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Notes

Discriminatory Housing Markets, Racial Unconscionability, and Section 1988: The Contract Buyers League Case

In the spring of 1968, the Supreme Court revived Section 1 of the 1866 Civil Rights Act from a century of quiescence:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.¹

Jones v. Alfred H. Mayer Co.² interpreted these words to prohibit "all racial discrimination, private as well as public, in the sale or rental of property."³

A year later the Northern District of Illinois gave force to Section 1982 in a lawsuit radically different from Jones v. Mayer. In a class action,⁴ a number of blacks who purchased used homes in the ghettos and changing neighborhoods of Chicago sued their sellers in federal court for "overcharging"⁵ them because of their race, asking in the alter-

² 392 U.S. 409, 413 (1968).
³ Id. at 413 (emphasis in original). In that case a real estate developer's refusal to sell a home to a black on the basis of his race was declared illegal. As relief the black plaintiff was entitled to obtain an injunction directing the developer to carry through with the transaction. Id. at 414 nn. 13, 14.
⁴ The plaintiff class was composed of all blacks who had purchased residential property in the city of Chicago since January 1, 1952, a date arbitrarily set by the court, on installment contracts from the named defendant-sellers. The sellers numbered several dozen and the buyers an estimated 3,000. Brief for Appellees at 5, Baker v. F & F Investment, 420 F.2d 1191 (7th Cir. 1970). The district court's decision holding the suit to be a proper class action under Fed. R. Civ. Proc. 23(b)(3) is reported as Contract Buyers League v. F & F Investment, 1969 Trade Cas. ¶ 72,754 (N.D. Ill. 1969).
⁵ The Contract Buyers League organization uses the following example to illustrate the injustice committed against its members:

The heart of our story is that real estate speculators have made unjust profits in selling us homes. For example, on September 23, 1960, a typical real estate speculator, taking advantage of residential racial segregation and the admitted discriminatory policies of the Federal Housing Administration, banks and savings and loan institutions, purchased a residence from a panicked white family for $14,000 and sold it three days later to Mr. and Mrs. Howell Collins, a black couple for $25,500. The speculator had paid $2,000 down and obtained a mortgage for $12,500. Mr. and Mrs. Collins paid $1,500 down to the speculator and signed a con-
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native for rescission or reformation of the contracts, plus actual and punitive damages. In this case, Contract Buyers League v. F & F Investment, Judge Hubert L. Will found, in ruling on the defendant-sellers' motion to dismiss, that the plaintiff-buyers stated a claim under Section 1982.

Relying heavily on the new life given the 1866 Civil Rights Act by Jones v. Mayer, Judge Will said that the defendant-sellers would have violated Section 1982 if it were proven at trial that they sold property to blacks at higher prices than similar property was or would have been sold to whites. He conceded the sweeping implications of his interpretation:

Defendants contend that this holding would mean that 'every non-white citizen has a cause of action maintainable in Federal Court to either rescind or reform each and every transaction involving a purchase or leasing of either real or personal property by the simple allegation that he was charged more than a white person would have been charged or that he received less favorable terms and conditions than would have been given to a white person.'

For purposes of a motion to dismiss, and considering that any such allegation would be subject, as any allegation, to the test of proof on trial, defendants are correct.

Under the contract, Mr. and Mrs. Collins will pay a total of $44,820. With a mortgage and fair price of $15,000, the appraised value of the building, they would have paid only $30,740—a difference or "race tax" of $23,980. Moreover, they would have made their final payment in October, 1968; but, with a perfect payment record, Mr. and Mrs. Collins had a contract balance of $17,800 on October 1, 1968.


6. 300 F. Supp. 210 (N.D. Ill. 1969) [hereinafter referred to as Contract Buyers League]. The suit is now progressing as Baker v. F & F Investment, filed as No. 69 C 15 on Jan. 6, 1969. Pursuant to Judge Will's decision to dismiss the organization "Contract Buyers League" as a plaintiff, 300 F. Supp. at 230-32, the heading presently carries the name of the League chairman, a plaintiff-buyer.

A companion suit instigated by other members of the League, buyers of new homes, is Clark v. Universal Builders, Inc., No. 69 C 115 (N.D. Ill., filed Jan. 20, 1969). Judge Will decided that Clark stated a § 1982 claim as well, without any written opinion beyond the decision applied in Baker. With trials yet to come, Clark has been reassigned to Judge Perry and Baker to Judge McGarr.

7. 300 F. Supp. at 214-16. The court also found claims stated under federal (Sherman Act § 1, 15 U.S.C. § 1 (1914)) and state (Illinois Antitrust Laws, ILL. REV. STAT. 1967, ch. 38, § 60-3(1) [9]) antitrust statutes. It dismissed counts based on federal securities law (Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78ff(a) (1964)) and the Illinois law of fraud, unconscionability, usury, and breach of implied warranty. The usury claim was filed under ILL. REV. STAT. 1967, ch. 74, § 5. All the other commercial actions were alleged under the common law of the state of Illinois. 300 F. Supp. at 216-18, 223-29.


9. Id. at 215-16 (emphasis in original).

Another suit, almost identical to Contract Buyers League, has been initiated in Baltimore. Montebello Community Ass'n v. Goldsacker, Civil No. 21552-T (D. Md., filed Dec. 22,
This Note will explore the issues raised by the *Contract Buyers League* case. After a description of the interplay between the racial and economic problems involved in the case, Judge Will's attempt to make the sellers' alleged conduct fit the traditional definition of discriminatory action under Section 1982 will be criticized. The Note will then analyze the possibility of remedies against those who cause racial economic inequalities by restricting the entry of blacks into a white market. The sellers' liability, arising from the broad claim that they took advantage of the buyers' unequal bargaining position as blacks in order to impose oppressive prices and conditions, rests on the commercial law principle of unconscionability. This principle, it is argued, can be imported through Section 1988 (a companion to Section 1982) to reach the sellers' activity. Finally, the Note will consider the implications of Section 1982 as a mandate for federal courts to correct the entire phenomenon of racial discrimination in the disposition of property.

I. The Economics of a Dual Housing Market

The *Contract Buyers League* complaint itself describes the historical formation and present effect of Chicago's dual housing market.\(^{10}\) Residents of Chicago have a long history of economic discrimination in the housing market, with the sellers restricting the entry of blacks into the white market. In an unreported decision dated Sept. 23, 1970, denying a motion to dismiss, Judge Roszel C. Thomsen said only: "Although this case is quite different from *Jones v. Mayer Co.*, and this Court does not agree with all of the reasoning in *Contract Buyers League*, this Court, in the present state of the authorities, is of the opinion that if plaintiffs are able to prove all of the facts alleged, they may well be entitled to some relief under 42 U.S.C. 1982 or 1983." Opinion at 3-4.

Hopes (and fears) have been expressed that after the *Contract Buyers League* decision the 1866 Civil Rights Act will begin to be used to authorize extensive judicial relief for millions of black consumers. The U.S. Justice Department filed an *amicus curiae* brief during Judge Will's consideration of the motions to dismiss in *Contract Buyers League*, the first of its kind to be submitted at the trial level. A New York Times interview with Jerris Leonard, chief of the department's civil rights division, quoted him as saying "anybody who rakes off a profit based on racial discrimination should have to pay it back," evincing interest on the part of the Nixon administration in supporting § 1982 lawsuits by black consumers to retrieve millions of dollars lost through discrimination in pricing. Graham, *U.S. Backs Negro Suit to Recoup 'Blockbusting' Profit in Chicago*, The New York Times, March 29, 1969, at 1, col. 3. See also Kohlmeier, *Nixon Bid to Aid Blacks: Negros Could Sue Home Dealers, Stores for Sales Bias Under Plan*, The Wall Street Journal, March 31, 1969, at 26, col. 1. On the "fear" side, a group called the Real Estate Investors Association declared the rightness of the contract seller's practices in an advertisement placed in the Chicago Catholic Archdiocesan newspaper. *Will All Chicago-Area Small Businessmen be Subjected to this Same Shameful Harassment?* (paid advertisement), The New World, Nov. 1, 1968, at 9.

10. Filed as No. 69 C 15, Jan. 6, 1969, in the Northern District of Illinois [hereinafter referred to as *Contract Buyers League complaint*]. An abbreviated version of the civil rights count, but containing all the allegations referred to herein, is reprinted in S. PLACE, *NEW APPROACHES IN THE LAW OF PROPERTY* (Social Justice through Law Series) 112-25 (1970). As Judge Will for purposes of the motion to dismiss took the facts alleged in the *Contract Buyers League complaint* to be true, so will this Note. The type of injustices..."
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Dental segregation was created and sustained in Chicago and its suburbs by real estate selling and lending practices such as the use of restrictive covenants; refusals by white homeowners, developers and realtors to sell to blacks; refusals by banks and savings and loan associations to lend to blacks wishing to buy in white areas; and the Federal Housing Administration’s (FHA) practices which, in effect, made loan insurance for blacks unavailable in white or changing neighborhoods. These barriers prevented black entry into the white market and artificially restricted the supply of housing and financing for blacks.

In the limited, crowded section of the market where blacks could purchase homes, sellers were able to obtain high prices and stringent conditions of sale for dilapidated housing, an inferior deal compared with that available to a white man of similar buying power in the white market. Since blacks were unable to obtain conventional or FHA-insured loans, the sellers on the black side of the market doubled as financiers; they were able to charge inflated interest rates and insist on executing installment land sale contracts, under which buyers build up

complained of by the Contract Buyers League plaintiffs have been repeatedly recognized in scholarly and popular literature as well as in government reports and judicial decisions.


For popular pieces “exposing” the practices of the dual real estate market see the following: Norris Vitchek as told to Alfred Balk, Confessions of a Block-Buster, THE SATURDAY EVENING POST 15 (July 14, 1962); Discrimination in Housing: How It Hurts the Economy, NEWSPAPER 62 (Sept. 5, 1962); Marciniak, Breaching the Housing Barrier, COMMONWEAL 585 (March 1, 1963); Downie & Hoagland, Mortgaging the Ghetto, THE WASHINGTON POST, Jan. 5 to Jan. 15, 1969, at 1, col. 1-5 (series).

Government reports include: REPORT OF THE NATIONAL ADVISORY COMM’N ON CIVIL DISORDERS (Kerner Report) 467-73 (1968); REPORT OF THE U.S. COMM’N ON CIVIL RIGHTS, 349-80 (1959); and THE REPORT OF THE PRESIDENT’S COMMITTEE ON URBAN HOUSING, A DECENT HOME 42-43 (1968). The President’s Committee on Urban Housing commissioned TEMPO, General Electric’s Center for Advanced Studies, to make an in-depth computerized study of current and future housing needs. The Committee reported the results of the TEMPO study:

The nonwhite family must pay an economic penalty because of racial discrimination. ‘Nonwhites,’ TEMPO concluded after analyzing data on national housing
little or no equity, instead of employing mortgage loans. The level of black demand for housing, unsatisfied because the white supply was forbidden, supported these practices.

Inasmuch as this pattern occurs over and over with respect to goods and services and jobs, the segregated Chicago housing market may be cost patterns, 'must earn approximately one-third more annual income than whites, irrespective of household size, to assure [themselves of] standard housing.'

A DECENT HOME at 42.

Two surveys prepared by the Chicago Commission on Human Relations cover aspects of the Chicago dual housing market in depth: Selling and Buying Real Estate in a Racially Changing Neighborhood (1962), which gives the history of every contract of sale block of the ghetto, including several being sold on contract by defendant-sellers in the Contract Buyers League case; Mortgage Availability for Non-Whites in the Chicago Area (1963).

There has also been judicial notice of the racially dual market. In Chicago Real Estate Board v. City of Chicago, 36 Ill. 2d 550, 556, 224 N.E.2d 793, 796 (1967), the Illinois Supreme Court found:

With respect to the quality and cost of Negro housing in Chicago, according to the 1960 census returns, 82% of the housing occupied by white persons and 59% of the housing occupied by Negroes was classified as being in sound condition. [Yet] the same median rental of $88 was shown for both white and colored persons.

Problems of ghetto conditions and race relations in Chicago have received judicial notice as early as the decision in Beauharnais v. Illinois, 343 U.S. 250, 258-61 (1962), and more recently in Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, 910-915 (N.D. Ill. 1969).

11. A mortgage under Illinois law is an interest in land given as security, usually in return for a loan of money. The party who gives the mortgage (the mortgagor) and receives the loan usually retains legal title to the property "subject" to the mortgage. The lender (mortgagee) has a lien against the property which he may enforce by invoking Illinois foreclosure and sale statutes, if the mortgagor defaults. I.L.L. Rev. Stat. ch. 95, §§ 17.23, and ch. 77, §§ 18-27 (1967). Within a reasonable time (in chancery's discretion) after default, the mortgagor can tender the amount of the outstanding debt and keep his property—the equitable right to redeem. Even after a judicial sale, the mortgagor has a "statutory period of redemption" of 6 to 12 months, I.L.L. Rev. Stat. ch. 77 § 18(e) (1967), during which he can tender the amount bid at the sale and keep his home. If the property goes to someone else, the mortgagor is entitled to the excess of the proceeds of the sale over and above the amount satisfying his debt to the mortgagee.

The Illinois installment land sale contract is usually titled "articles of agreement for warranty deed," "trustee's deed" or simply "contract for deed." In the event of the buyer's default, the seller can foreclose the contract like a mortgage utilizing a common law vendor's lien proceeding. Or the law permits a contract seller, if the buyer is in default for 30 days, to declare the contract forfeited, retain all payments as liquidated damages, and demand immediate possession. The seller will inevitably prefer the latter remedy because he can then use the statutory procedure of forcible entry and detainer (eviction), which is swift and streamlined, I.L.L. Rev. Stat. ch. 57 §§ 1-22 (1967). Originally designed for trespassers and tenants in default of their rent, the forcible statute was subsequently extended to reach buyers whose contracts were forfeited. The installment land contract has been frequently characterized by Illinois courts as an executory contract of sale, with the subject of the bargain to be transferred only when all conditions have been fulfilled. Functionally, however, the contract is a financing instrument with the seller as financier, freed from conventional mortgage strictures such as the appraisal disclosures and lending limitations commonly required of savings and loan associations.

In summary, while the mortgage-buyer has slightly more hope with each payment of retaining his home or recouping part of his investment should he default, the contract buyer finds that his seller does not hesitate to proceed for repossession, that he has little time to reinstate himself, and that his down payment, monthly payments, and expenditures for improvements will be irretrievably lost regardless of how much he has invested.

In 1961 the Illinois legislature gave contract buyers purchasing homes thereafter a flexible statutory period of redemption of at least 60 days if the buyer had paid in more than 25% of the purchase price. I.L.L. Rev. Stat. ch. 57 § 13 (1967).
The 

used to represent the commercial predicament of the black man in America wherever racial barriers restrict his access to resources. Similarly, the theories of discrimination applicable to the housing market in Chicago carry broad implications for other situations where market discrimination acts to disadvantage blacks. There is an additional, pressing reason for the courts to address themselves to this phenomenon: this litigation is only one of several efforts initiated by the Contract Buyers League organization during the last three years to improve the lot of the black homebuyer. As such, the case challenges the effectiveness of the judicial process itself as a way of rectifying racial injustice “within the system.”

12. The Contract Buyers League was organized in February 1968 after extensive research work begun during the summer of 1967 by Jesuit seminarians and college students. These young men moved into a West Side ghetto apartment and engaged in a “listening process” by which they came to identify the installment home purchase contract as the most oppressive problem felt by their black neighbors. In response they researched the titles, prices, costs and appraised values of hundreds of ghetto properties. When the high markups taken by the sellers were revealed to the buyers in community meetings, the people formed the League for the purpose of renegotiating the prices and obtaining the safety of mortgage financing. Their tactics have included publicity, verbal persuasion, picketing, several payment strikes, and litigation. The most complete history of the early period is contained in a publication by a Chicago group, The Gamaliel Foundation, Progress and Prospects (revised September 1970). An excerpt from this publication can be found in G. LEECE, LAND FINANCE at 208-14 (1969). One of the first college student researchers has published a novel based on his experience. D. QUAMNEN, To Walk the Line (1970). Other accounts of the League’s campaign include Boles, Black Homeowning, The New Republic 7 (December 13, 1969); Chicago’s Quiet Slum Revolt, AMERICA 250 (Oct. 25, 1969); Garino, Slum Clearance, The Wall Street Journal, Jan. 2, 1969 at 12, col. 4; and Home Buyers Fight Contract Racket, The Washington Post, August 4, 1969 at 1, col. 5-8.


While unable to stave off evictions, the League’s attorneys did obtain some liberalization of the state’s forcible entry and detainer proceedings, under which the contract buyers were evicted like tenants. Rosewood Corp. v. Fisher, 46 Ill. 2d 249, 263 N.E.2d 833 (1970). At latest report, the League has accomplished the private renegotiation of 105 contracts saving a total of $1.5 million for the families involved. Its goal is the renegotiation or judicial reformation of the 3500 to 4000 contracts remaining in the two federal lawsuits, Contract Buyers League, What’s Happenin’ at CBL (newsletter), January 1, 1971.

13. In a last ditch effort to stop the evictions in December, 1969 the League’s attorneys petitioned a three-judge federal court to find the Illinois eviction statute unconstitutional. The League, however, wrote to the panel on its own behalf:

For some time, people have been telling black people that they should seek redress for their grievances by going through the courts. Our experience over the last year is
II. The Nature of Discriminatory Action

A. Traditional Definition

To commit an act of private “racial discrimination,” as the term seems to have been applied by courts and legislatures, one must treat blacks worse than whites because of their race. This basic model of discrimination visualizes the offender dealing with both races and treating one less favorably than the other. Whether the proof of discrimination consists of comparing his treatment of blacks with the way he had actually handled whites under similar circumstances or consists of evidence from which it can be inferred that he would have treated the races differently, this is the conceptual model. For our purposes, such behavior fits within what may be called the “traditional definition of discriminatory action.”

The illegal conduct found in Jones v. Mayer is clearly within the traditional definition. There a white developer refused to sell to a black, when at the same time he was openly selling and seeking to sell similar property at the same price to whites. In the Contract Buyers League such that we are beginning to believe that it is impossible for black people to get justice through the judicial system. For us, things get worse when we try to get “justice” in the courts.

Those of use who are in the Contract Buyers League are now beginning to question seriously whether the situation is so impossible that it is foolish for us to continue with the lawsuits we initiated (Cases 69 C 15 and 69 C 115). We are seriously considering asking our lawyers to withdraw these lawsuits because the judicial system of this country apparently is not equipped to provide justice for poor black people.

Contract Buyers League, Memo to the judges of the three-judge panel for Federal District Court, Dec. 27, 1969.

The evictions that followed soon thereafter were the result of the so-called “second holdout.” The first payment strike, begun in December, 1968, was ended shortly after the filing of the federal lawsuits in January 1969. Payment withholding was resumed in July 1969, largely because the League members felt that the judicial process was too time-consuming and provided remedies to the contract purchaser which were grossly unequal to those available to the contract seller. Progress and Prospects, supra note 12, at 21-39.

That was six months after the lawsuits had been filed. Now, nineteen months later, as the League newsletter reports, “the twenty-one staff people who are working zealously to complete the discovery work in preparation for trial are optimistic that the lawsuits will be tried this year.” What’s Happenin’ at CBL, supra note 12.

14. Most generally stated, racial discrimination is the treatment of one race differently than another, encompassing both discrimination against and in favor of a particular racial group. Since this case involves only injury to blacks by discrimination against them, the issues of “reverse discrimination” and “benign quotas” need not be discussed.

15. The notion of differential treatment of two groups of people by the defendant himself lies at the very essence of a traditional discrimination claim. This idea is so basic that courts have rarely bothered to give it special affirmation. One case where the Ninth Circuit did so is Agnew v. City of Compton, 239 F.2d 226 (9th Cir. 1957):

The plain purpose [of Sections 1931 and 1982] is to provide for equality of rights as between persons of different races. The complaint under review does not allege that appellant was deprived of any right which, under similar circumstances, would have been accorded a person of a different race. It follows that no cause of action is stated under these sections.

Id. at 230 (footnote omitted).
case, Judge Will decided that Section 1982 was "equally applicable" to "the sale of used residential property to negroes at higher prices and on more burdensome terms than similar property is sold to whites." To fit this statement into the traditional formula comparing the defendant's treatment of blacks with his actual or probable treatment of whites requires an inference that defendants would have treated whites differently, since actual sales or attempts to sell to whites by defendants need not be shown. But as will be demonstrated, such an inference is impossible to make since a lower price in the white market shows only that there is traditional discrimination in that market as a whole, not that the individual seller in the black market so discriminates.

B. Is the Sellers' Conduct Within the Traditional Definition?

If a seller establishes at trial that he sold to blacks only, the Contract Buyers League court indicates it would receive evidence of sales to

17. Id. at 218 (quoted below). The greatest difficulty in understanding Judge Will's opinion in Contract Buyers League is an underlying uncertainty whether he is really trying to fit the allegations into a traditional definition of discriminatory action or whether his test of illegality is an entirely new and different one. He may be saying that the defendants discriminated if they charged blacks higher prices than whites are charged for comparable housing in the general market, regardless of whether the defendants would themselves have charged or did charge whites the same prices as blacks. In other words, prices in comparable areas are relevant to the defendants' conduct not for evidentiary value in showing what they would have charged whites, but as an "objective" standard of liability imposing upon sellers an obligation to treat blacks the same way others treat whites, rather than the way sellers themselves would have treated whites. This uncertainty is most noticeable in the following passage:

Defendants also suggest that his case cannot involve "actual" discrimination, but only "hypothetical" discrimination. Their notion is that because the complaint does not state that defendants ever made sales of similar property to whites as they sold to plaintiffs, the possibility of discrimination somehow disappears.

We first point out what should be obvious—that allegations are not "hypotheticals." The claim that defendants sold to negroes at a higher price than similar property would be sold to whites will be subject to proof on trial. Second, and most important, defendants' position elaborated is that if property is sold to a negro above what can be demonstrated to be the usual market price, there can be no discrimination unless the same seller actually sells to whites at a lower price. It should be clear that in law this result would be obnoxious. In logic, it is ridiculous. It would mean that the 1866 Civil Rights Act, which was created to be an instrument for the abolition of discrimination, allows an injustice so long as it is visited exclusively on negroes.

Id. at first glance, Judge Will appears to be saying that comparable sales have more evidentiary value than mere hypotheticals. On closer inspection, serious questions arise: In the second paragraph, where he alludes to the price at which "similar property would be sold to whites," is he referring to prices defendant-sellers would have charged whites for similar property or to prices white market sellers would have charged? Is it relevant if the defendants would have asked whites to pay just as much as their black buyers, as long as the "usual" market price is lower?

This Note later acknowledges that a new standard of "strict" liability like the one Judge Will may be using might be supported by a textual analysis of the 1866 Civil Rights Act and a contextual analysis of the present-day phenomenon of racial inequality, note 156 infra. But such a development cannot rest upon the traditional conception of discrimination basic to past cases, even Jones v. Mayer, because the fact situations presented there consistently conformed to the traditional definition of discriminatory action.
whites, by other realtors, of comparable property in order to establish what the “white price” for each home he sold would have been. Can this evidence prove discriminatory action without disturbing its received definition? The definition remains intact, we are led to believe, since comparable sales would be looked to as an accurate prediction of how much a defendant-seller would have charged a white buyer. Even assuming that finding such data were empirically possible, it is conceptually erroneous to look at the price differential between the black and white sides of the market and call it discrimination by the ghetto seller.

Let us suppose that sales of comparable property could be found in the white market at large. The comparison would then be made between two quite dissimilar things: the black market, with its sharp demand and short supply, and the white market with its relatively lesser demand and absolutely greater supply. Simple economics would dictate a price differential between the black ghetto and the white market at large. Assume that a ghetto realtor does no more than put up houses for auction in black or changing neighborhoods. The bids he receives from blacks, who have nowhere else to go, are higher than those received by other sellers auctioning comparable property in a white area only to whites. This is not, however, discriminatory action as it has been traditionally defined.

If the ghetto realtor just accepts the highest bids as offered he has done

18. This is an assumption of heroic proportions. Arriving at a realistic “white price” for a particular seller, buyer, and parcel of property demands controlling all variables so that the effect of the buyer’s race alone can be tested. To determine what comparable property is, the court would have to look not only at the age, construction, and size of the housing, but also its state of repair and the density, socio-economic status, and the quality of the surrounding neighborhood. A similar white buyer must have the same credit background, amount of cash available for down payment, access to mortgage loans, occupational status, education and family situation. And, to make a really accurate prediction of how a certain defendant-seller would respond to a white buyer, the seller compared would have to be a realtor with the same type of business organization, capital structure, access to mortgage money, volume of sales, diversity of investments, costs of overhead, and internal inefficiencies. Quite possibly there may be no combination of property, buyers and sellers in the white market able to fit these criteria. Ironically, if such comparable property were found, that would be inconsistent with the Contract Buyers League plaintiffs’ own charge that they are confined to the worst housing in Chicago. Contract Buyers League complaint, count I, allegation no. 9(g), at 9.

19. What if the only nonblack sales fitting this description are found in ghettos inhabited by poor Appalachian whites, Puerto Ricans, or Mexican-Americans? If the price of housing for them does not turn out to be less than for blacks, does that prove that neither the sellers nor the market discriminated? One would think that sales in other types of ghettos would be unacceptable for comparative purposes, on the theory that the purpose of anti-discrimination law is to remove differences in housing costs between blacks and those whites who are untouched by ethnic residential segregation or discrimination of any kind.

20. The economic analysis used here to explain the difference between black and white price levels can be stated rather simply. Assume that price (P) is directly proportional to the number of buyers in the market (B) (a quantity interchangeable with the concept of
nothing to cause the prices to be different from those in white areas. As long as he has competitors in the black market, and absent a price-fixing conspiracy, when a seller "charges what the market will bear" he engages in auction-like activity in which it is presumed that the market, not he, controls the price level. There is an abundant supply of black buyers who will outbid whites for property in ghettos and changing neighborhoods. No white sales\(^1\) will occur unless that supply is exhausted, because no rational businessman will sell for less as long as there are customers willing to pay the going rate.

So, if the use of comparable sales to predict what a Contract Buyers

\[^{1}\text{demand}^\text{ demand}\] and inversely proportional to the supply of homes available to them (S):

\[ \frac{B}{P} = \frac{1}{S} \]

Further assume that there are two separate racial markets for housing, each with its own group of buyers (B\(_b\) and B\(_w\)) and supply stock (S\(_b\) and S\(_w\)). We have ample statistical evidence that black market prices (P\(_b\)) are higher than white market prices (P\(_w\)), so that P\(_b\) > P\(_w\). It follows from this (assuming that P bears a constant relation to B/S) that:

\[ \frac{B_b}{P_b} > \frac{B_w}{P_w} \]

If preferences for housing are the same for B\(_b\) and B\(_w\), and the homes contained in S\(_b\) and S\(_w\) are of interchangeable value, the inequality results from the presence of a greater number of black buyers per available home in the black market than there are white buyers per available home in the white market. It is believed that the most important factor causing this inequality are the actions of those who created and now sustain the dual market by establishing a larger white (S\(_w\)) than black supply (S\(_b\)) per buyer and by preventing homes from moving from the white supply to the black supply. In other words, those who control access to the larger white supply by virtue of their positions in the selling and financing fields are able to keep out blacks and restrict them to the smaller existing black supply.

Other factors may influence the disparity by increasing the number of black buyers (B\(_b\)) per available home over time: a higher black than white birth rate, immigration to city areas from the South, and a tendency by buyers frustrated by lack of access to the white supply to remain in the pool of potential buyers for a longer time. It must also be remembered that there is a force countervailing the protection imposed by most of the white selling and lending community on the white supply—blockbusting by the "mavericks"—ghetto realtors like the Contract Buyers League defendants. It is important to keep this model in mind, because the statement that blacks are in an inferior market position is true only if there is a net restriction on black supply compared with white supply. Thus, if blockbusting completely counteracts the effect of white market restriction, there is no net disparity in quantity of supply, but only on locational selection. See G. Becker, \textit{supra} note 10, at 59-81.

\[^{21}\text{The problem of sales to whites in changing neighborhoods has received considerable attention in discussions of the "tipping point" of a changing neighborhood. Morton Grodzins, credited with originating the term, defines it as "the proportion of nonwhites [which] exceeds the limits of the neighborhood's tolerance for interracial living." M. Grodzins, \textit{The Metropolitan Area as a Racial Problem} 6 (1958). The sophisticated view of this concept holds that most neighborhoods begin to tip not when whites "flee" but when whites will no longer move into the area. The whites probably react both to race and price: After the "tipping point" large price concessions would have to be made to whites to induce them to buy; at some point whites would not move in even if the housing were "free" as in the case of public housing. This can be seen as a price phenomenon—whites cease moving in because the price level maintained by black demand is too high. See testimony of Saul Alinsky, \textit{Report of the U.S. Comm'n on Civil Rights} 443-46 (1959); R. Helper, \textit{supra} note 10 at 296-300.\]
League seller’s “white price” would have been is based on the assumption that the seller would have dealt more favorably with whites, that assumption is invalid. Likewise, if ghetto prices exceed comparable white sales, the conclusion that the sellers must have taken action to cause the difference is invalid, since even if the seller is as passive as an auctioneer the laws of supply and demand will inevitably dictate a disparity. Thus, the mere disparity between prices in the white and black markets cannot support an inference of discrimination. Despite Judge Will’s attempt to make the Contract Buyers League facts look as much like Jones v. Mayer as possible, the complaint does not state a cause of action which comports with the traditional definition of discriminatory action.

C. The White Market Restrictors

A realtor who sold to the black side of the market did not engage in the activity which really affected prices—that activity being the artificial restriction of black entry into the white side of the market.22 Racial barriers, by keeping blacks out of white residential areas where they could afford to live, decreased the supply of housing available to them with the necessary result of increasing the price within the restricted market.23

Who, then, erected and maintained these barriers? They include those who refused to provide housing to blacks on account of their race (landlords, real estate agents, developers and private homeowners); courts which gave effect to restrictive covenants; those who refused to provide financing or imposed stricter requirements for blacks to obtain it (savings and loan associations, banks, mortgage brokers); those who declined to take black people’s mortgage paper (insurance companies and other investors, perhaps including the Federal National Mortgage Association [FNMA]); governmental agencies which followed practices of not insuring black mortgage loans (the FHA and the Veteran’s Administration) and those which acquiesced in the discrimination of the

22. Ironically, the blockbusting done by realtors in changing neighborhoods opposed this restriction. See note 20 supra. The impact of this irony on sellers’ possible liability is considered in note 34 infra.
23. The price level for a completely open, unitary market would be somewhere in between the present black and white price levels, since removal of discrimination against blacks would open up the supply so that black prices would decrease and white prices increase, eventually reaching at least a temporary equilibrium. The injury to blacks done by white market restriction, then, could be seen as the difference between the black price and the equilibrium price of a totally unrestricted market. But the gap between actual white and black prices, larger than that amount, effectively measures discrimination if we view it as the difference between the rights that blacks enjoy and the rights that whites enjoy. See pp. 559-60 infra on discriminatory effects.
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financial institutions they supervised (the Federal Home Loan Bank Board). 24

In the Contract Buyers League trial, if comparable property is found in white areas of Chicago at lower prices the question that should be asked in seeking the responsible party is not "why didn't the defendant-sellers charge these prices," but, to go to the source of the problem, "why couldn't blacks buy in this market"? Ghetto realtors certainly would have lowered their prices if they had had to compete with the white market, with its relatively cheaper prices and easier financing. The white market realtor or lender, whenever he refused to deal with a black on account of his race, forced the black purchaser to "cover" by paying a steeper price to a ghetto realtor for similar (or, more likely, worse) property. The white market restrictor was the discriminator in traditional terms, and he caused the black buyer injury to the extent that the cover purchase involved an increase in price, a decrease in quality, or both.

The kind of activities allegedly carried on by those who restricted black entry into the white market are clearly within the traditional definition of discriminatory action. After Jones v. Mayer, many of these activities are arguably violations of both Section 1982 and the 1968 Fair Housing Act. 25 Under the Supreme Court's decision in Sullivan v. Little

24. Many of these were contained as allegations in the original Contract Buyers League complaint at 8-10. But the only ones who could be labeled white market restrictors actually named as defendants were a few changing-neighborhood savings and loan associations—and they were sued mainly for lending to defendant-sellers. Contract Buyers League complaint at 7-9. It was not until 19 months later that plaintiffs joined as defendants George Romney as Secretary of HUD, the FHA, the VA, the Federal Savings and Loan Insurance Corporation (FSLIC), and the Federal Home Loan Bank Board (HLBB). Count VII, filed on August 11, 1970, amended the complaint to charge them with acts sounding in white market restriction by traditional discriminatory action. (The FSLIC was named primarily in its role of successor-in-interest to defendant-lenders as mortgagees under mortgages made to defendant-sellers. See Thomas Todd, supra note 10, at 25.) Assertions implicating them in the original complaint were re-alleged. In addition, the FHA was charged with discrimination beginning as early as 1938 with "homogeneous neighborhood" standards in its Underwriting Manual and continuing through "economic soundness" requirements and "red-lining" as late as July 1967. The VA was charged with engaging in similar policies and practices. The Federal Home Loan Bank Board was allegedly negligent in its duty to supervise and regulate defendant-lenders so as to aid and abet racial discrimination. A complete, rather devastating indictment of federal home financing programs is laid out in Report of the U.S. Comm'n on Civil Rights: Housing 16-80 (1961). See C. Abram, Forbidden Neighbors 293-30 (1955). Rev. Theodore M. Hesburgh, chairman of the U.S. Commission on Civil Rights, has recently charged the HLBB, FHA, and other government agencies with continuing to support housing discrimination, according to a New York Times editorial. White Magic, N.Y. Times, Aug. 24, 1970, at 32, col. 1.


In noting that 42 U.S.C. § 1982 differs from the Civil Rights Act of 1968 in not dealing exclusively and exhaustively with such matters [e.g., advertising, financing, brokerage], we intimate no view upon the question whether ancillary services or facilities of this sort might in some situations constitute 'property' as that term is now
Hunting Park, discriminators are liable to victims in money damages for injuries caused by their illegal conduct. Thus, if the black people of the Contract Buyers League paid more for their housing than their white counterparts, judicial relief theoretically could be full and complete without abandoning existing civil rights definitions and without subjecting those who are named as defendant-sellers to any liability at all.

An analysis of discrimination by white market restrictors is, however, insubstantial basis for leaving the contract buyers to their remedies against these restrictors, unless the remedies in fact exist.

With respect to a case against the market restrictor, the causal link between discriminator and victim is usually remote, with the discriminatory practice operating more in the aggregate than in individual cases. For instance, the FHA is charged not only with refusing individual black applicants on racial grounds but also, as an effect of its general discriminatory policy, with discouraging blacks from even applying and influencing other discriminators to follow suit. Thus, the question is raised whether the FHA is liable only to racially rejected applicants or to the class of blacks who were eligible for FHA mortgage insurance or to all black homebuyers or, even, to the whole class of black Americans. A corollary question also arises: what proportion of the inequality in housing prices suffered by the appropriate class of blacks is attributable to one particular discriminator like the FHA? Yet the FHA is really the easiest example because it is practically the sole supplier of mortgage insurance to low-income people. In comparison, assessing the contribution to price inequality resulting from the discrimination practiced by a multitude of savings banks, suburban
developers and others, let alone private homeowners, is even more difficult.

A question of timing also arises. The statute of limitations may bar actions against those who have discontinued their discriminatory practices, though the effects of their discrimination are still felt through oppressive long-term installment contracts and through the general inertia of segregated housing patterns.28

Even assuming that an assortment of white market restrictors were found guilty of discriminatory action resulting in increased ghetto prices, it is unlikely that a remedy against them could achieve real equality in property rights between the races. If discriminatory behavior were stopped today, thousands of black buyers would still be locked into many years of high payments under existing contracts; land sales at high prices in black areas would continue until patterns of segregation finally dissipated.29 In order to achieve some kind of economic equality through compensatory money damages, black homeowners would have to go to court “after the fact” of their purchase and pursue a long, expensive lawsuit against a host of powerful business institutions.

While the complications of proof and relief in litigation against white
market restrictors may not be insurmountable, by contrast the black buyer versus ghetto seller suit is much more straightforward. Uncertainties plague the extension of Section 1982 to financing and mortgage insurance; but a sale if it contains any discrimination is explicitly covered by the statute. The Federal Tort Claims Act may prevent damage suits against government institutions like the FHA, while private parties are not so sheltered. There is no "privity" problem: each buyer sues his seller, much evidence of "wrongdoing" may be shown by the plaintiff's own testimony from first-hand experience; the remedy is reformation of the contract. Since the defendant continues to injure the buyer by collecting excessive monthly payments from him, the statute of limitations is kept from running. Obviously this felt injustice has provided the whole energy and orientation (and much of the grief) for the Contract Buyers League organization and its lawsuit. Relative simplicity of litigation and buyers' subjective impressions are not in themselves reasons for charging sellers with liability, but they should prompt us to conduct an exhaustive inquiry before concluding that there is no legal theory under which sellers could be liable.

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30. Judge Will in Contract Buyers League took a rather restricted view of the kinds of policies, practices and transactions covered by § 1982, quoting Justice Stewart's comparison of the 1866 and the 1968 Civil Rights Acts:

The Court did point out that § 1982 was limited to activity directly covered by the express terms of the Section. The Court thus stated, 'at the outset, it is important to make clear precisely what this case does not involve,' and went on to say that § 1982 'does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling. . . . It does not refer explicitly to discrimination in financing arrangements or in the provision of brokerage services.' . . . Of course, the alleged blockbusting and discriminatory lending in the Instant case do not fall within the express terms of § 1982. However, the basic claim in this lawsuit clearly does. The basic activity is the purchase of property.

31. 28 U.S.C. § 2671-80, especially §§ 2674 and 2680. Section 2680 lists as an exception for which the federal government cannot be held liable—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

This would seem effectively to prevent any damage claim against the federal government where state action, either under any of the Civil Rights Acts or the Fourteenth Amendment, is involved.

32. See note 28 supra.

33. Progress and Prospects, supra note 12, at 5-8, 14-15, 33-44.

34. There is a perennial cry of disapproval against this sort of liability: the risk of legal action will drive sellers out of the market and leave the group we intended to protect with less access to housing than before. The rejoinder is three-fold: (1) It may be empirically false. Despite the disincentive of losing a particular business advantage by the law's interdiction, there may be plenty of incentive left in the trade. Also, the improved reputation of a business cleaned of its sharper practices and practitioners may attract new entrants. (2) It exalts the value of status quo market activity over other values, ignoring the possibility that it may be well worth the cost of a somewhat less active market

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III. An Expanded View of Discriminatory Action

A. The Broader Exploitation Claim—“Taking Advantage”

The primary violation of Section 1982 claimed in the Contract Buyers League suit is not the seller's charging of prices higher than they would have charged whites but the course of conduct which is described at the outset of Judge Will's opinion:

[D]efendants exploited a system of de facto racial segregation that existed in the City of Chicago [in] that by taking advantage of the scarcity of housing for negroes in the City of Chicago [they] secured unlawful advantage in the contracts executed by plaintiffs.3

In greater detail, the civil rights count of the complaint alleges that the sellers, well aware of their customers' special vulnerability, "exploited" and "took advantage" of the inequality in bargaining position between themselves and buyers. Most importantly, the resulting contracts were oppressive—through them the sellers obtained compensation and protection grossly in excess of what was reasonable to yield a fair profit and cover their expenses and risks. In particular, they charged prices far exceeding the cost and fair value of the property, charged excessive and usurious interest rates, and included many unlawful and unjust provisions in the contract documents.37

As fully presented, the sellers' alleged course of conduct bears little resemblance to action within the traditional definition of "discriminatory" exemplified by Jones v. Mayer. Rather, the alleged conduct has all the characteristics of behavior illegal under the commercial law doctrine of unconscionability and the sellers' behavior thus includes

to eradicate a particular evil. In other words, the "favor" blockbusters confer upon blacks by supplying them with housing loses its beneficence when the price amounts to an oppressive exaction. (8) Given these two reasons to continue to search for a valid sellers' liability theory, such a theory may be carefully constructed so as to achieve its objective with a minimum of adverse market reaction, which is what this Note attempts to do. See pp. 554-55 and note 156 infra.

35. 300 F. Supp. at 214.

36. The dual housing and financing markets deprived the black buyers of any meaningful choice as to where they could buy and who they could buy or borrow from.

37. Some of the provisions found in most Contract Buyers League contracts include: a restriction on the buyer's right to assign or sublet the property; a prohibition on mechanic's liens; a prohibition on improvements without the consent of the seller; a prohibition of recordation of the contract; a confession of judgment clause; required payments for insurance, with claim settlements to go to the seller rather than for repairs to the building; a clause making the buyer liable for all attorney's fees incurred by the seller in any matter arising out of the contract; no delivery of deed to the buyer until principal amount owed is reduced by at least one-half; a provision that no title, legal or equitable, shall vest in the buyer until deed is delivered; clauses calling for forfeiture, liquidated damages, and restriction upon default of one payment; prepayment of property taxes and insurance premiums; and assignment of rents. Exhibits 2, 3, 4 attached to Contract Buyers League complaint.

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elements which can only be evaluated with the aid of commercial law standards. In developing a theory of action based in part on such unconscionability, it is necessary, first, to determine whether the 1866 Civil Rights Act, of which Section 1982 is a part, was designed to reach a commercial injury whose impact is only on blacks. This Note will ultimately argue that Section 1982 sweepingly prohibits all effects of the phenomenon of racial discrimination in property rights, including the actions of all those who carry out the effects of the dual housing market as well as the traditionally recognized discriminatory actions of those who created the biased market. Thus, commercial law standards will be sought not for the purpose of grafting appendages onto an under-inclusive statute. Rather, Section 1982 is a statute of broad yet undeveloped authority, and commercial law can play an extremely useful role by defining the scope of liability under it, identifying civil injuries and their sources.

B. Importation of State and Common Law Through Section 1988

By enacting Section 1982, Congress declared that all citizens shall enjoy the same rights to property as whites. At first glance, no provision appears to have been made for the enforcement of this declaration. Section 2 of the 1866 Act contained a misdemeanor penalty for “colorable” deprivations of “right[s] secured or protected by this act.”38

Section 1,39 from which Sections 1981 and 1982 were extracted by the

38. Sec. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.


39. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, regulation, or custom, to the contrary notwithstanding.

Id. Notice that the rights expressed here are made pursuant to a declaration of citizenship.
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codifiers, contained no criminal sanctions. The entire 1866 Act was passed without any specific federal civil enforcement provision. Yet its title was "An Act to protect all persons in the United States in their Civil Rights, and furnish the Means of their Vindication." The only language in the Act which spoke of comprehensive enforcement was the second sentence of Section 3, now codified as 42 U.S.C. § 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(Notice that the codifiers took the vindication language from the title of the Act and inserted it in the middle of Section 1988.) Throughout most of its hundred year history, Section 1988 has received even less attention than Section 1982; the section has often evoked an air of mystery and skepticism.

Thus, it has been argued, they are entitled to more respect than the ordinary legislative enactment, since these rights arise out of the federal government's overriding interest in protecting what it deems to be concomitants of the citizen-state relationship. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 51-61 (1969).

40. Act of April 9, 1866, ch. 31, 14 Stat. 27 (emphasis added).
Examinined in the most favorable light, the provision is a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations, which in legal effect amounts to no more than a direction to a judge sitting in such a criminal trial to conduct the same as well as he can, in view of the three systems of criminal jurisprudence without any suggestion whatever as to what he shall do in such an extraordinary emergency if he should meet a question not regulated by any one of the three systems. Id. at 299. He dissented from a decision, concerning § 1988 and similar enforcement statutes, that held: "The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law." Id. at 271.

Up until the *Jones v. Mayer* decision, Section 1 of the 1866 Act was thought to cover only state action. Accordingly, Section 2 (18 U.S.C. § 242), along with Section 1 of the 1871 Civil Rights Act (42 U.S.C. § 1983), which apply only to state action, were used as the enforcement statutes for Sections 1981 and 1982. The presumed lack of an enforcement provision may well account for the dormancy of Section 1982 in the area of private civil rights deprivations. The majority in the *Civil Rights Cases* used the presence of Section 2 in the 1866 Act to limit the scope of Section 1 to state action, saying that a Section 1 cause of action could be no wider than the accompanying enforcement clause. In *Jones v. Mayer*, without mentioning the textual analysis of its predecessor bench, the Court pointed to the existence of Section 2 to demonstrate that just the opposite was true; Justice Stewart stated that the words “under color of [state] law” would have been surplusage in Section 2 if Section 1 had no broader application. A full realization that Section 3, now Section 1988, was available for use in the area beyond state action might have altered the holding of the *Civil Rights Cases* and would have smoothed the path for the new interpretation in *Jones v. Mayer*. And, surprisingly enough, there is legislative history indicating that Section 3 was intended to be applied to behavior outside the ambit of state action. Senator Trumbull, author of the 1866 Act, stated during the debates:

> Then, sir, the only question is, will this bill be effective to accomplish the object, for the first section will amount to nothing more than the declaration in the Constitution itself unless we have the machinery to carry it into effect. A law is good for nothing without a penalty, without a sanction to it, and that is to be found in the other sections [note the plural] of the bill.

After commenting on the “scare” effect of Section 2 as an instrument of criminal punishment, he went on:

> The third section of the bill provides for giving to the courts of the United States jurisdiction over all persons committing offenses against the provisions of this act, and also over the cases of persons who are discriminated against by State laws or customs.

Although Section 1988 has been ignored as a private enforcement
tool, within the realm of action under color of state law the section has been utilized frequently by lower federal courts to "import" or "incorporate" state law and common law into the Civil Rights Acts. In the leading case of Brasier v. Cherry, the Fifth Circuit described the process of importation as follows:

On our analysis federal law is not suitable, i.e., sufficient, since it leaves a gap . . . in a substantive policy . . . Since the Federal statutory framework is, in the words of [Section 1988], "deficient in the provisions necessary to furnish suitable remedies and punish offenses against" that law and policy, the state law is to be used to the extent that it is currently available to overcome these deficiencies.

Brasier incorporated both the Georgia wrongful death and survival statutes into Section 1983 to enable the widow of a black man beaten by policemen to sue them for violating their federal civil rights. Two months earlier, in Pritchard v. Smith, the Eighth Circuit had employed an Arkansas survival statute to permit a Section 1983 suit against the administrator of the offender's estate. In Hughes v. Smith, Section 1988 was used to bring in a state statute of limitations. Despite the paucity of legislative history, these courts were able to discern congressional intent from the words of Section 1988 itself. The Fifth Circuit in Brasier said:

Indeed, Section 1988 uses sweeping language. It reflects a purpose on the part of Congress that the redress available will effectuate the broad policies of the civil rights statutes.

46. 293 F.2d 401 (5th Cir. 1961), cert. denied, 385 U.S. 921 (1961). The importation rule was earlier applied in criminal prosecutions. Tennessee v. Davis, 100 U.S. 257, 271 (1879) (quoted note 41 supra). Many similar usages are found in criminal cases collected in the U.S.C.A. annotation to § 1988, although the opinions themselves rarely refer directly to the statute. These cases include: Howard v. United States, 75 F. 986, 991 (6th Cir. 1896); Malarango v. United States, 88 F.2d 264, 265 (3rd Cir. 1937); United States v. Gonella, 103 F.2d 123 (3rd Cir. 1939); Commonwealth v. Heller, 147 Pa. Super. 63, 24 A.2d 460 (1942) (§ 1988 was then identified as 28 U.S.C. § 729).

47. 293 F.2d at 408.

48. Id. at 402, 407 n.15.

49. 289 F.2d 153 (6th Cir. 1961), 88 A.L.R.2d 1146. The first attempt to apply § 1988 to this particular problem was made in Davis v. Johnson, 138 F. Supp. 572 (N.D. Ill. 1955), where the court discussed the statute in partial support of its conclusion that the § 1983 action survived. Id. at 574. By the time of the decision in Salazar v. Dowd, 256 F. Supp. 220 (D. Colo. 1966), § 1988 was automatically accepted as the device for incorporating state survival statutes into federal civil rights law. Id. at 223-24.


51. 293 F.2d at 409.
And in *Pritchard* the Eighth Circuit stated:

It appears to us that Congress by the language [of] § 1988 intended to enlarge the civil rights remedy by authorizing resort to state law . . . .

With the advent of new Congressional enactments against private racial discrimination during the last decade came the realization that even modern, highly detailed civil rights legislation might need the assistance of Section 1988. In 1965, a Mississippi federal district court in *Sherrod v. Pink Hat Cafe* used Section 1988 to give the black plaintiff a right to money damages against a restaurant owner for violating the public accommodation title of the 1964 Civil Rights Act, thereby extending a provision of the 1866 Civil Rights Act to the private realm three years before *Jones v. Mayer*. Once Section 1982 broke the bounds of state action the Court at last began to feel the need for authority to enforce the older law against private infractions. In the *Jones v. Mayer* opinion itself, the Court listed Section 1988 among possible sources of equitable remedies and of an implied right to compensatory damages for Section 1982 violations. The next step was taken in *Sullivan v. Little Hunting Park* where the Court relied upon Section 1988 as authority for an award of tort damages to a white suburban homeowner who was ousted by his community recreation corporation for attempting to assign the right to use the corporation's facilities to his black lessee. In so holding the Court stated:

[A]s we read § 1988, . . . both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. *Brazier v. Cherry*. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.

52. 289 F.2d at 15.
53. 250 F. Supp. 516 (N.D. Miss. 1965). The *Sherrod* court found that rights and remedies available through other state and federal laws were not precluded by the new legislation:

Thus section 1988 is retained, in full effect, and the rights that it authorizes to be drawn from state law to achieve the purposes of federal enactments designed to protect civil rights, are fully available to a plaintiff who has been deprived of rights conferred upon him by Title II of the 1964 Act. If Congress had intended to negate this result, it would have said so. There is no repeal of section 1988 in the 1964 Act. *Id.* at 520.

§ 1988 has always been seen as more than just a supplemental provision for the benefit of the 1866 Civil Rights Act. In practically all of the previous civil cases, § 1988 had come to the aid of § 1983, which was derived from the 1871 Civil Rights Act.

54. 392 U.S. at 415 n.14.
56. *Id.* at 240 (citation omitted). Justice Harlan, in dissenting from the position that the federal remedy could be imposed in the state court where *Sullivan* was brought, never-
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What Sherrod signaled for the 1964 Act, Sullivan signals for the 1866 Act: when all the complexities of private action are opened up to regulation by civil rights laws, an enforcement statute of Section 1988's flexibility and comprehensiveness is needed.

To summarize, the federal courts have been forced by the exigencies of coping with the recent emergence of private racial discrimination law, almost unconsciously, to move toward the use of Section 1988 which Congress originally had in mind. Where private discrimination is found to violate any civil rights act, it is clear after Sullivan that state and common law can be imported through Section 1988 to provide whatever remedy is necessary to equalize the rights of nonwhites to those enjoyed by whites and to compensate victims of discrimination.57

The difficult question remaining regards what kind of law Section 1988 can import. Early pronouncements indicating that Section 1988 was merely procedural have now been rejected.58 Beyond forms of remedy like statutes of limitations, wrongful death and survival statutes, and money damage allowances, it is an open issue whether Section 1988

57. The most recent statement by a member of the Court on the question of civil rights law enforcement and § 1988 is found in Adickes v. Kress & Co., 398 U.S. 144 (1970), concerning the ordering of a new trial in a § 1983 case. Justice Brennan, concurring in part and dissenting in part, expressed his views on the kinds of relief available to the plaintiff upon remand, a subject not taken up by the majority:

Section 1983 in effect authorized the federal courts to protect rights "secured by the Constitution and laws" by invoking any of the remedies known to the arsenal of the law. Standards governing the granting of relief under § 1983 are to be developed by the federal courts in accordance with the purposes of the statute and as a matter of federal common law. See Tenney v. Brandhove; Monroe v. Pape; Pierson v. Ray; Basista v. Weir: cf. Sullivan v. Little Hunting Park; J. I. Case Co. v. Borah. Of course, where justice requires it, federal district courts are duty-bound to enrich the jurisprudence of § 1983 by looking to the remedies provided by the States wherein they sit. 42 U.S.C. § 1988. But resort to state law as such should be had only in cases where for some reason federal remedial law is not and cannot be made adequate to carry out the purposes of the statute.

Id. at 257. (citations omitted).


The court in Pritchard refused to follow the Dyer case, stating: "We cannot accept the view that § 1988 is procedural only." 289 F.2d at 157. Brazier took the same position, pointing out that "[i]f it were] a statute incorporating merely state procedural mechanisms or devices § 1988 would have been, at least for actions at law, superfluous as a duplication upon the enactment of the Conformity Act . . . 28 U.S.C. § 724." 293 F.2d at 403 n.18. But see Hopkins v. Wasson, 227 F. Supp. 278, 281 (E.D. Tenn. 1962), aff'd, 229 F.2d 67 (6th Cir. 1964), cert. denied, 379 U.S. 834 (1964). See also note 59 infra.

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can use state and common law even more "substantive"—rules which define the unlawful behavior giving rise to a cause of action—to give detailed content to the general federal framework of civil rights law. This issue was addressed directly by the Brazil court:

In enacting this legislation by reference to incorporate that of the several states currently in effect when and where a civil rights case would arise, Congress was under no restraint in enacting procedural, i.e., remedial, rather than substantive legislation or vice versa. Consequently, it does not really matter whether in the eyes of the local law the local statute, rule or decision thus incorporated by reference is in the category of substance, or procedure, or mixed. Congress adopts the whole "common law, as modified and changed by the constitution and statutes of the State" without regard to its technical local characterization. From a federal standpoint the only limitation upon the use of such adoptive state legislation, rule or decision is that it is suitable to carry the law into effect because other available direct federal legislation is not adapted to that object or is deficient in furnishing a fully effective redress. Thus § 1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available, not because it is procedure rather than substance, but because Congress says so.6

In addition, the court argued by analogy from other instances where

59. 293 F.2d at 409 (per John R. Brown, footnotes omitted). Technically, a wrongful death statute is regarded as creating a new cause of action. This holding and statement contradicts other, mostly earlier, opinions holding that § 1988 did not have reference to "rules of decision." In re Stupp, 23 Fed. Cas. No. 13,563, at 296, 12 Blatchf. 501 (S.D.N.Y. 1875); and Schatte v. International Alliance, 70 F. Supp. 1008, 1010 (S.D. Calif. 1947); or "cause of action," Hirych v. State, 376 Mich. 394, 395 n.1, 136 N.W.2d 910, 912 n.1 (1965). See note 8 supra. However In re Stupp was a situation in which § 1988, regardless of its characterization, was not needed at all:

The laws of the United States are fully suitable to carry into effect the jurisdiction of this Court in this case, and they are adapted to the object of such jurisdiction, and they are not deficient in any provision necessary to furnish suitable remedies to exercise and enforce such jurisdiction.

Two decisions since Pritchard and Brazier have established that § 1988 does not operate to bring in state and common law where the action is grounded solely in substantive state law without the slightest claim of discrimination or deprivation of federal civil rights. Hopkins v. Wasson, 227 F. Supp. 278, 281 (E.D. Tenn. 1962), aff'd, 829 F.2d 67 (6th Cir. 1964), cert. denied, 379 U.S. 854 (1965) (common-law slander only); Pierre v. Jordan, 333 F.2d 951 (9th Cir. 1964), cert. denied, 379 U.S. 974 (1965) (purpose of lawsuit was to put waterworks out of business, not to redress a constitutional deprivation). Here it is argued that substantive state commercial law rules can be imported through § 1988 not as the sole basis for a cause of action, but as one component of a hybrid which is principally a claim of discriminatory action. See p. 541 infra.
Congress had adopted state law describing illegal conduct as federal law,\(^6\) and advocated a broad interpretation of the term “remedy.”\(^1\)

It may be objected that survival and wrongful death statutes define only who may sue whom, not illegal behavior, and that *Brazier* ought to be limited to its holding. Such a limitation of scope might be sensible where illegal acts were defined with sufficient specificity by the federal statute, leaving forms of redress unmentioned. But in the context of Section 1982, a broad declaration with no acts specified, the meaning of enforcement must be strong enough for Section 1988 to take up all the slack in Section 1982, and define causes of action as well as relief. Also, it is clear from the language in Section 1988 specifically referring to criminal law that Congress authorized resort to state and common law definitions of illegal conduct:

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[I]n \text{ all cases where [federal] laws are not adapted to the object, or are deficient in the provisions necessary to . . . punish offenses against law, the common law [and state constitution and statutes] shall . . . govern [federal] courts in the trial and disposition of the cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.}^2
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This seems to imply that when crimes like murder and assault are committed federal courts may apply state and common criminal laws prohibiting such acts, if committed in such a way as to deprive blacks of equal rights guaranteed by the 1866 Act.

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\(^1\) There is nothing in this comprehensive declaration of a purpose to make a policy fully effective which would justify reading the single word "remedies" in a literal sense. It is hardly consistent with the diverse convictions so deeply felt and often spoken by ardent champions of the competing forces in the stormy struggle culminating in the Civil Rights Acts, see *Monroe v. Pape*, to think that they were consciously legislating in terms of the mechanisms or devices generally associated in the lawyer’s mind with procedure as such. The term “suitable remedies” had a deeper meaning. Used as it was in parallel with the phrase “and punish offenses against law,” it comprehends those facilities available in local state law but unavailable in federal legislation, which will permit the full effectual enforcement of the policy sought to be achieved by the statutes.


In fact, it is not necessary to conceive of § 1988 as a provision which works only when the federal remedy is deficient, because the parallel construction of § 1988 applies equally to “cases where [the federal laws] are not adapted to the object” of the Civil Rights Acts. A statute like § 1982, which is simply a declaration of rights without enumerating illegal acts, is not adapted to its object and requires the aid of § 1988 to formulate a broad federal common law of discriminatory action.

\(^2\) Emphasis added. The *Brazier* court saw the substantive parallel between imported criminal and civil law. See note 61 *supra*. 539
To this reading of Section 1988 it could also be objected that the statute was intended to be limited to crimes actually defined in the 1866 Act, i.e., Section 2 (now Section 242), except for cases that came to the federal court through removal from state courts. But with Jones v. Mayer we are given an interpretation of the 1866 Act that allows federal courts original jurisdiction of private civil infractions despite the fact only criminal acts under color of state law are specifically referred to in the Act. Since Section 1982 is stated in a declaratory fashion, the courts will have to develop a “federal common law,” as they already have done for Section 1983, describing exactly what private civil (and perhaps criminal) acts will violate the statute. Section 1988 answers this need by directing them to draw upon injuries defined by the existing state and common law.

C. Racial Unconscionability

Federal civil rights law has now progressed, as has the economic predicament of black people in America, to the point where racial unconscionability can and should be introduced as a vital legal principle. The essence of this concept may be briefly stated: An unconscionable contract which is so only because the buyer is held in an inferior market position as a member of one race is an inherently discriminatory contract, regardless of whether the particular seller would have tried to impose the same contract on a member of another race. Thus, racial unconscionability represents a type of discriminatory action that goes beyond the traditional definition. But federal courts need no longer feel, as they have in the past, so restricted to the literal implications of federal statutes as the sole source of substantive civil rights law, that they

63. See pp. 559-60 infra.

64. See Justice Brennan’s statement supporting this application of § 1988 in Adickes v. Kress & Co., 398 U.S. 144, 231 (1970), quoted at note 57 supra. He then continued:

In some types of cases where the wrong under § 1983 is closely analogous to a wrong recognized in the law of torts, it is appropriate for the federal court to apply the relevant tort doctrines as to the bearing of particular mental elements on the existence and amount of liability.


Observers are beginning to put two and two together with respect to § 1988 and the common law. The Whirl comment, after approving of the Fifth Circuit’s use of common law principles, said in a footnote: “The court was, in a sense, compelled to such a result [by] 42 U.S.C. § 1988 . . . .” Id. at 1162 n.35.
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cannot see discrimination except when it is presented in the obvious form of one individual treating the races differently. The development of new rules of liability is feasible now that the full potential of Section 1988 is being rediscovered. Employing Section 1988, federal courts may create specific definitions of illegal conduct and begin to flesh out the underdeveloped common law of Section 1982's broad declaration by constructing hybrids\(^6\) of federal, state, and common law. The hybrid suggested here, racial unconscionability, is composed of a racial component derived from Section 1982 itself and a commercial component drawn from state and common law.

As noted, the allegations of the *Contract Buyers League* complaint set out an injury which can be best described using the commercial term of unconscionability. Thus, the substantive content of the unconscionability doctrine is chosen to provide the *commercial* component of the hybrid. In the sub-sections following, the state of current unconscionability law is compared with these allegations to determine whether, if a state court saw in an analogous commercial context the diminished degree of meaningful choice and bargaining power imposed on blacks by the dual housing market, it would grant reformation of a burdensome contract.

The *racial* component of racial unconscionability comes from the general declaration of Section 1982 that non-whites are to enjoy the same right to buy property as whites do. It must follow that blacks ought not to be subjected to any kind of specially oppressive contract because of their position as victims of the dual housing market. In order for such a hybrid rule of law to remain peculiarly racial, the

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> [In general federal law is a limited interstitial overlay upon the more complete system of state law. It would be impossible in such a context for either state or federal jurisprudence to develop as a fully independent system. In fact, it is not at all unusual for any given lawsuit to turn in part on legal doctrines derived from each of the two bodies of law. The interrelation between the systems can take innumerable forms. State law claims can be defeated by federal defenses; federal claims, by defenses derived from state law. Various elements of a single right to recover may derive from each legal system. Because of this kind of constant interaction, it seems quite natural for our two legal systems to borrow from one another, simply as a matter of convenience. Thus federal law often adopts state standards, and, although much less frequently, the states sometimes borrow federal standards, even in situations in which the supremacy clause would not so require. For example, the state may make tortious what is already forbidden by a federal regulatory statute, or private parties may attempt to harmonize their state contractual obligations with their rights and obligations under federal law. In each situation, the state has created a kind of "hybrid," a combination of state and federal law.]

Id. at 290-91 (footnotes omitted).
link between race and the commercial injury must be tight. Not every unconscionable contract which a black person may enter into is racially unconscionable—only those in which the relevant market accounting for his lack of choice and bargaining power was clearly caused by racial discrimination.

1. Sources of Unconscionability Doctrine

Judge Will found that the unconscionability claim in the Contract Buyers League complaint did not state a cause of action under Illinois law.66 This should not, however, foreclose consideration of whether a claim for racial unconscionability is stated under an expanded understanding of Section 1982. As has been argued, Section 1988 dictates quite different sources of law than were considered by Judge Will. First, Judge Will's opinion on this point was based on facts alleged in Count V, the section of the complaint where violations of the common law and statutes of Illinois are charged. The court dealt with these claims pursuant to its pendent jurisdiction, which allows it to determine, once a federal claim has been stated, only whether a state court would find infractions of its law arising out of the same circumstances.67 The charge of racial unconscionability, on the other hand, is made under the court's original Section 1982 jurisdiction so the court must look primarily to federal law unless Congress directs it to look elsewhere.

Judge Will made it very clear that he decided the question of unconscionability on purely commercial grounds, ignoring the racial component of the course of conduct charged:

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 . . . Civil Rights Act.68

"Discriminatory exploitation" cannot be ducked when racial unconscionability is considered, because such a claim is brought under the Civil Rights Act and because race is an integral and inseparable part of the offense. Indeed, the Supreme Court has already recognized in Sullivan that Section 1988 requires the use of those aspects of both civil rights law and local law which will be most helpful to the party seeking vindication of his civil rights. Even before Sullivan, the Fifth Circuit in Lefton v. City of Hattiesburg, Miss. had said:

In civil rights cases . . . Congress has directed the federal courts to use that combination of federal law, common law, and state law as will be best "adapted to the object" of the civil rights laws. . . . Therefore a federal court is required to use common law powers to facilitate, and not to hinder "proceedings in vindication of civil rights."71

Furthermore, Section 1988 authorizes application of state and common law with the explicit proviso "so far as the same is not inconsistent with the Constitution and laws of the United States," and courts have relied on such language to read out aspects of local law which would inhibit effectuation of the purposes of civil rights law. This implies for the Contract Buyers League case that if Illinois unconscionability law refuses to recognize market conditions artificially contrived along racial lines, that boundary should not prevent application of a law aimed at alleviating racial inequities, for the federal interest is paramount over conflicting state law.73

The search for the source of the commercial law component of racial unconscionability is not an untroubled quest. One's reflex, conditioned by Erie v. Tompkins, is to look to the decisional law of the forum state, Illinois in the Contract Buyers League case. But a close scrutiny of

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69. 396 U.S. at 240, quoted p. 536 supra.
70. 333 F.2d 280 (6th Cir. 1964).
72. For instance, Lefton waived a Mississippi statute which required removal petitions, brought by SNCC demonstrator arrested for violation of local picketing laws, to be pleaded individually rather than jointly. 333 F.2d at 284.
73. Again, Justice Brennan's discussion in Adickes, quoted notes 57, 64 supra, succinctly states this federal policy interest:

The common law of torts may be divided on important questions of defenses and relief, or it may be inadequate to carry out the purposes of the statute. Thus the common law is not an infallible guide for the development of § 1983. In particular, denial of equal protection on the basis of race was the central evil that § 1983 was designed to stamp out. Where that is the basis for recovery, relief should not depend on the vagaries of the general common law but should be governed by uniform and effective federal standards.
74. 304 U.S. 64 (1938).
Section 1988 dictates a different approach: "[T]he common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held . . . shall . . . govern . . . ." Reference to "decisions by the highest courts of the forum state" is conspicuous by its absence. It must be remembered that Section 1988 was enacted at a time when "common law" meant the federal courts' interpretation of general law, that is, the whole Anglo-American case law tradition. *Swift v. Tyson* in 1842 had interpreted the Rules of Decision Act to leave the federal courts free to exercise their own notions of substantive common law in matters before them, even in diversity cases. So Congress must have had this "federal common law" in mind when it wrote Section 1988, intending to restrict the federal courts' interpretation of common law only where state constitutions or statutes specifically did so, irrespective of forum state decisional law. This approach would certainly promote uniform enforcement of federal civil rights. In fact, the language of Section 1988 is more susceptible to this construction than the Rules of Decision Act, for Section 1988 refers separately to common law and state statutes.

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75. 41 U.S. 1 (1842).


The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

77. In *Pritchard*, the court used the following mode of analysis in applying §1988: First, it determined that no federal statute specifically dealt with the substantive issue of survival. Then, the court concluded: "We find no well-established federal common law on the survivorship issue. . . . Section 1988 indicates that in situations such as this, resort should be had to state law to provide an appropriate remedy." Thus, the Arkansas statute was adopted. 289 F.2d at 158. Justice Brennan subscribes to the same process. *Adickes v. Kress & Co.*, 398 U.S. 144, 231 (1970), passage quoted at note 57 supra.

Several criminal cases in federal court have refused to apply particular state laws on evidence, saying that their own interpretations of the common law governed in the absence of federal statutes. United States v. Thompson, 251 U.S. 407, 415 (1920) (Pennsylvania common law on resubmission of matters to grand jury not applicable in federal courts, which follows general common law); Hanley v. United States, 123 F. 849, 851 (2d Cir. 1903); Bandy v. United States, 245 F. 98, 101 (8th Cir. 1917) (both involving rules on corroboration of an accomplice's testimony); Young v. United States, 107 F.2d 490, 492 (6th Cir. 1939) (admissibility of confessions).


Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present.

while the Rules of Decision Act refers generally to "the laws of the several states." Thus, as to subjects not explicitly covered by state constitution or statute, federal courts may use Section 1988 to rely upon the entire body of commercial case law, within or outside of Illinois, to define racial unconscionability.

There is a statute on unconscionability in Illinois—Section 2-302 of the Uniform Commercial Code—but by its terms it applies only to sales of goods. So we are remitted to the general common law, in this case not by the Swift v. Tyson type of analysis but by the fact that Illinois courts have said almost nothing about Section 2-302. Although scholars may disagree on whether there existed a common law of unconscionability before the enactment of the Uniform Commercial Code, a strong common-law extension of the principles of Section 2-302, now enacted in 49 states, beyond sales of goods has been developing. Many post-Code decisions in areas outside of personal property sales, such as financing arrangements and real estate leases, have relied on Section 2-302 and cases decided under it as precedent for finding an unconscionable contract. Recent commentators believe, as Corbin hoped, that Section 2-302 will not be confined to Article 2 transactions.

80. Section 2-302 reads in pertinent part:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

81. There have been only two reported decisions in Illinois even mentioning § 2-302, let alone expanding the statute beyond sales of goods. Theo. Hamm Brewing Co. v. First Trust & Savings Bank, 103 Ill. App. 2d 190, 242 N.E.2d 911, 914 (1963); Dow Corning Corp. v. Capitol Aviation, Inc., 411 F.2d 622, 626-27 (7th Cir. 1969). If Illinois courts had rejected expansion of § 2-302 to realty, then the Swift v. Tyson argument would apply.
Further, there are historical and policy reasons for applying unconscionability to real property sales. In sum, one may clearly speak of a common law of unconscionability applicable to non-sale-of-goods situations, including real estate contracts, which can be imported through Section 1988 to form the commercial law content of racial unconscionability.

2. **Content of the Unconscionability Component**

In order to define sharply this commercial law component, we must determine what elements comprise unconscionability according to the case law of Section 2-302. One of the often repeated definitions is that delivered by Judge J. Skelly Wright in *Williams v. Walker-Thomas Furniture Co.*

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.

This definition includes both parts of the analytic breakdown, introduced by Leff and accepted by subsequent commentators, into procedural elements (bargaining characteristics of contract formation) and substantive elements (actual overreaching in the executed contract).

**Procedural.** If we turn to the cases and commentaries, several bargaining characteristics of contract formation appear relevant to racial unconscionability. One of the most important ways of establishing lack of meaningful choice has been a showing that the buyer occupies a bargaining position inferior to the seller. A few of the more frequently

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"Wherever this section is made applicable to contracts for the sale of goods, no court should fail to make it applicable to all other contracts; for the policy it adopts is applicable to all alike." SA A. CORBIN, CONTRACTS § 1164, at 223 (1964).

83. Leff points out that the great bulk of so called pre-Code unconscionability cases involved the practice of denying specific performance in equity to real property transactions, rather than sales of goods. Leff, supra note 82, at 533-34. See Spanogle, Analyzing Unconscionability Problems, 117 U. PA. L. REV. 931, 937-38 (1969).

85. The doctrine of unconscionability is at least as appropriate to sales of real estate as it is to sales of goods: Sales of land involve large commitments of resources—money and time for payment—so that the possibilities for oppression are greater. Land sales are usually "once-in-a-lifetime"; buyers become locked-in. Unlike buyers of consumable goods, they cannot simply cease doing business with someone who deals unfairly with them. Leff pursues these arguments at greater length. Leff, supra note 82, at 534-37.

87. 350 F.2d 445 (D.C. Cir. 1965).
88. Id. at 449.
89. Leff, supra note 82, at 487-88.
90. "In many cases the meaningfulness of the choice is negated by a gross inequality of
heard phrases mentioned in connection with unequal bargaining position are "necessity of life," "economic duress," and "specially vulnerable class."

Food, clothing, shelter, and transportation are necessities of life; courts have taken judicial notice of the fact that a person can choose to do without them only at unthinkable cost to himself. It has been suggested that as a rule contracts for necessities, like housing in *Contract Buyers League*, ought to be more closely scrutinized for unconscionability than luxury purchases.

Duress has long been a procedural element of unconscionability. As a doctrine standing on its own, it has traditionally required acts or threats by the seller forcing the buyer to enter into the contract before the contract will be rendered unenforceable. However, the Restatement of Contracts in Section 496 does leave an opening; it provides for avoidance of a contract if duress by a third person (like white market restrictors?) coerced its execution. A movement toward a broader usage of the term was heralded by Dawson's famous article on "economic duress" in which he stated:

The fact situations toward which duress doctrines are directed are, overwhelmingly, situations in which an unequal exchange of values has been coerced by taking advantage of a superior bargaining position.

The current reach of the concept of economic duress is demonstrated by *In re Elkins-Dell Mfg. Co.*, a bankruptcy proceeding in which certain security arrangements executed by a necessitous borrower for the


95. *See also Restatement of Contracts* § 477 (1932).
assignment of his accounts receivable were found unconscionable, the court saying:

Another species [of unconscionable contract] concerns what is basically economic duress. In the absence of a general mandate to review the adequacy of consideration, there has sometimes been a review of the economic positions of the parties and a finding that the position of one was so vulnerable as to make him the victim of a grossly unequal bargain.98

There has also been a movement toward consolidating much of the procedural component of unconscionability law by creating specially vulnerable classes of people whose contracts are to be more closely examined for unfairness. Ancient classifications of "sheltered" people include minors, sailors, expectant heirs, and, sometimes, farmers and women.99 There has been a similar trend toward making certain types of personal disabilities hardened categories; the Uniform Consumer Credit Code [UC3] in Section 6.111(3) (e) has gone so far as to list some of them in proposed statutory text.100 The class most often (and heatedly) discussed is the "under-privileged consumer."101 A series of cases have acknowledged and turned on the special weaknesses of this class: Williams v. Walker-Thomas involved sale of a stereo to a woman on welfare with seven children.102 As Leff points out, subsequent com-

98. Id. at 871. See Davenport, supra note 82, at 131-34.
99. 3 POMEROY, EQUITY JURISPRUDENCE §§ 944-49, 952-53 (1941); Leff, supra note 82, at 531-33.
100. Section 6.111 [Injunctions Against Unconscionable Agreements and Fraudulent or Unconscionable Conduct].

(b) In applying this section, consideration shall be given to each of the following factors, among others:

(a) belief by the creditor at the time consumer credit sales, consumer leases, or consumer loans are made that there was no reasonable probability of payment in full of the obligation by the debtor;

(b) in the case of consumer credit sales or consumer leases, knowledge by the seller or lessor at the time of the sale or lease of the inability of buyer or lessee to receive substantial benefits from the property or services sold or leased;

(c) in the case of consumer credit sales or consumer leases, gross disparity between the prices of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in credit transactions by like buyers or lessees;

(d) the fact that the respondent has knowingly taken advantage of the inability of the debtor 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.

101. This term comes from Ellinghaus, supra note 84, at 768-73. For other views, see Leff, supra note 82, at 555-58; Spanogle, supra note 85, at 955; and Shanker & Abel, Consumer Protection under Article 2 of the Uniform Commercial Code, 29 Ohio Sr. L. J. 689, 702-04 (1968).
102. 350 F.2d at 448. For a fuller presentation of the judicial motivation behind Williams, see Wright, The Courts Have Failed the Poor, N.Y. Times, March 9, 1969, § 6 (Magazine).
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The Contract Buyers League Case seems to consider the salient fact of this case to be the sale of an expensive item to such a person, the seller knowing she could not afford it.\textsuperscript{103} \textit{State by Lefkowitz v. ITM, Inc}\textsuperscript{104} found unconscionability in a referral plan whose "recruitments," as Ellinghaus (who believes that the underprivileged consumer is a sui generis category) puts it, "were apparently sought from low-income and low-literacy strata of society."\textsuperscript{105} Finally in \textit{Jones v. Star Credit Corp.},\textsuperscript{100} the court explicitly stated:

The very limited financial resources of the purchasers, known to the sellers at the time of the sale, is entitled to weight in the balance.\textsuperscript{107}

And in UC\textsuperscript{3} Section 6.111(3) (a), the seller's belief that the buyer will not be able to pay is seen as a factor of unconscionability.\textsuperscript{108}

Is the black homebuyer, disadvantaged by racial discrimination and segregation, eligible as a specially vulnerable class for institutionalization\textsuperscript{109} in unconscionability law? There are several objections to such a classification. First, Leff argues that supra-personal categories immensely simplify decision and foster grave inaccuracies because inquiry into the actual bargaining situation is foreclosed.\textsuperscript{110} In answer to that, the Contract Buyers League case contemplates extensive proof of how discrimination and segregation restrict the black buyer's housing choices. The class will be identified not simply as members of the black race, but by "very concrete and particular references to . . . vulnerability of bargaining position," as Ellinghaus suggests in arguing for institutionalization of the "class" factor.\textsuperscript{111} Secondly, it may be objected that such a classification is racist and patronizing in that it makes black people "presumptive sillies" like careless sailors, expectant heirs and helpless women, unable to take care of themselves. This is not so, for

\textsuperscript{103} Leff, \textit{supra} note 82, at 555, and articles cited therein.

\textsuperscript{104} 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1969). In Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1969), rev'd with respect to damages, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (1967), another case where a contract was declared unconscionable, "the defendant husband told the salesman that he had but one week left on his job and he could not afford to buy the appliance." Id. at 27, 274 N.Y.S.2d at 758.

\textsuperscript{105} Ellinghaus, \textit{supra} note 84, at 770.


\textsuperscript{107} Id. at 192, 298 N.Y.S.2d at 267.

\textsuperscript{108} Note 100 \textit{supra}.

\textsuperscript{109} Ellinghaus, \textit{supra} note 84, at 771. Compare equal protection law under the Fourteenth Amendment, where race is regarded as the prototype of suspect classifications, requiring judicial review on the more rigorous compelling state interest standard. See generally \textit{Developments in the Law—Equal Protection}, 82 HARV. L. REV. 1065, 1124-27 (1969).

\textsuperscript{110} Leff, \textit{supra} note 82, at 555-56.

\textsuperscript{111} Ellinghaus, \textit{supra} note 84, at 772.
the unequal bargaining position of the black buyer, as a black, does not result from any want of mature, intelligent, informed deliberation, but from the economic predicament which forces him to do business on the ghetto realtor’s terms or not at all.\footnote{1}

For these reasons black homebuyers, disadvantaged as they are by the dual housing market, make a much more valid category of people needing protection from commercial oppression than do those fitting the classification of “improvident consumers.” But there is an additional reason why the procedural element of racial unconscionability should be fulfilled by recognition of disadvantaged black homebuyers as a specially vulnerable class. As victims of discrimination against their race, they are singled out by Section 1982 for protection which will guarantee them equality in property rights. This specific congressional designation comports with Leff’s admonition that “if one wants to protect a class... it is at least arguable that one should just up and do so—but clearly.”\footnote{13}

All of the procedural factors just presented\footnote{14} are external circumstances—circumstances inhibiting the buyer’s meaningful choice of

\footnote{12. In their “Memorandum in Opposition to the Motions to Dismiss,” the \textit{Contract Buyers League} plaintiffs argued this very point:

The circumstances revealed by the complaint demonstrate that the Negro plaintiffs had no meaningful choice. As a result of racial discrimination, the would-be Negro buyer was automatically placed in an inferior bargaining position. He was a buyer in a market which was made to order for unscrupulous sellers. If the Negro did not accede to the terms dictated by the few sellers in the market, he could not buy a new home.


\footnote{15. Leff, \textit{supra} note 82, at 558.}

\footnote{14. Not listed are certain personal disabilities like ignorance, sickness, drunkenness and old age, which have also been important in stimulating the courts to find unconscionability. See notes 99-100 \textit{supra}. The only individual disabilities claimed by the \textit{Contract Buyers League} plaintiffs over and above their weak market position as subjects of racial discrimination and segregation are lack of formal education and lack of sophistication in real estate matters. While these may be indirectly caused by race in that blacks generally receive inferior schooling, the concept of racial unconscionability demands that we focus on contract abuses directly related to race and not consider individual differences that may exist among blacks. Besides, if buyers had lawyers, as many of them did, the effects of personal disabilities would be nullified. \textit{But see} testimony of Ralph Nader on the \textit{Contract Buyers League} problem, \textit{Hearings on S. 2045, S. 3097, S. 3165, and S. 3240 Before the Subcomm. on Executive Reorganization and Gov't Research of the Senate Comm. on Gov't Operations, }91st Cong., 2d Sess. 43 (1970):

I would put the primary responsibility of that unconscionable contract on the legal profession. I would recommend suspension or disbarment proceedings for any lawyer who has anything to do with the creation and transfer of that kind of contract on behalf of his client, and that is just where the responsibility from now on must be placed.

When there is this type of vicious exploitation, as we know, some of these stories are enough to make strong men weep as reported in the Chicago papers, the lawyer must begin to stand on his own two feet and not justify everything he does on the basis that he is just representing his client. He has got to become a primary human being, not just a secondary human being, and there comes a point whereby the limits}
which the seller is aware but over which he has no control. While the economic circumstances of the dual market fully satisfy the procedural requirement in this case, the requirement has been met in other ways too. The procedural element of unconscionability may also consist of direct conduct by the seller which inhibits the buyer's choice or misleads him. In the *Contract Buyers League* complaint, one can find allegations that the transactions were to some degree tainted with undue influence, fiduciary relationships, misrepresentation, concealment, fraud, deceit, adhesion form contracts and refusals to negotiate. Nevertheless, questionable seller conduct ought not to be necessary to the concept of racial unconscionability. Since the action is one brought by blacks as a class, we want to avoid inquiring into the idiosyncracies of each transaction to determine whether the seller has insulated himself by refraining from such behavior. Even if some "bargaining naughtiness" were present in every transaction, in order to be consistent with the auction model of seller behavior we must focus on race alone as a bargaining circumstance. Indeed, as will be seen, evidence of improper seller conduct is not necessary to a *prima facie* case of unconscionability.

**Substantive.** Courts are relying more and more heavily on the executed contract itself as a determinant of unconscionability. At one time when courts found grossly inadequate consideration or a misallocation of legal rights and responsibilities, unjustified by economic necessities, they seemed to look backward to the bargaining process and assume something had gone wrong there. Now, regardless of actual or presumed procedural abuses, a contract may be deemed unconscionable as a whole because of "overall imbalance" or in part ("component unconscionability") because certain terms, including price, may be unreasonably favorable to one party and oppressively harsh on the other. The

115. There are indications that seller knowledge of a buyer's disabilities or economic circumstances is significant in unconscionability theory. In all the "impecunious consumer" cases mentioned earlier, notes 102, 104, 106 *supra*, the buyer's impoverished condition was communicated to the seller. Certainly where a personal trait of the buyer like financial status is not readily apparent to the seller, actual knowledge would seem to be essential. This is the thrust of UC3 § 6.111(3), which is replete with requirements for seller "belief" and "knowledge," quoted at note 100 *supra*. In the *Contract Buyers League* case, the sellers' awareness of racial discrimination in housing can in most instances be safely assumed from his position as an experienced realtor.


117. P. 524-26 *supra*.

118. P. 556 *infra*.

119. These two concepts are treated at length in Leff, *supra* note 82, at 509-16 and Ellinghaus, *supra* note 84, at 775-87, and cases cited therein.

120. See the Williams definition of unconscionability, p. 546 *supra*. 

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definition of oppression best fitting the Contract Buyers League facts is that presented by one commentator:

An oppressive contract is one in which party A forces party B to accept burdensome terms, not justified by commercial necessities, as the cost of obtaining the contract's benefits. B accepts the oppressive terms, although aware of the consequences, because his bargaining power is such that he must do business on A's terms or not at all.121

The most important contract component for the Contract Buyers League buyers is the price term. The long-standing rule that "courts will not inquire into the adequacy of consideration" has been deeply eroded by recent unconscionability law, so that the New York Supreme Court could say in Jones v. Star Credit:

Indeed, no other provision of an agreement more intimately touches upon the question of unconscionability than does the term regarding price.122

This decision is only the latest in a series of unconscionability cases where contracts have been declared unenforceable on the basis of excessive price alone.123 Commentators are beginning to try to distill from these cases a definite ratio of actual price to fair price akin to the fixed ratio figures of laesio enormis in civil law.124 Without assigning it a value, UC3 includes a provision for "gross price disparity" in proposed statutory text.125


In discussing the statement in the Comment to § 2-302 that "the principle is one of the prevention of oppression," Spanogle concludes:

There are at least two different connotations of the word 'oppression,' and the definition of the word will vary according to which of them is emphasized. A court may find that 'oppression' connotes only those harsh terms obtained through oppressive means, so that the definition of the term depends upon procedural abuses. But a court may also interpret 'oppression' to mean terms, however obtained, that will create oppressive effects, so that procedural abuses are irrelevant. Under this interpretation, the real question is whether enforcement of the contract terms will result in oppression, rather than whether those terms were caused by objectionable procedures. Although either a result-oriented or a cause-oriented definition is arguably correct, the case law supports at least a limited use of the former definition.

Spanogle, supra note 85, at 948. See also Leff, supra note 82, at 499-501.

122. 59 Misc. 2d at 191, 298 N.Y.S.2d at 266.


124. French law uses a ratio of 2:1 and German law, 5:3. Shanker & Abdel, supra note 101, at 706; Davenport, supra note 82, at 965-67. For criticism, but a generally favorable response, see Leff, supra note 82, at 548-49; and Ellinghaus, supra note 84, at 790.

125. See note 100 supra (subsection [c]).
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The most difficult problem in applying a fixed rule regarding an unconscionable price term is determining the base figure—the fair price. Leff demonstrated how the Maclver decision fell into one pitfall; it ignored the effect of the time-price differential, which may have amounted to fair interest on a fair cash price. The two standards that appear most rational are the "reasonable return" test of Frostifresh Corp. v. Reynoso and the "comparable transaction" rule found in the UC3. Based on a record containing a Section 2-302(2) hearing as to "commercial setting, purpose and effect," the New York Appellate Term in Frostifresh reversed a previous opinion on the issue of damages and held that the seller was entitled to "net cost for the refrigerator-freezer, plus a reasonable profit, in addition to trucking and service charges necessarily incurred and reasonable finance charges." A different standard for the base price is proposed by UC3 Section 6.111 (3)(e): "Value" is to be measured by "the price at which similar property or services are readily obtainable in credit transactions by like buyers or lessees."

The typical transaction presented in the exhibits to the Contract Buyers League complaint involves the seller's purchase of a home from the previous (usually white) owner for $15,000, financed by a $14,000 mortgage loan from a savings and loan association, and a resale within a few days or weeks to the black buyer at a contract price of $24,000, with $1,000 down payment and the balance to be paid in monthly installments at 7% interest. Even if the $9,000 difference between the two "cash" prices were "pure profit" to the seller, the disparity falls short of the 2:1 ratio of actual price to fair price seen by some observers in prior cases. But the same reasons that suggest a liberal application of unconscionability law to real property sales also suggest that courts should be able to find unconscionability in smaller proportional price disparities than in sales of goods. Because of the sheer size, time commitment and once-in-a-lifetime nature of a home purchase, the oppressive impact of a 40% overcharge on a $17,000 house is greater than a 200% overcharge on a $300 refrigerator.

126. Leff, supra note 82, at 549-50.
128. Id.
129. See note 100 supra.
130. See note 86 supra.
131. In another piece of "extraneous correspondence," the Contract Buyers League told Judge Will of their hardships in trying to meet the monthly home purchase installments: "Most of our families are working two and three jobs to meet these notes. In doing this, they have to leave their children unsupervised and be embarrassed because they do not have money to make repairs. We believe that is hardship. Moreover, since
As for the determination of the base, an issue which affects both liability and the measurement of damages, the correct standard would seem to be the reasonable return rule used in Frostifresh—reasonable cost and expenses plus a reasonable profit. Inasmuch as expenses may include the risks of “managing” (i.e., collecting on and foreclosing) property in a ghetto neighborhood, it must be remembered that unconscionability is to be determined as of the time of the transaction, meaning that expenses attributable to seller practices aggravating the risks of collection and foreclosure ought to be disallowed. It might be contended that the appropriate price in a case of racial unconscionability is the UC3 “comparable transaction” price paid by similar white buyers for similar property (a figure perhaps impossible to determine empirically for the housing market). While evidence of business practices in other areas might help the court assess the reasonableness of a ghetto seller's profits and the efficiency of his operation, if the white price is still much below the price which would give a ghetto seller a reasonable return it should be a red flag that the white area business may not be truly similar. Instead, the focus should be on the ghetto realtor himself. If the overcharge based on the “reasonable return” computation is more than it would be based on the comparable white transaction price, it might be argued that only the smaller overcharge results from the operation of racial factors. But the theory is one of racial unconscionability where racial factors are significant as the premises of unequal bargaining power and lack of meaningful choice—the question whether sellers took oppressive advantage of these factors is to be answered by looking at whether the consideration, rights and responsibilities under the contract are reasonably allocated between buyer and seller themselves. Lastly, the use of a standard geared to prices in another market which the ghetto seller must follow at his peril would be a severe dis-

everyone of our families is paying between 35% and 45% of monthly income (we have included rents received by owners of two-flat buildings as part of monthly income) as contract payments, we believe that every case is a hardship case, especially since the Federal Housing Act of 1968 provides that subsidies will be granted for anything over 25% if low income families are buying on mortgage.

Judicial attacks on smaller-than-2:1 overcharges are not unheard of, even in Illinois, In re Chicago Reed & Furniture Co., 7 F.2d 885 (7th Cir. 1925), refused to enforce a contract calling for a profit of 40%, finding it “so manifestly harsh and oppressive as to shock the conscience.” If it is thought that a judicial scrutiny of profits this closely will end real estate “speculation” in ghetto homes, that is exactly what is suggested. See note 34 infra.

128. Some of these practices are described by Satter in the Chicago Bar Record, supra note 10, at 263.
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incentive to anyone doing real estate business in a black area, while the rule approved here strikes only at profits which are unreasonable and unfair.\textsuperscript{135}

Finally, the term “base” is not to be confused with the principal amount owed under the contract, to which interest is added. Where both a sale and financing are concerned, base for unconscionability purposes is composed of a fair cash price and a fair interest rate. If a defendant-seller claims that his cash price is high because the usury laws prevent him from covering what he considers his “financing risk” with a higher rate of interest, the issue becomes whether the additional interest amounts to an illegal overcharge. But then the seller is in even deeper trouble, for the legality of the price will be tested by the unconscionability law and by the usury statutes, which are backed by harsh penalties.

Also within the range of substantive unconscionability, other contractual provisions can—just as have price terms—be declared illegal or unenforceable or cause a court to refuse to enforce the entire contract. A number of clauses recently found unconscionable under Section 2-302 or unenforceable under other statutes bear resemblance to provisions commonly included in Contract Buyers League contracts. As further evidence of substantive oppression, their presence strengthens a claim of racial unconscionability.\textsuperscript{136}

Elements of a prima facie case. This brings us to the question whether a prima facie case of racial unconscionability is made out by proving (1) a racially discriminatory housing market, (2) making blacks as a class specially vulnerable to commercial oppression, and (3) a sale of housing

\begin{footnotes}
\item[135] See note 34 supra, note 156 infra.
\item[136] A list of typical Contract Buyers League clauses is given at note 37 supra.

Particular legal provisions can be declared unconscionable components, just like price terms, under § 2-302. As Leff complains, neither the statute nor the cases provide any criteria for judging whether a clause is an unconscionable one. \textit{Leff}, supra note 82, at 515-28. In their absence the general tests of imbalance of the whole contract, unreasonable favoritism to one party or unnecessary harshness on the other, will have to do. Some contractual provisions recently found unconscionable include warranty disclaimers, provisions requiring the buyer's submission to a foreign jurisdiction, installment contract repossession clauses, and waivers of defenses against assignees. Ellinghaus gives a quite thorough discussion of these, supra note 84, at 793-808. Unconscionability theory is exhibiting a tendency to swallow up clauses illegal under other provisions of the UCC, those declared void as against public policy, and those which attempt to allocate rights between the parties in areas pre-empted by existing statutory or decisional law. Examples of situations where § 2-302 has been used in conjunction with other provisions of the Uniform Commercial Code include Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 447, 240 A.2d 195, 198-199 (1968) (§ 2-316); Dow Corning Corp. v. Capitol Aviation, Inc., 411 F.2d 622, 626 (7th Cir. 1969) (§ 2-718, 2-719); and Único v. Owen, 50 N.J. 101, 125, 232 A.2d 405, 418 (1967) (§ 9-206). See \textit{Leff}, supra note 82, at 517-23; Ellinghaus, supra note 84, at 793-808. For a list of provisions barred from retail installment sales contracts in various states, see B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 312-22 (1965).
\end{footnotes}
to a black at a price well in excess of the seller's cost and expenses (with
an allowance for reasonable profit) and under the kind of conditions
found in *Contract Buyers League* contracts. Translated into uncon-
scionability terminology, assume a finder of fact determines that housing
market discrimination creates this specially vulnerable racial class, sub-
jected to economic duress, placed in an inferior bargaining position and
deprived of meaningful choice in a necessity of life (shelter). Assume
also that the price and conditions of the contract are found to be out of
balance, unreasonably favoring the seller and unnecessarily harsh on
the buyer. Is the contract *prima facie* racially unconscionable? Substan-
tive oppression alone has been sufficient in the past, so it is clear that
if the imbalance is gross enough the contract is unconscionable under
existing commercial law without regard to the dual market. Since the
economic consequences of race are a necessary element of a racial
unconscionability claim under Section 1982 as embellished by Section
1988, however, the case will not have to rest solely on substantive aspects.

The next question concerns what sort of procedural component is
necessary to prove unconscionability where the substantive imbalance is
large but not gross. Is the predicament of one who is specially disadvan-
taged by the dual housing market, as an economic concomitant of being
black, enough or is some form of seller misbehavior necessary? The
cases under Section 2-302 have said neither that the procedural com-
ponent *must* include an element of seller bargaining abuse, nor that
external circumstances alone are insufficient. On the contrary, the fre-
quency with which procedural unconscionability is stated in terms of
lack of meaningful choice or unequal bargaining position rather than
more restrictive phrases suggests that courts do not want to foreclose
their ability to find procedural unconscionability in any set of bargain-
ing circumstances.

The *degree* of choice-inhibition required seems to be conceived as
roughly inversely proportional to the extent of the substantive oppres-
sion, as Spanogle notes:

> In all cases, a sliding scale is used, so that unconscionability may be
> found in a severely harsh term although the procedural abuse was
> mild, and *vice versa.*

The "sliding scale" does not run to zero on the substantive end, though.

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137. The theme of Comment, *Bargaining Power and Unconscionability: A Suggested
Approach to UCC Section 2-302*, supra note 121, is that some showing of unequal bar-
gaining power is *always* a necessary element of unconscionability.

Comment 1 to Section 2-302 warns against "disturbance of allocation of risks because of superior bargaining power." Ellinghaus reads this to mean that—

[M]ere disparity of bargaining strength, without more, is not enough to make out a case of unconscionability. . . . [S]ome element of deception or substantive unfairness must be shown. 139

To summarize, a prima facie case of racial unconscionability against the seller consists of proof of the racially discriminatory market, the creation of a specially vulnerable class of blacks, plus some minimum amount of substantive oppression in the contract terms, depending on how restrictive the market is proven to be.

Remedies. What kind of affirmative 140 relief is available to the victims of racial unconscionability? The traditional defensive remedy has been a simple refusal by the court to enforce the contract. A recent New York decision, Jones v. Star-Credit Corp., indicates that the black buyer may be granted the remedy sought by the Contract Buyers League plaintiffs—reformation:

Having already paid more than $600 toward the purchase of this $300 freezer unit, it is apparent that the defendant has already been amply compensated. In accordance with the statute (2-302) the application of the payment provision should be limited to amounts already paid by the plaintiffs and the contract be reformed and amended by changing the payments called for therein to equal the amount of payment actually so paid by the plaintiffs. 141

The difficulty with the Jones v. Star-Credit Corp. reformation is that it is based on expediency rather than a notion of fair price. The Con-

139. Ellinghaus, supra note 84, at 766-67. The "something-for-everyone" history of this clause in Comment 1 is perused by Leff, supra note 82, at 499-501.
140. Judge Will in his dismissal of the Contract Buyers League state commercial law court doubted whether a claim of unconscionability could be initiated affirmatively. Speaking of the Illinois unconscionability cases involving "a disparity in values exchanged," he commented:

[T]hese rare cases are significantly distinct from the instant case in that the court is typically being asked to enforce the unconscionable contract; and when the court refuses, it states as its reason the classic proposition that "courts of equity will not lend their aid to assist one in realizing upon an unconscionable bargain.” 300 F. Supp. at 227 (citations omitted). But Pomeroy’s statement of the concept of unconscionability, accepted by the Contract Buyers League court on that same page as "standard" reads:

[T]hese [inequitable] circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative.
3 Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE § 928, at 641 (5th ed. 1941) (footnotes omitted). In fact, courts have already heard affirmative unconscionability claims and granted relief, even where illegality was found on the basis of price disparity alone. See, e.g., Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969).
tract Buyers League class includes people who have entered into agreements as early as 1952 and as late as 1968. There are buyers who have paid in full or nearly in full, and, assuming final judgment is reached sometime in the near future there will be buyers who will have not yet paid in the equivalent of a fair price. The latter group is easy to relieve—they will still owe the sellers money. In instances where the seller will have to give back some money in order to achieve the state of affairs that would have existed if the price had been fair the remedy of reformation would permit a money judgment, to which the only obstacle might be collection difficulties.

IV. The 1866 Civil Rights Act and the Phenomenon of Racial Discrimination in Property

In the previous section, it has been shown that the text of Section 1988 authorizes importation of state and common law commercial injuries arising in a distinctly racial setting to define the scope of the right declared in Section 1982. An additional argument supporting this

142. 300 F. Supp. 210, 213, 223 (N.D. Ill. 1969). It should be noted that § 2-302 provides a new kind of reformation, based not on mutual mistake nor on an actual meeting of minds, but on a sort of public policy curbing the unconscionable aspects of a contract.

143. Following the analogy of racial unconscionability, any commercial claim which includes, as a necessary element of proof, the economic position of a non-white subjected to racial discrimination or segregation in the relevant market states a cause of action under § 1982 as fleshed out by § 1988.

Federal and state anti-trust statutes offer lucrative possibilities (both in terms of legal theory and treble damages). Under the price-fixing charges in Counts II and III of the Contract Buyers League complaint, accepted by Judge Will, 300 F. Supp. at 216-18, if the sellers' power to fix prices is an essential part of the claim and this power existed only because of the discriminatory market, then the price-fixing injury is necessarily inflicted on black people because of their race, and through § 1988, this is a violation of § 1982. Though it is not alleged in the Contract Buyers League complaint, selling property on installment contract may involve a tie-in between housing and financing illegal under antitrust law. See generally Note, Consumers and Antitrust Treble Damages: Credit-Furniture Tie-ins in the Low Income Market, 79 YAL L.J. 254 (1969). If the unavailability of housing and mortgage loans for blacks resulting from institutional race discrimination is the basic premise and precondition for the ghetto seller's refusal to sell on any terms except the installment land contract, then the injury done by his tie-in is a racial one and § 1982 applies. One commentator has already recognized the "unilateral" price discrimination achieved by the low-income market (LIM) retailer who ties financing to furniture sales:

Given both a segregated market and the tying arrangement the LIM retailer is able to allocate his total price arbitrarily between "furniture price" and "credit price."

Segregation, then, is necessary for the initiation of charge shifting . . .

Id. at 260, 264 (citation omitted). Thirdly, if the seller and his savings and loan association financier agreed that the lender would make no direct loans to purchasers even if a qualified borrower requested, in order to favor the seller's installment contract sale, this not only would be § 1982 traditionally discriminatory action, but as a combination in restraint of trade made possible by the general unavailability of conventional financing for blacks it would seem to be a Sherman Act violation based on race which also violates § 1982 through § 1988.
result can be made: the very nature of the right created in Section 1982 requires the breadth such a textual reading allows. Let us consider again the wording of Section 1982:

All citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property.

The statute does not identify who may be a violator nor does it specify the conduct for which one may be held liable. In this sense, it is unlike the 1968 Fair Housing Act, which makes certain acts illegal, such as "[t]o refuse to sell or rent . . . or otherwise make unavailable" housing because of race and "[t]o discriminate against any person in the terms, conditions, or privileges of sale." It is also unlike the Fourteenth Amendment, which makes it unconstitutional for states to "deny to any person . . . the equal protection of the laws." As the Court spells out in Jones v. Mayer, Section 1982 is closer kin to the Thirteenth Amendment, which simply says "neither slavery nor involuntary servitude . . . shall exist within the United States." That Court stated the relation between the statute and the amendment: In order to keep the Thirteenth Amendment's "promise of freedom" Congress "assure[d] that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."

For almost a century, Section 1982 had been thought to proscribe the act of discrimination only when committed through state action. Jones v. Mayer changed that construction by stating that the terms, intent and constitutional authority of Section 1982 were properly interpreted as barring "all racial discrimination, private as well as public, in the sale or rental of property." Just as the courts have come to acknowledge that Section 1982 does not specify possible violators, they must soon see that the statute does not specify prohibited acts of discrimination, traditionally defined or otherwise. As the offspring of the Thirteenth Amendment, as well as by its own terms, Section 1982 guarantees equal property rights between the races in fact. The statute is addressed to whether the present status of the black man's property rights is the same as that enjoyed by whites—it is oriented toward the

144. 42 U.S.C. § 3904.
145. U.S. Const., 14th Amend. § 1.
146. U.S. Const., 13th Amend. § 1; Jones v. Mayer, 392 U.S. at 437-44.
148. 392 U.S. at 413 (emphasis in original).
situation of the victim of discrimination, not the acts of the discriminator. Thus, Section 1982 is ultimately dedicated to the eradication of the effects of discrimination in property disposition.

The general problem, then, is to develop a usable legal principle out of a broad law which flatly prohibits the existence of racially discriminatory effects. The limits of the implications that can be drawn from such a theory are hard to define. It may go so far as to impose an affirmative duty upon Congress and state legislatures to cure the effects of discrimination, as Arthur Kinoy suggests.149 Our concern here, however, is with the federal courts' responsibility to develop theories of individual liability which will fulfill the purposes of Section 1982. Since the judicial application of Section 1982 will be a process of singling out particular individuals and making them liable for particular acts, courts must specify offending behavior as carefully and precisely as possible.150 For Section 1982 to become a workable legal principle, a way must be found to relate rationally the effects of discrimination to identifiable acts and the actors causing them.

The potential scope of liability under Section 1982 thus cannot be ascertained without an understanding of the complex phenomenon of discrimination in situations involving property rights. Earlier we discussed how individual acts of traditionally defined racial discrimination committed by white market restrictors can be connected, through a chain of events, to the high cost of a ghetto home purchase. The practical difficulties uncovered in that liability theory suggest the obvious legal


150. Enforcement of § 1982 without the minimum specification of who may be brought into court would be enforcement by judicial caprice. At the very least one would expect that upon the judicial proof of a discriminatory phenomenon in one commodity in an area, housing in Chicago for instance, the court's remedial order would be directed to those who are in a good position to correct one or more of the aspects of the phenomenon (e.g., force the FHA to reverse its dual market supportive practices and allocate low-cost mortgage financing to relieve people struck by the effects of discrimination, such as high-priced installment contracts). But the law must set a standard clear and precise enough to have the essential quality of due process. A law which is too vague gives people no "notice" that the courts may interfere with their lives and surprises them when they have no idea what they should or should not have done. In Connally v. General Construction Co., 269 U.S. 385 (1925), the Court phrased this doctrine: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning or differ as to its application, violates the first essential of due process." See Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961); Collings, Unconstitutional Uncertainty—An Appraisal, 40 CORNELL L. REV. 195 (1955); Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67 (1960). Development of § 1982 using state and common law imported through Section 1988 avoids the vagueness problem by relying upon existing standards of fault liability.
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limits of its approach: conceiving the phenomenon of discrimination as a linear process, starting with racial discrimination in the sale of suburban housing, for example, and ending with an exorbitant installment land sale contract in the ghetto, involves so long a chain of causation between original act and final effect that recovery for a black contract homebuyer would be rare indeed.\(^{151}\) To achieve a more adequate and comprehensive application of Section 1982, the phenomenon of discrimination must be broken up into three dimensions, each with certain acts related closely enough to certain racially discriminatory effects so that legal liability can be attached to them.

First, there is the isolated *individual act* of treating a person unfavorably because of his race, which has been designated traditional discriminatory action. What this act means *in effect* for the black man is that he cannot complete the transaction he wants because he is black.

Secondly, when the society is pervaded with these traditional acts of selection for differential treatment, from a private homeowner's refusal to sell to the promulgation of a government agency's biased national policy, these *traditional acts in the aggregate*, in combination with other limitations on the housing stock,\(^{152}\) unbalanced by alternative sources of supply,\(^{153}\) result in white market restriction—the creation and support of the dual market. When discrimination becomes institutionalized in this way, we style its effect the creation of the *systemic condition* of discrimination. The effect in this "second dimension" is the placement of the black consumer in a captive market devoid of significant free choice.

Thus, the potential is created for a third dimension of discrimination to result. Given the systemic condition of discrimination, other individuals, though they may not have created the racially dual market, *act to take advantage* of it. Those who sell to blacks, if they charge what the black side of the market will bear, receive a profit inflated by a race "tax." Upon the specially disadvantaged position of blacks trapped by the systemic condition of discrimination, social and economic mechanisms operate, though often in a manner not traditionally discriminatory, to misallocate resources—blacks end up with less in the way of goods and services per dollar spent than do their white counterparts.\(^{154}\)

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\(^{151}\) See pp. 528-30 *supra*.

\(^{152}\) E.g., suburban zoning practices preventing access by low-income people to housing throughout a metropolitan area.

\(^{153}\) E.g., housing made available by blockbusting or special government financial aid programs. See note 20 *supra*.

\(^{154}\) See note 27 *supra* for a treatment of this dimension as "circular and cumulative causation."
This misallocation—and the burdensome effect on the black man which results—unmistakably has its origins in widespread racial discrimination.

Once the phenomenon of discrimination is properly analyzed—into three types of acts with three types of effects—the application of the 1866 Civil Rights Act becomes strikingly clear: Section 1982 provides the mandate for the federal courts to be active in all three dimensions, with Section 1988 providing manageable theories of liability for each of them. Since Section 1982 is directed at the totality of racially discriminatory effects in the disposition of property rights, and at the acts that produce them, none of the three dimensions of discriminatory action—traditional individual acts, acts that in the aggregate create a systemic condition with a clear racial impact, or acts that “take advantage” of such a systemic condition—are immunized from its prohibition. If it is illegal to commit a discriminatory act—traditionally defined—and thus participate in the creation and maintenance of a dual market, it should also be illegal to make an “excessively large” profit by taking advantage of the black man’s captive market position. To do so is to bring an oppressive effect of discrimination down upon him.165

Section 1982 can in practice be enforced against discriminatory action in each of the three dimensions. The delineation of specific rights flowing from the general right declared by Section 1982 is left to the courts with the command of Section 1988 to construct whatever federal law is necessary to achieve the objective of Section 1982. Jones v. Mayer identified the first such specific right, the traditional right to be free from an individual’s differential treatment on the basis of race. But the Jones v. Mayer standard of liability is, as we have seen, absolutely useless against

165. Judge Will’s reading of Jones v. Mayer in Contract Buyers League moves far toward a realization that § 1982 is directed at the entire phenomenon of discrimination in property rights, including the systemic condition and excessive profit-taking:

The Court found that the legislative history of the 1866 Act demonstrated the Congressional intent to ensure that the former slaves could participate fully in a national economy. It was the Court’s conclusion that the existence of a black market distinct from a white market was the de facto vestige of what the Congress in 1866 intended to abolish as a critical means of making the black man a free man. The conviction recognized was that the obliteration of the social system where one man was the slave of another required as a fundamental matter that our economy be undifferentiated as to the race of a man.

Defendants present the discredited claim that it is necessarily right for a businessman to secure profit wherever profit is available, arguing . . . that they did not create the system of de facto segregation which was the condition for the alleged discriminatory profit. . . . [But] it is now understood that under § 1982 as interpreted in Jones v. Mayer there cannot be markets or profits based on the color of a man’s skin.

300 F. Supp. at 215-16.
illegal conduct operating to take advantage of a systemic condition arising from initial traditional discrimination practiced in the aggregate. This fact should not insulate acts of "taking advantage" from liability. The analysis of racial discrimination as a divisible phenomenon serves to show that the kinds of behavior found in each of the three dimensions, though interlocking to form a totality, are so different as to be impossible to judge by a single rule. Traditional discrimination occupies only a particular location in a complicated phenomenon. Once this is understood, it suggests that discriminatory acts vary in their nature depending on where they fall within the total phenomenon of discrimination. Therefore, specific rights and rules defining liability must be tailored to those variations. This is the function for which Section 1988 is designed. And, as the phenomenon may change over time and grow in sophistication, Section 1982 will continue to apply, because the flexibility of Section 1988 allows an on-going process of rule-making.

The Supreme Court in *Jones v. Mayer* was able to imply the traditional rule against discriminatory action from the text of Section 1982, but it had to turn to Section 1988 in *Sullivan v. Little Hunting Park* to make that rule fully enforceable. There is nothing in Section 1982 to indicate that courts must stop there in defining standards of liability. Rather, the value of the 1866 Act is that by Section 1988 it authorizes a court to construct whatever combination of federal, state and common law will be appropriate to remedy the kind of discriminatory effects at hand. In identifying reprehensible behavior in the third dimension—"taking advantage"—we are obviously dealing with the normal operation of our society’s distribution system given the existence of a dual market. For this reason, commercial standards found in state and common law are especially appropriate to regulation of action in the third dimension—development of civil rights law under Section 1988 can parallel familiar standards of ethical commercial conduct. For instance, racial unconscionability has the desirable characteristic of building upon an existing, "fault" liability rule.\(^{156}\)

156. Still satisfying the legal values of consistency and predictability, a new set of definitions of the third-dimensional acts incurring liability under § 1982—acts not tainted with fault under present law—could be developed in an alternative way. The courts could just hold that the non-white’s guarantee of a discrimination-less society imposes a duty on ghetto sellers not to charge more than whites pay for comparable housing. This is the standard that appears to crop up in Judge Will’s *Contract Buyers League* opinion at several points. See note 17 supra.

In a sense, the text of § 1982 referring to "the same . . . right as is enjoyed by white citizens" allows a reading that this means white citizens generally, i.e. in comparable situations within the white market at large. While this interpretation may be appropriate
What the concept of racial unconscionability does is link up this commercial standard with the recognition that the act of taking advantage depends on the existence of the systemic condition of discrimination—the racially dual market—and carries out its potential to oppress black homebuyers. In doing so, racial unconscionability demonstrates how a commercial injury becomes a civil rights cause of action under Section 1982 when the phenomenon of racial discrimination is analyzed in three dimensions.

The cause of action can be stated in general form:

If there exists a systemic condition with a distinctly racial impact in the marketplace resulting from the aggregation of traditionally discriminatory acts and there is taking advantage of this condition, then an injury may be found under Sections 1982 and 1988 and appropriate imported state and common law.

In order for "taking advantage" to be properly identified as discriminatory, a sufficient factual foundation must be laid in the dimension upon which the taking advantage depends—the existence of the systemic con-
dition of a racially discriminatory market. For example, in the Contract Buyers League setting, evidence of a low-income housing shortage is not enough; there must be proof that individual acts of traditional discrimination in the aggregate produce a net restriction on supply and quality which is peculiarly directed at the black man. Translated into racial unconscionability terms, it is inferred from this net restriction that the black buyer is deprived of bargaining power and meaningful choice and placed in a specially vulnerable class on account of his race. Once the strictly racial foundation is laid, the other general problem of proof is defining the content of "taking advantage." The term generally comprehends the action of one who uses his superior social or economic position to confer some benefit on himself by imposing a detriment on someone else. Racial unconscionability attempts to deal with this problem by resolving the issue into an evaluation by judge or jury of whether the seller's planned rate of return on each contract was reasonable. Certain guidelines as to appropriate time of assessment, allowable costs and expenses, use of profits, and relevance of credit risk information may be developed to aid them.

Distinguishing the three dimensions of discrimination also facilitates a sketch of the social and economic impact of this newly-fashioned legal concept. A rule against racial unconscionability functions to minimize the harsh effects of a systemic condition produced by racial discrimination, but does so only partially. It remedies the problem of overpricing suffered by blacks. But it does nothing to discourage traditional acts of discrimination, and so cannot eliminate the systemic condition of discrimination. Hence all other effects deriving from the existence of the dual market remain. Housing may become less expensive, but blacks will still be limited in the areas where they can live and in the quality of housing available to them. Indeed, the result of a judicially lowered price only emphasizes the dual market's continued existence. The "artificially" reduced price is not favorable to profit-motivated tendencies which increase the supply of housing in the black market, such as blockbusting. Instead, a classic example of rationing takes place: At the administered (rather than market-determined) price, more blacks want to purchase homes than the supply can serve, leaving black housing needs still unsatisfied. Thus, a rule directed against racial unconscionability, despite its practical advantages, treats the symptoms of discrimination only. Legal actions against traditional discriminators, against the institutional white market restrictors who maintain the systemic
condition of discrimination—these are in reality much more important in the sense that they go to the root causes of the phenomenon of discrimination, despite their practical disadvantages.

In the final analysis, thinking about racially discriminatory actions in three different dimensions should suggest that the problem cannot be solved by relying on the law of one dimension and ignoring the other two. The 1866 Civil Rights Act was intended and designed, with its broad declaration of rights and flexible enforcement clause, to be a complete legislative package equal to the task. As its sponsor, Senator Trumbull, phrased it when he asserted the authority of Congress to pass the 1866 Civil Rights Act: “I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing.”