrastructure that are located along the United States-Mexico border." Provencio, *supra* note 129, at 284. *Colonias* are found in California, Arizona, New Mexico, and Texas. Defining features of *colonias* include majority Mexican-American residents who are living in poverty. Provencio points out that regardless of the poor living conditions in *colonias*, they are important sources of community and cultural identity, and that because of this, the *colonias* should remain, but be reformed. *Id.* at 289-93. See also Kristen Rees, *Texas Colonias: A Paternalistic Depiction of Unconscionability at the Bottom of the Market*, 16 TEMP. POL. & CIV. RTS. L. REV. 167, 177 (2006).

144. Provencio, *supra* note 129, at 284 (footnote 4).

145. *Contra* Rees, *supra* note 143, at 190-91. Rees argues that there are, in fact, alternative housing options, at least in Texas. *Id.* Additionally, she argues that *colonias* residents do know that they are purchasing housing or land that is in poor condition, that they make this choice freely, and thus these contracts are not unconscionable. *Id.* However, she relies almost entirely on the experience of one family friend as evidence for her argument that *colonias* residents knowingly enter into such contracts. *Id.* at footnote 1.

available soon, but which is never delivered.¹⁴⁶ Many residents of *colonias* speak only Spanish and are first-time homebuyers without a sophisticated knowledge of contracts.¹⁴⁷ Provencio notes that in *colonias* in New Mexico, contracts for deed are sometimes handwritten on scraps of paper.¹⁴⁸ Professor Fajardo describes how contracts for deed in *colonias* in Texas are often informal, and may be unrecorded entirely, which means the buyers can later be evicted.¹⁴⁹ Similar to the black homebuyers in mid-20th century Chicago, Latinos living in *colonias* are a marginalized group who purchase from sellers who are deviating from industry home-selling standards. Additionally, the sellers make misleading claims, which border on fraud, not only that public services will be available when this is not true, but also misrepresentations of the contract price.¹⁵⁰

Moreover, “[i]n many cases . . . vendors inflate sales prices a bit, aware that low-equity, often low income, purchasers have few other purchase options and that no independent appraisal will reveal the amount of inflation.”¹⁵¹ Furthermore, the interest rates for land contracts tend to be higher than for mortgages,¹⁵² and the rates of default are higher.¹⁵³ As Professor Fajardo notes, “unscrupulous sellers often make extra-contractual statements that misrepresent the terms of the contract, to encourage buyers to complete the deal.”¹⁵⁴ Again, these circumstances are very similar to those the CBL faced: excessive housing prices, misrepresentations of housing quality, “minority and low-income”

146. Provencio, *supra* note 129, at 290 (footnote 32). “Rarely will an individual colonia resident have the confidence or knowledge to challenge a predatory developer. Colonia residents remain very easy victims for these kinds of developers.” *Id.* at 303 (quoting Robert Lee Maril, *Contracts for Deed and Colonia Residents in the Lower Rio Grande Valley of Texas* 6, 17 (Aug. 1992)).

147. Fajardo, *supra* note 128, at 431. Even many native English speakers, however, do not understand contractual terms and what they are bargaining for or away. See, e.g., Debra Poggrund Stark, Jessica M. Choplin, and Eileen Linnabery, *Dysfunctional Contracts and the Laws and Practices that Enable Them*, 46 IND. L. REV. 797, 803 (2013).

148. Provencio, *supra* note 129, at 284.

149. Fajardo, *supra* note 128, at 431-433 (describing examples where if there is no record, unscrupulous sellers may sell the property to another buyer even if the current occupant is fulfilling the terms of the contract). Also, the counts in Table 1 could be skewed because the contracts are informal, and this population does not speak English and is rural, meaning U.S. Census survey researchers may not have access to those living in *colonias*. Thus, the rates of installment housing contracts may be even higher for Hispanics than the Census shows.

150. Provencio, *supra* note 129, at 290 (footnote 32). *But see* Rees, *supra* note 143, at 191 (“They [colonias residents] gamble on this deal, not out of desperation, but because of an informed, calculated decision.”).

151. Provencio, *supra* note 129, at footnote 55 (quoting Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low Income Purchaser*, 62 N.Y.U. L. REV. 293, 305). Others argue, however, that sellers raise prices and interest rates to protect themselves from risk. Rees, *supra* note 143, at 172.

152. Fajardo, *supra* note 128, at 435-436; Meitrodt, *supra* note 135.

153. Meitrodt, *supra* note 135.

154. Fajardo, *supra* note 128, at 445 (footnote 97).

buyers,¹⁵⁵ likely buyer default and subsequent forfeiture of all payments, and subsequent profit for sellers.

At least for the Latinos in the *colonias* of the Southwest, it seems as though a lawsuit claiming unconscionable contracts is necessary and can succeed if the court is willing to apply the doctrine of unconscionability. Such a lawsuit would require help from lawyers willing to work with these low-income buyers, however.¹⁵⁶ Additionally, a lawsuit would require community mobilization, similar to the CBL social movement.

It is important to note that the trend of Hispanics buying homes on contract at higher rates than other groups holds outside of the Southwest and beyond *colonias*.¹⁵⁷ In Detroit, for example, where only 1.8% of homes were purchased on contract in 2009, the rate of Hispanic installment housing contracts was 5.5% (it was 5.1% for African Americans).¹⁵⁸ Similarly, in Northern New Jersey, six percent of all homes were purchased on contract in 2009, while 10.4% of Hispanic homebuyers purchased on contract (7.4% of African-American homebuyers purchased on contract).¹⁵⁹ Even more stark differences are found in Philadelphia, where in 2009, 6.5% of homes were purchased on contract, but 16.1% of Hispanics homeowners purchased on contract.¹⁶⁰ A final example is Minneapolis-St. Paul, where in 2007, 1.4% of homeowners purchased on contract, but 9.7% of Hispanic homeowners did.¹⁶¹

III. PROPOSED VIEW OF INSTALLMENT HOUSING CONTRACTS

A. *Installment Housing Contracts as Presumptively Unconscionable*

In the *Contract Buyers League* case, Judge Will wrote that the plaintiffs did not claim that the “device of the installment contract . . . [was] unconscionable per se, but that they represent unconscionability as they resulted in this case.”¹⁶² While like the CBL plaintiffs I do not argue that installment housing contracts are per se unconscionable, I do argue that installment housing contracts—as a type of contract—should be considered presumptively unconscionable.¹⁶³ That

155. *Id.* at 430 (footnote 5).

156. Because lawsuits are also expensive, one way to remove barriers to litigation for low-income persons is to implement the suggestion that attorneys’ fees be awarded to the prevailing party upon a finding of unconscionability. Friedman, *supra* note 104; Stark, Choplin, and Linnaberry, *supra* note 147, at 845.

157. Fajardo, *supra* note 128, at 437; Larson, *supra* note 143, at 142.

158. *AHS 2005 National Summary Report*, *supra* note 139.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Contract Buyers League*, 300 F.Supp. at 227.

163. For an argument that findings of unconscionability should be extremely limited for all contracts, see Paul Bennett Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187 (“Only those who are not prepared to accept responsibility for a poor decision stand to lose by my proposal”).

is, given all of the drawbacks of this type of contract for a buyer, no one with any real choice would enter into this contract.¹⁶⁴ Given that an absence of meaningful choice combined with oppressive terms is doctrinal definition of unconscionability,¹⁶⁵ it follows that these contracts are presumptively unconscionable.¹⁶⁶ Therefore, if an adjudicator is faced with a buyer breach of installment housing contract case, it should fall to the seller of the contract to demonstrate why such contract should not be void as unconscionable,¹⁶⁷ rather than the buyer of the contract to demonstrate why the contract should be void as unconscionable.¹⁶⁸

This presumption of unconscionability should be strengthened when the sellers are “sophisticated,” and when the buyers are racial-ethnic minorities who are not advised by a lawyer prior to entering into the installment housing contract. As seen by the paradigmatic case of unconscionable housing contracts with the CBL, and more recently with the existence of *colonias* in the Southwest and the high rates of buying homes on contract by Hispanics relative to other racial-ethnic groups, it seems clear that seller-speculators often exploit social

164. Some may argue that the buyer should make better choices, but in many circumstances for many prospective buyers, the choice is between purchasing a home on contract and not purchasing a home at all. If the only homes available to the prospective buyer are those on contract, then the true choice may be between buying on contract and homelessness. *Contra* Rees, *supra* note 143.

165. 7-29 Corbin on Contracts § 29.4. “Modern” unconscionability often requires both and substantive unconscionability. See Friedman, *supra* note 104, at 345; Swanson, *supra* note 89, at 367.

166. To my knowledge, since adhesion contracts have become the norm, no scholar or judge has argued for a *class* of contracts to be considered unconscionable. Until recently, however, some courts, especially in California, routinely held that arbitration *clauses* in contracts of adhesion were unconscionable. For a discussion of this phenomenon, see Stephen A. Broom, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L. J. 1 (2006); Susan Randall, *Judicial Attitudes toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. R. 185 (2004). For a discussion of how *Concepcion* has impacted the relationship between unconscionability and the Federal Arbitration Act, see David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L. J. 1217 (2013); Horton, *supra* note 89.

167. For example, a seller could rebut the presumption of unconscionability if she showed, for example, that the buyer was advised by counsel prior to entering the contract or that the seller and buyer are from the same social class or that the price of the home is not inflated, etc.

168. Burden shifting in contract defenses is extremely rare, but not without precedent. See Paul Bennett Marrow and Craig E. Penn, *The “Circle of Assent” Doctrine and the Mandatory Pre-Dispute Arbitration Clause: When the Unconscionable Contract Analysis Just Won’t Do*, 68 DISP. RESOL. J., 1 (2013). Typically asserting unconscionability, “. . .places the burden of establishing the acute unfairness of a term with the party seeking to blunt the impact of the overreaching.” *Id.* at 6. But in Tennessee, the Circle of Assent doctrine is applicable in cases that may not rise to the level of unconscionability. The doctrine “requires of the party seeking enforcement a showing why a term not negotiated yet included in the final agreement is reasonable given the circumstances of the transaction.” *Id.* at 6. This is applicable to adhesion contracts where, by definition, terms are not negotiated. *Id.* at 6. “Instead of emphasizing the motivation of the draftsman, the Circle Doctrine focuses on the consequences to the party against whom the term is sought to be enforced.” *Id.* at 3-4.

inequality for profit and that the grounds for unconscionability are met.¹⁶⁹ Thus, there should not be an uphill battle for buyers seeking equitable solutions in courts in case of breach. When courts refuse to do equity by correctly applying the doctrine of unconscionability, they risk the legitimacy of our legal system.¹⁷⁰

To narrow my main argument, the presumption of unconscionability should exist when the contract is for a home in which the buyer will be living, and when the buyer has substantially performed the contract in good faith.¹⁷¹ If contracts for deed are entered into for the sale of undeveloped land or commercial property, then there is not the same *prima facie* unconscionability. This is because when someone is buying property on contract for a business, it seems as though this is a free choice, given that buying land for business reasons is likely not a necessity. Buying a *home* on contract does not indicate that same degree of choice, particularly when other housing options do not exist.¹⁷² Similarly, buying property on contract for a business seems to indicate a greater degree of business sophistication or legal consultation compared to buying a home on contract. There may be arguments for extending this analysis to contracts for deed generally, depending on the circumstances, power, and business sophistication of the two parties. However, that is beyond the scope of the article, and my argument applies to the unconscionability analysis for installment housing contracts specifically rather than an unconscionability analysis for contract for deed generally.

Finally, while some may argue that the truly unconscionable aspect of contracts for deed—namely the forfeiture clause—have been eliminated, and thus these contracts are no longer problematic, I assert that it is still important to examine the “setting, purpose, and effect” of any contract. In the case of installment housing contracts, the conditions under which they are entered, and

169. Or as the judge in *Williams v. Walker-Thomas Furniture Co.* put it, there is a tyranny of the “lender-seller.” Fleming, *supra* note 89, at 1418.

170. This is because the unconscionability defense acts as a safety net of sorts. See Horton, *supra* note 89, at 13 (“The unconscionability doctrine has emerged as the primary check on drafter overreaching.”); Swanson, *supra* note 89, at 386 (“...the unconscionability doctrine provides a safety net, one that voids contracts not quite meeting the more rigid requirements of other policing devices such as duress and misrepresentation.”).

171. This is because parties should not be able to benefit in law or equity when they have “unclean hands.” The unclean hands doctrine can be summarized as follows: “That whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.” *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 244-45 (1933). For a description of the contemporary application of this doctrine, see T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 K.Y. L. REV. (2010).

172. This addresses the reality that “courts more readily overlook procedural unfairness if the contract involves goods or services that are nonessential or could have been acquired elsewhere.” Swanson, *supra* note 89, at 365 (quoting E. Allen Farnsworth, *CONTRACTS* § 4.28, at 313 (3d ed. 1999)).

the effect are often truly unconscionable. Furthermore, the fact that seller-speculators may prey on minorities and the poor to obtain as much profit as possible makes the purpose of these contracts suspect as well.

B. But Who Will Sell to the Poor?

There are some economic benefits to the buyers on contract. One obvious benefit to contracts for deed is the expansion of the home purchasing market to those with poor credit who are unable to obtain traditional mortgages.¹⁷³ This arrangement makes it possible for low-income people to purchase property because the down payments are often lower, and because costs such as closing costs or title search are nonexistent.¹⁷⁴ Some also assert that the price of the home is lower if the seller has quick forfeiture available.¹⁷⁵

These benefits may lead some to argue that if courts view installment housing contracts as presumptively unconscionable, this will result in no one selling homes to the poor, which may then lead to a shortage of affordable, low-income housing.¹⁷⁶ In fact, the named defendants in the CBL South Side lawsuit said, "I'd prefer not to sell houses on contract. But if I didn't, I wouldn't be able to provide housing for hundreds of families that need it."¹⁷⁷ Furthermore, when called unscrupulous, sellers often said that they were, in fact, pro-black because they were doing business with African Americans.¹⁷⁸ However, even if selling homes on contract was the only way for blacks to get housing at this time period, the sellers did not have to set such grossly unfair terms and take advantage of desperate people.

The assertion that the poor will be shut out of the housing market entirely may or may not be true. As Professor Kennedy notes, "[I]t is not possible to predict a priori what consequences will follow when the decision maker imposes a nondisclaimable duty. It all depends on the particular conditions of the market for the commodity in question, and its relation to other related markets."¹⁷⁹ In the case of installment housing contracts, it is not clear that a presumption of

173. Nelson, *supra* note 7, at 1164; Fajardo, *supra* note 128, at 429; Rees, *supra* note 143, at 177.

174. Nelson, *supra* note 7, at 1164.

175. Jensen v. Schreck, 275 N.W. 2d 374, 386 (Iowa 1979) ("From the vendors' standpoint forfeiture presents a swift and inexpensive remedy in the event of a default. A vendee can live with such remedy to obtain the advantages of an installment contract and the usual low down payments when other financing could not be obtained.").

176. Rees, *supra* note 143, at 185. Also, for a general summary of the fear that finding contracts unconscionable will price the poor out of the market for consumer goods, see Fleming, *supra* note 89.

177. Satter, *supra* note 1, at 288.

178. *Id.* at 73. However, as the plaintiffs saw it, "the company sold this way for one reason only—financial gain from a captive market." *Id.* at 324.

179. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 604 (1982).

unconscionability in a court of law will have this effect. In fact, holding sellers to a standard of fair dealing in regards to home-selling may actually improve the market.¹⁸⁰

More importantly, however, it is the role of the courts to apply the law and doctrine of contracts—including, when warranted, the defense of unconscionability—and not engage in policy analysis (an analysis that judges likely are not trained to conduct). Although some may characterize installment housing contracts as just one example of a necessary capitalist system,¹⁸¹ if the contracts are unconscionable, a court must call them that. If this does lead to even more housing shortages, this is unfortunate, and hopefully other housing opportunities will come into the market.¹⁸²

C. How Will This Proposal Change Anything?

Some may argue that the entire system of law is meant to privilege those with racial and economic prestige and power,¹⁸³ and thus a presumption that installment housing contracts are unconscionable will not change anything in order to further social equality. If we care about protecting the poor from exploitative capitalists, however, we must use the tools of the system we currently have in order to strive for equality because dismantling the entire legal system is unrealistic. Furthermore, there is no evidence that the defenses to breach of contract are not sufficient to protect those with fewer resources from those with more, assuming that those with fewer resources still have access to adequate legal services. The critical question is whether judges will correctly apply legal doctrine to do equity when necessary.

During the time of the CBL litigation, when other buyer plaintiffs were challenging installment housing contracts in court, they tended to lose,¹⁸⁴ in part, because of the political corruption present in Chicago.¹⁸⁵ Judges were appointed,

180. One can imagine a situation wherein prospective homebuyers who felt more confident that their transactions with sellers would be fair would be more likely to purchase a home on contract rather than live with relatives or pursue some other low-cost housing option. Also, Kennedy offers another perspective on the matter: “A second distributive effect is that some buyers are priced out of the market now that sellers have raised their price in an attempt to recoup the cost of the compulsory term. From a paternalist perspective, this may not be an undesirable side effect, but a part of the paternalistic program. If we really believe that those buyers were not acting in their best interest when they bought the commodity without the term, then they may be better off priced out of the market than they were when we let them stay in it.” *Id.* at 625.

181. As Satter notes, “Some [sellers] insisted that they were simply capitalists who, like any good investor, bought low and sold for as high as they could get away with.” Satter, *supra* note 1, at 73.

182. Some who argue that contracts for deed in *colonias* should not be considered unconscionable advocate for other housing situations, such as Limited Equity Cooperatives. Rees, *supra* note 143, at 191-94.

183. See e.g., Derrick Bell, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (demonstrating how embedded in the law is systematic oppression).

184. Satter, *supra* note 1, at 58.

185. *Id.* at 88.

and often ruled in ways that benefitted those who had appointed them to their position.¹⁸⁶ In fact, several white slumlords during this time bribed judges and other officials to obtain favorable verdicts.¹⁸⁷ More generally, it is possible that because judges are members of the elite class in American society,¹⁸⁸ they are unable to empathize with the lower social classes. Additionally, judges may also have a personal stake in the larger economic struggle and desire legal rules that benefit people like them. These factors may lead judges to replicate social hierarchies.

These facts and possibilities suggest that it is not the law of contracts that is problematic, but rather the failure of courts to correctly apply the law. In fact, Judge Will was widely known to be a “racial liberal” who sympathized with the plaintiff buyers.¹⁸⁹ More importantly, he believed in equality under and in enforcing the law.¹⁹⁰ Where Judge Will went wrong, however, was in dismissing the claim of unconscionability, and instead reading the facts that supported it to instead support a cause of action under The Civil Rights Act of 1866, not recognizing that the facts supported both claims.

Others may argue that the better approach to the problems inherent in installment housing contracts is to enact legislation or regulation protecting installment housing contract buyers or prohibiting such transactions entirely. Legislators likely are better able to comprehensively address the problem, but legislatures may choose not enact protections. In this case, the courts need to fulfill their responsibility to enforce unconscionability doctrine when necessary.¹⁹¹ Furthermore, some scholars have noted that legislative reforms have followed judicial findings of unconscionability,¹⁹² which suggests that if the courts do adopt the presumption of unconscionability in installment housing contracts, statutory reform may come later. In this case, the courts can be the

186. *Id.*

187. *Id.* at 146.

188. Kennedy, *supra* note 179, at 649 (“Let’s face it: [the decision maker is] almost certainly a middle or upper middle class person, or a person who identifies with those classes in his heart.”); Satter, *supra* note 1, at 89.

189. Satter, *supra* note 1, at 296-97.

190. *Id.* “Even deeper than Will’s liberalism, however, was his commitment to the justice system itself, his belief that the law applied equally to all . . . He felt that the idea behind the resumed payment strike—that the legal system was inherently unjust but could be swayed by external pressure—was an insult. False. If the CBL wished to change the law, they could lobby Congress to pass a new one. In the meantime, Will would enforce the law currently on the books.”

191. See also Stark, Choplin, and Linnabery, *supra* note 147, at 845. They address limitations-of-remedies clauses that disadvantage home buyers, and argue that courts should use a “reasonableness” test when evaluating these clauses. More importantly than their argument, however, is the reason for their argument about why *courts* should use this test. “Although legislation is preferable to pure judicial response to the problem of dysfunctional contracts because of legislation’s ability to more clearly and comprehensively address the problem than the judiciary, courts need to better protect home purchasers from highly unfair limitation-of-remedies clauses if legislatures fail to enact protections.” *Id.* at 845.

192. Fleming, *supra* note 89, at 1389.

leaders on the path toward social equality—using existing contract doctrine as a tool. Finally, there may also be unanticipated problems with legislative and regulatory reform. According to some historical analyses, consumer protection regulation has actually limited court’s ability to do equity when necessary.¹⁹³ Regulations may also cause housing prices to increase for this population.¹⁹⁴ Furthermore, enacting regulations can take many years, whereas a court can and must immediately apply existing contract law and doctrine to do equity.

CONCLUSION

Even with reforms that some state courts or legislatures have undertaken in order to protect buyers on installment housing contracts, not all buyers are adequately protected. Many installment housing contract buyers are still being exploited by lender-sellers, and the degree of protection varies by state and by the buyer’s ability to assert their legal rights. The common law defense of unconscionability is still, in theory, available in every state, however. The courts should permit this defense when a buyer needs relief from an oppressive or harsh installment housing contract.

Not only should this defense be available to buyers, but I also propose that when an adjudicator is faced with a legal dispute between contract buyer and seller, there should be a presumption that the installment housing contract is unconscionable. If this presumption cannot be overcome, then courts should uniformly refuse to enforce these contracts as written.¹⁹⁵ The excuses to contracts are what validate the integrity of contracts and what legitimize our entire system of contract law. When excuses to a contract are raised, courts should carefully consider whether they apply. When courts disallow valid excuses to contracts, they risk the legitimacy of law.¹⁹⁶

193. *Id.* at 1430.

194. Larson, *supra* note 143.

195. Some judges have offered complicated formulas for determining how to deal with a buyer breach in land contract cases. However, correctly conducting an unconscionability analysis would be much easier. See, e.g., *Ellis v. Butterfield*, 570 P.2d 1352-53 (dissent) (“For the rest, I would prefer to retain a measure of flexibility for case by case determination in a court of equity. The factors to be considered would include: the size of the down payment and the amount of payments as a percentage of the selling price; whether the purchaser is in possession or has abandoned the property; whether the purchaser has made improvements or has permitted the property to deteriorate; whether the property has appreciated or depreciated in value as a result of market trends; whether refinancing is easily available or, in an era of depression, is difficult to come by. When all these factors have been weighed, the court of equity must be free to fashion a remedy appropriate to the particular case.”).

196. *Contra* Marrow, *supra* note 163, at 233. (“Legislatures and courts have approached the possibility with foreboding, fearing that restrictions on the [unconscionability] doctrine might result in the elimination of a fail-safe mechanism against predatory practices not otherwise addressed by the law. But as illustrated in this Article, these fears are not justified.”) Compare Horton, *supra* note 89, at 13; Swanson, *supra* note 89, at 386.

There still is a role for social movements, however. The CBL is a reminder that social movements can be powerful in enacting change. Community outreach to groups of people who buy homes on contract is necessary to determine whether these contracts are fair and equitable, and if not, to pursue legal relief. In some areas of the country and for some demographic groups (such as Latinos living in *colonias* in the Southwest), it may be time for another movement that calls for community action to protest unconscionable contracts, which may have the effect of pressuring sellers to institute practices that reduce exploitation of marginalized groups.

It is still preferable for changes to occur in state courts, however, because applying the law is the best way to protect the interests of all members of society, and also because social movements are necessarily limited in scope, duration,¹⁹⁷ and geographic reach. Additionally, social movements may be coopted by people with different interests than those the movement emerged to serve¹⁹⁸ or may splinter if they are too diverse.¹⁹⁹ Court rulings may also be more influential on legislatures than social movements; legislatures may codify court findings of unconscionable housing contracts,²⁰⁰ which may then lead to more social equality.

Even if there are no further legal reforms made to contracts for deed, I call for those with property and capital who enter into contracts for deed to reconsider their pre-contractual relations and obligations to buyers,²⁰¹ the terms of contracts they offer to those with fewer resources, and what an ethical solution would be in case of buyer default. In short, regardless of whether courts adopt my proposal to view installment housing contracts as presumptively unconscionable, I call for a more ethical—rather than unconscionable—capitalism, one in which the rich parties to a contract act with care²⁰² toward the poor parties to a contract, as opposed to viewing the poorer parties as solely potential sources of profit.

197. Satter, *supra* note 1, at 311 (“Social movements thrive on a collective energy that is short-lived and unstable by definition.”).

198. Boles, *supra* note 1, at 87; Colvin, *supra* note 1, at 88; Fitzgerald, *supra* note 1, at 185.

199. McPherson, *supra* note 1, at 72-73. Two neighborhoods involved in CBL that were divided on the basis of social class fractured the movement. Also, some in the movement wanted to settle while others did not. Satter, *supra* note 1, at 308. Furthermore, social movements prompt response social movements, which may be more powerful. In the case of the CBL, the sellers also banded together. *Id.* at 66.

200. See Fleming, *supra* note 89 (describing how the legislature codified the holding of unconscionability in *Williams v. Walker-Thomas Furniture Co.*).

201. In other words, the “tyranny of the lender-seller” should end. Fleming, *supra* note 89, at 1418.

202. See Kennedy, *supra* note 179, at 638-42 (discussing the phenomenology of paternalism and when acting in someone’s best interests may be laudatory or frustrating).