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Law and Economic Exploitation in an Anti-Classification Age

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LAW AND ECONOMIC EXPLOITATION IN AN ANTI-CLASSIFICATION AGE

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ABSTRACT

Does our legal system permit the economic exploitation of extreme vulnerability? Focusing on predatory housing loans — a thriving business at the dawn of the twenty first century — this Article argues that the answer in most cases is yes. Under an individualistic neoliberal paradigm, borrowers are held liable for their contracts, even if they were targeted with predatory practices. Further, borrowers' attempts to resort to antidiscrimination law, and frame their exploitation as "reverse redlining," have offered no real answer. An important yet undertheorized explanation for this problem is the impact of the Supreme Court's anti classification jurisprudence on lower courts. In an anti classification age, even outside of the constitutional arena, courts are reluctant to accept race based arguments. As a result, color blind analysis of predatory lending permits economic exploitation to thrive.

This Article proposes a unique solution to this deadlock: embedding the analysis of individual borrowers in the context of their neighborhood, a move that neither denies nor relies on their race. Drawing on a variety of disciplines, including psychology, sociology, and public health, this Article explains how residing in distressed neighborhoods — the most embattled neighborhoods of our country — creates conditions especially fertile for exploitation. Based on this interdisciplinary analysis, this Article suggests an alternative legal framework which would circumvent the anti classification problem. The new framework is tailored around the idea of individual dignity, which includes the right to freedom from economic exploitation. To protect such right it is suggested to utilize contract law and particularly the doctrine of unconscionability — which is highly apposite for a contextual analysis of predatory agreements.

More broadly this Article argues that one of the important lessons to be learned from the tragic subprime crisis is how urgent it is to find an appropriate legal response to market exploitation of vulnerable individuals. Notably, the contractual framework suggested in this Article for predatory housing loans is useful for handling other exploitative loans, such as pay day loans and auto title loans. Further, the proposed framework is valuable beyond the contexts of lending and distressed neighborhoods, to address other forms of economic exploitation perpetuated by contract. Given persistent weakness in our economy, establishing an anti exploitation norm in the market seems more important than ever.

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But the existence of an opportunity is not the same thing as the decision to exploit it.

—Richard A. Posner[1]

INTRODUCTION

Dire financial times present opportunities for economic exploitation. When individuals are struggling, sophisticated market actors are there to offer "help" by lending money under predatory terms. Aptly, during the recent crisis lenders targeted *vulnerable communities*, comprised mainly of minorities, and identified them as ideal borrowers to whom one can sell almost any loan under any terms. For these lenders, *contra* Judge Posner, the existence of an opportunity leads directly to the decision to exploit it. As a result, it is not surprising that victims of predatory lending have failed to satisfy the harsh terms of their loans.[2] Facing a lawsuit with very limited means

1. RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 249 (2009).

2. There is no precise definition of the term "predatory lending." For this Article's purposes, predatory lending has two essential characteristics: "(1) a wide range of lender behavior that is either substantively or procedurally unreasonably abusive, exploitive, harmful, or unfair; and (2) a pool of borrowers that are particularity vulnerable, targeted, and exploited precisely because of their vulnerability." Cecil J. Hunt, II, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending under a New Theory of Economic Hate Crime*, 35 U. TOL. L. REV. 211, 222 (2003). For an example of a judicial definition which highlights the exploitation of vulnerability at the core of predatory lend ing, see *Associates Home Equity Services, Inc. v. Troup*, 778 A.2d 529, 537 (N.J. Super. Ct. App. Div. 2001) ("In using the term 'predatory lending' [an expert in the case] refer[red] to lenders who target certain populations for onerous credit terms. The population generally targeted includes, among others, the elderly, minorities, and residents of neighborhoods that do not have *ready access to mainstream credit*. Credit terms *not* warranted by the objective facts regarding the creditworthiness of these individuals are imposed upon them because for various reasons the lenders feel they can take advantage of a borrower. Typically predatory lenders take advantage of borrowers due to their *lack of sophistication* in the lending market, due to their *lack of perceived options for the loan* based on discrimination or some other factor, or due to deceptive practices engaged in by the lender

to carry a legal battle against powerful financial institutions, many borrowers have turned to courts across the country in search of legal relief.

Given the now-known fact that many victims of predatory lending are minorities, many borrowers have argued their loan agreements should not be reviewed as the product of a normal bargaining process which culminated in a free choice to contract.[3] Instead, they should be viewed by use of the anti-discrimination paradigm[4] to explain that their contracts are the result of a discriminatory market behavior known as "reverse redlining."[5] Subsequently, most courts have analyzed borrowers' arguments within the framework of anti-discrimination laws, particularly under the norms against discrimination in housing. Although reverse redlining was recognized as a possible cause of action by judicial interpretation of the Fair Housing Act and other antidiscrimination laws, courts have refrained from awarding relief based on this claim.[6] And so, almost without exception, borrowers who have fallen prey to predatory lending are losing the battle against their exploiters.

Leo White was one of those borrowers. When White set out to buy his very first home he was a twenty-one-year-old African-American, who had not graduated from high school and who was working as a hotel bellman earning roughly $2,100 per month.[7] The lenders led

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that mislead or fail to inform the borrower of the real terms and conditions of the loan." (second, third, and fourth emphases added)).

3. By and large, these claims have been made in the context of sizable housing loans and lending terms that have led to foreclosure. Other predatory loans, such as pay day loans, are frequently too small to justify the significant cost of litigation, especially due to the lack of applicable antidiscrimination laws. However, the alternative legal solution proposed in this Article can apply to all kinds of predatory loans. *See infra* CONCLUSION AND FURTHER IMPLICATIONS.

4. I use the word "paradigm" with awareness of Professor Richard Delgado's observation that something is called "paradigm" only after it has been recognized as causing systematic injustice that calls for a change and usually after the commentator has an alternative in mind. *See* Richard Delgado, *Centennial Reflections on the* California Law Review*'s Scholarship on Race: The Structure of Civil Rights Thought*, 100 CALIF. L. REV. 431, 456 57 (2012). Both aspects of this observation fit the arguments made in this Article.

5. The term "reverse redlining" is rooted in the dark days of actual redlining: banks would mark maps with red lines to exclude entire minority neighborhoods from the housing loan market. Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 179 (2009) (explaining the origins of the term). In its reversed form, the term refers to a newer method of mistreatment where residents of the formerly redlined areas are being enticed by lenders to receive egregious housing loans. *Id.* The legal theory, or cause of action, of reverse redlining takes its name from this market behavior. *Id.*

6. *See infra* Part I.

7. M & T Mortg. Corp. v. White, 736 F. Supp. 2d 538, 546 (2010).

him to believe that he would be able to repay his loan;[8] however their estimation was unrealistic given his income and the property's poor condition, which prevented him from renting out parts of it.[9] When White defaulted, the lenders initiated foreclosure proceedings.[10] Defending against foreclosure, White did not deny signing a loan agreement.[11] Rather, he argued that he was preyed upon as part of a larger scheme of reverse redlining in his Brooklyn neighborhood, which had been described as "a 'hot zone' for predatory lending schemes."[12] This lawsuit began in 2003 when the scope and magnitude of predatory lending, and its contribution to the larger subprime mortgage crisis, were still unclear. Years later, in 2010, after so much more was already known about the patterns of predatory lending,[13] the court still doubted that White would be able to prove his arguments regarding mass targeting and race-based discrimination in lending:

> A jury might well conclude that [the borrowers] were targeted not on the basis of being African-Americans, but because they were vulnerable, low-income, unsophisticated, first-time home buyers who *happened* to be African-American. It is unfortunate that buyers fitting that profile may be found in proportionally greater numbers in the African-American community, but that observation does not mean that the [borrowers] were targeted *because* of their race.[14]

Subsequently, the courts' refusal to credit vulnerable and exploited borrowers' antidiscrimination claims has acute ramifications that can only be recognized by piecing public and private law together. These ramifications originate, I argue, from the lack of an "anti-exploitation" legal norm—a fact evidenced by the idea that exploiting Leo White not as African-American, but "merely" as a vulnerable low-income borrower is not sufficient to justify relief. First, such judicial response not only reinforces, but exacerbates the growth of economic inequalities between the powerful and the powerless. Second, it permits and even incentivizes future exploitative market behavior

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8. *Id.* at 544 46.

9. *Id.* at 546 47.

10. *Id.* at 547.

11. *See id.* at 546.

12. M & T Mortg. Corp. v. White, No. 04 CV 4775 (NGG)(VVP), 2006 U.S. Dist. LEXIS 1903, at *8 (E.D.N.Y. Jan. 9, 2006).

13. Ironically, by 2010, most of what is known today regarding these lenders' patterns of targeting vulnerable communities had already been documented by mainstream news. *See, e.g.*, Manny Fernandez, *Study Finds Disparities in Mortgages by Race*, N.Y. TIMES (Oct. 15, 2007), http://www.nytimes.com/2007/10/15/nyregion/15subprime.html?pagewanted=print& r=1&.

14. *White*, 736 F. Supp. 2d at 576.

by rewarding those who take advantage of others' vulnerabilities. Combined, these consequences create an environment that facilitates the perpetuation and growth of economic exploitation. This Article uncovers the roots of the problem and, with those roots in mind, argues for an alternative legal framing that would allow courts to respond more effectively to contract-based economic exploitation.

The repeated failure of reverse redlining arguments can be explained, at least in part, by the devastating constraints placed on the litigating borrowers. As other scholars have pointed out, the leading reasons are that the borrowers lack the minimal financial means necessary to endure prolonged litigation and are faced with grave problems of information asymmetry.[15] Nonetheless, this Article argues that there is another, unacknowledged reason for the disappointing results of reverse redlining litigation. This important explanation does not relate to the borrowers, but to the antidiscrimination doctrine courts use to resolve their cases.

Notably, group-based or identity-based arguments are increasingly met with judicial opposition. The resistance seems to start at the top—the Supreme Court has expressed increasing reluctance to engage in group-based classifications. Most recently, the Supreme Court's decision in *Fisher v. University of Texas at Austin*[16] reconfirmed an "anti-classification" judicial approach: an interpretation of the Equal Protection Clause[17] as barring governmental use of classifications, including even benign classifications.[18] This view makes it harder to characterize claimants as *members of groups*. Scholars writing in the context of equal protection jurisprudence have described and evaluated this resistance in various ways, using a variety of names to fit their own perspective, such as "color blindness,"[19] "anticlassification,"[20] "anti-antidiscrimination,"[21] "antibalkanization,"[22]

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15. *See, e.g.*, Andrew Lichtenstein, *United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class*, 43 LOY. L.A. L. REV. 1339, 1339 (2010); Charles Falck, Note, *Equitable Access: Examining Information Asymmetry in Reverse Redlining Claims Through Critical Race Theory*, 18 TEX. J. C.L. & C.R. 101, 114 18 (2012).

16. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415 (2013).

17. U.S. CONST. amend. XIV, § I ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

18. *Fisher*, 133 S. Ct. at 2421.

19. Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 84 (2000).

20. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI. L. REV. 9, 10 (2003).

21. Jed Rubenfeld, *The Anti Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142 (2002).

22. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

"the new equal protection,"[23] and "post-racialism."[24] Despite the range of approaches, a common theme has emerged: the Supreme Court's willingness to accept group-based arguments is decreasing. Ours is becoming an anti-classification age, where classifications are increasingly considered "repugnant."[25]

By and large, commentators' attention to this phenomenon has been reserved for high profile constitutional battles that are covered extensively by the media, like the refusal to acknowledge sexual orientation as a protected classification in *Lawrence v. Texas*.[26] Yet this Article identifies and analyzes the impact of the Supreme Court's reluctance to engage in group-based classifications on lower courts' decision-making, namely with respect to both private law issues and economic transactions, particularly in the context of housing loans. Although, originally, the anti-classification approach is a reading of the Equal Protection Clause with regard to *state actors*, there is a "spillover" of anti-classification sentiments. This process shapes judicial thinking and operates to restrict both lower courts' willingness to charge *private actors* with discrimination and their readiness to award, as arms of the state, race-conscious remedies based on group-based arguments.[27]

Further, recognizing such "spillover" illuminates how—hidden from the public eye—the tendency towards anti-classification has contributed to the repeated failures of the subprime crisis victims in court. As a result, borrowers are forced to pay the price for what society prefers to frame, not as a social problem, but rather as the borrower's private choice to agree to a bad contract.

Some scholars have insisted on the crucial role of race in the predatory lending story and engaged in group-based efforts to propose reforms.[28] Unfortunately, the anti-classification frame courts employ

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23. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 792 93 (2011).

24. Sumi Cho, *Post Racialism*, 94 IOWA L. REV. 1589, 1603 (2009) ("[P]ost racialism idealizes a society in which race is no longer a basis for differential treatment, grievance, *or remedy*." (emphasis added)); *see also* William M. Carter, Jr., *The Paradox of Political Power: Post Racialism, Equal Protection, and Democracy*, 61 EMORY L.J. 1123, 1125 26 (2012).

25. Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa,* 117 HARV. L. REV. 1378, 1383 (2004).

26. Lawrence v. Texas, 539 U.S. 558 (2003).

27. *See* Adam Weiss, Note, Grutter, *Community, and Democracy: The Case for Race Conscious Remedies in Residential Segregation Suits*, 107 COLUM. L. REV. 1195, 1197 (2007) (discussing the fact that changes in the Supreme Court's equal protection jurisprudence have made lower courts "hesitant to use race" in the context of awarding race conscious remedies by ordering *state actors* to promote housing desegregation).

28. *See, e.g.*, Charles L. Nier, III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941, 946 47 (2011).

seems to render this trajectory idle. Therefore, it may be a more pragmatic strategy for borrowers, who are locked in predatory agreements, to carve a different path: bringing courts the question of exploitation while relying less on racial classifications.

To distinguish between inequality and discrimination would be a useful first step in this alternative direction. The sad fact that some people take advantage of their unequal counterparts does not always fit conventional models of discrimination, which assume some level of animus. Put simply, it is possible that the lenders who dealt with Leo White were exploiting his evident vulnerabilities—which are surely connected to his race—without having a particularly negative attitude towards African-Americans in general. To be sure, this reasoning should not legitimize the lenders' behavior, but it may explain why a court that avoids seeing discrimination would not award relief that is based on antidiscrimination laws. For that reason, to focus on the shared vulnerabilities of the exploited borrowers, and the ways in which these vulnerabilities were identified and preyed upon, has more potential than relying on racial identities, at least in an anti-classification age.

Indeed, the vulnerabilities shared by borrowers who signed predatory loan agreements stem from physically residing in the formerly-redlined neighborhoods. These neighborhoods are, for the most part, our country's worst neighborhoods. Living in such "distressed neighborhoods," as referred by sociologists and other non-legal scholars,[29] has dire effects that occupy space that is both public and private. As studies in the fields of health, psychology, and sociology uniformly show, life in a distressed neighborhood often results in some degree of chronic stress. Further, the outcomes of chronic stress are noticeable and include interference with complex decision-making processes. Thus, these outcomes attract lenders' deliberate efforts to confuse borrowers and exploit them.[30] Although such outcomes are taking their toll on *individuals*, their causes are tightly linked to *state policies*.[31] Accordingly, to focus on neighborhoods' effects on its residents offers a new understanding of the problem of predatory lending. Importantly, it challenges the tendency to frame the agreement using predatory terms as an autonomous choice under a free market paradigm. That the majority of residents in distressed

29. *See infra* Part II.

30. *See generally* Hila Keren, *Consenting Under Stress,* 64 HASTINGS L.J. 679 (2013).

31. *See, e.g.*, Michelle Wilde Anderson, Comment, *Colorblind Segregation: Equal Protection as a Bar to Neighborhood Integration*, 92 CALIF. L. REV. 841, 848 50 (2004) (discussing, among other policies, the situating of public housing projects only in minority neighborhoods).

neighborhoods are minorities is an unquestionable reality.[32] Nonetheless, a neighborhood-based analysis explains the implications of such reality in terms that take the impact of race into account without relying on it as a necessary factor. Thus, for example, a white older female borrower who has lived in the distressed neighborhood all her life may as well be an easy target for greedy lenders. And so, rather than viewing borrowers merely as market players making free choices, or casting them off as members of subordinated groups, a third path exists. This neighborhood-based path still views borrowers as autonomous individuals, but simultaneously acknowledges their shared vulnerabilities. To focus on the borrowers' neighborhood context would help courts understand that the individual exploitation of each borrower can be properly recognized and remedied, if linked to its social roots and its *public*, state-produced causes.

The innovative vulnerability theory[33] supports the proposal to find a way to award protection to borrowers without relying on classification. What is required is a space between inappropriate individualist colorblindness and unpopular group-based measures. Contract law, as the body of law that directly applies to predatory agreements, can offer exactly that third possibility. In appropriate cases—where it is evident that vulnerability was preyed upon—courts would exercise their discretion, under the existing contractual doctrine of unconscionability, to invalidate exploitative contracts in general, and predatory loan agreements in particular. Unconscionability is designed to give courts the power to invalidate unfair contracts that result from an absence of meaningful choice of one party combined with sharp methods of the other. As such, unconscionability can be used to review predatory loan agreements and establish a clearer norm against

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32. *See, e.g.*, ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT (2012) (exploring the structural reasons for the poor conditions in the country's worst neighborhoods, while taking race into account and linking neighborhood effects to the virtual absence of low income white communities not only in Chicago but nationwide).

33. The vulnerability theory suggests replacing the autonomous subject with the vulnerable subject as the focus of any legal or political project. Insisting that all human beings are vulnerable, in different ways, the theory also emphasizes the role of the state, and the legal system it holds to, in creating, maintaining, and intensifying vulnerabilities. This role, often concealed under the neoliberal approach, justifies, even requires, interventions by the state on behalf of the vulnerable subject. The vulnerability theory has been developed by Professor Martha Fineman. Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 256 57 (2010) (introducing the vulnerability theory and arguing for a "vulnerability approach" that requires the state to assume a positive obligation to effectuate equality among its citizens) [hereinafter Fineman, *The Responsive State*]; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 10 14 (2008) (presenting the concepts of the "vulnerable subject" and the "responsive state" as important to America's approach to inequality) [hereinafter Fineman, *The Vulnerable Subject*].

economic exploitation, thereby filling the void created by reverse redlining cases. Moreover, unconscionability is uniquely structured around a balancing test that allows careful and contextual legal analysis of multiple factors without committing to an overarching classification. Therefore, although possible objections exist (and are discussed),[34] contract law and its unconscionability principle offer a much-needed legal response to economic exploitation, especially in times where other reliefs are becoming improbable due to anti-classification sentiments.

This Article proceeds in three parts. Part I explains the systemic failure of predatory lending victims in courts as the result of borrowers being trapped between the rock of neoliberalism and the hard-place of colorblindness. Under a neoliberal approach, borrowers are framed as *individuals* and therefore held liable for the contracts they have signed, even if they are undeniably unfair. Under a colorblind jurisprudence, borrowers' arguments, which are based on *racial-identity*, are routinely rejected. Consequently, colorblind analysis of predatory lending permits economic exploitation to thrive. Part II contends that a solution to this deadlock exists in defining the space between the neoliberal and the colorblind analyses: much can be gained by embedding individual borrowers in the context of their environment, by neither ignoring nor solely relying on their race. In the same vein, it is possible to comprehend predatory loan agreements, with their tie to previously redlined areas, as the result of exploiting the special vulnerability that stems from residing in *distressed neighborhoods*. This Part explains *how* residing in a distressed neighborhood creates conditions especially fertile for exploitation efforts. Part III argues for an alternative legal framework, which would circumvent the anti-classification problem described in Part I while utilizing the interdisciplinary analysis offered in Part II. This framework is based on an existing contractual cause of action—the doctrine of unconscionability—which is highly apposite for the contextual analysis of predatory agreements. The proposal is made with the hope that courts will be more amenable to borrowers' contract-based arguments than they have been to their color-based arguments.

In conclusion, this Article asserts that this framework can apply to other urgent contexts of economic exploitation. Among these, non-housing loans that target residents of distressed neighborhoods—such as the increasingly popular but tremendously risky auto-title loans and pay-day loans—are of special significance. In times of prolonged economic crisis, such applications are important and aid us in

34. *See infra* Part III.

thinking more generally about how the law could and should respond to the exploitation of growing inequalities.

I. PREDATORY LENDING AND THE IDENTITY TRAP

A. Reverse Redlining as a Cause of Action

Each borrower who signs a predatory loan agreement has different individual circumstances that might explain her or his decision. However, with time we have learned that it was not only, and perhaps not mainly, about the borrowers' personal situations. Something larger was happening. We now know that many people were preyed upon, not as individuals, but rather as members of *vulnerable communities* who belong to certain social groups and reside in poorer and less popular neighborhoods. African-Americans and Latinos were affected more than any other group, but the elderly and the poor[35] have also suffered. Sophisticated and powerful actors, such as banks and other creditors, have used the market, specifically the institutionalized instrument of contracts,[36] to take advantage of borrowers with limited bargaining power who attempted to participate in the housing market. For a long time, and especially during the years preceding the recent economic crisis, these sophisticated lenders had done so in an intentional and calculated manner. Their faulty practices are now exposed: "[t]he more segregated that a community of color is, the more likely it is that homeowners . . . will face foreclosure because the lenders who peddled the most toxic loans *targeted* those communities."[37] At present, it is recognized that lenders are focused on minorities in certain areas and engaged in "*reverse redlining*"—a phrase that importantly connects past forms of discrimination by refusing mortgage lending ("redlining") with the more recent sale of unfair loans to these same populations ("*reverse*-redlining").[38] Critically, the

35. Hunt, II, *supra* note 2, at 213 ("The recent explosive growth in the predatory subprime market has 'created a crisis of epidemic proportions for communities of color, elderly homeowners, and low income neighborhoods . . . .' ").

36. I use the term "institutionalized," because the existence of a flourishing system of contracts relies heavily on legal institutions such as courts, arbitrations enforced by courts, confirmations of public notaries, and so on.

37. *Protecting the American Dream (Part II): Combating Predatory Lending Under the Fair Housing Act: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 11 (2010) (statement of Thomas E. Perez, Assistant Att'y Gen., Civil Rights Division, Department of Justice) (emphasis added).

38. *See, e.g.*, Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7, 20 21 (D.D.C. 2000) (describing past "redlining" and more current "reverse redlining" as connected evils). Unfortunately, some courts have stripped the term from its association with a discriminatory past. *See, e.g.*, Steed v. EverHome Mortg. Co., No. 08 13476, 308 F. App'x 364, 368 (11th Cir. 2009) (adopting only part of the abovementioned footnote in *Hargraves*,

same neighborhoods that were once sites of exclusion under redlining policies had turned into sites of exploitation under reverse redlining policies.

This modernized form of redlining has included targeting vulnerable communities in "credit-starved neighborhoods"[39] and actively steering them "to pay more for their loans than they should or to receive loans that they cannot afford."[40] To illustrate, in one case, lenders exerted immense pressure on a borrower who was an immigrant from Barbados working as a custodian at a day-care center.[41] When the borrower expressed concerns about his ability to repay the loan, the lenders kept reassuring him and his wife that they could afford to repay the loan with income from tenants that the lenders promised to help them secure. During the closing the borrower grew so stressed that he "suffered a heart attack . . . and was taken to the hospital."[42] Consequently, the borrower was then unemployed, but the lenders were not deterred and relentlessly contacted the borrower and his wife until they eventually managed to seal the deal.[43] This exemplifies the predatory nature of the deal, which subsequently ended in foreclosure. The fact that these agreements were and still are referred to as "ghetto loans" further demonstrates the social dimension of this seemingly contractual phenomenon.[44]

Moreover, although the lenders—banks, credit companies, and loan officers—are all "private" players acting within the bounded morality of a market economy, they were permitted and were perhaps even encouraged by public leaders to engage in lending to minorities. In an effort to include more minorities in the "American dream," the

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and defining " 'reverse redlining' as 'the practice of extending credit on unfair terms' because of the plaintiff's race and geographic area." (internal citation omitted)). It is important to note that the historical "redlining" practice had its roots in *governmental* and not only private discrimination. For example, in 1933 Congress created the Home Owners Loan Corporation (HOLC). Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2195 (2007). In about two years HOLC refinanced over a million loans. *Id.* at n.46 (citation omitted). However, it "used racist underwriting and appraisal practices, such as rating minority neighborhoods much more unfavorably than white neighborhoods," setting a discriminatory legacy that outlived HOLC. *Id.* (citation omitted).

39. Jesus Hernandez, *Redlining Revisited: Mortgage Lending Patterns in Sacramento 1930 2004*, 33 INT'L J. URBAN & REG'L RES. 291, 292 (2009).

40. City of Memphis v. Wells Fargo Bank, N.A., No. 09 2857 STA, 2011 U.S. Dist. LEXIS 48522, at *22 (W.D. Tenn. May 4, 2011) (quotations omitted). For a particularly shocking collection of six different predatory loan agreements that resulted from such methods, see Barkley v. Olympia Mortg. Co., Nos. 04 CV 875(RJD)(KAM), 05 CV 187(RJD)(KAM), 05 (CV) 4386(RJD)(KAM), 05 CV 5302(RJD)(KAM), 05 CV 5362(RJD)(KAM), 05 CV 5679(RJD)(KAM), 2007 U.S. Dist. LEXIS 61940 (E.D.N.Y. Aug. 22, 2007).

41. This is the story of the Mr. and Mrs. Gibbons as told in *Barkley*. *Id.* at 19 22.

42. *Id.* at 21.

43. *Id.*

44. *City of Memphis*, 2011 U.S. Dist. LEXIS 48522, at *7.

President and government were greatly involved in a public push to increase private homeownership in minorities.[45] In June 2002, for example, President Bush issued *America's Homeownership Challenge* to the real estate and mortgage finance industries to encourage them to join the effort to close the gap between the homeownership rates of minorities and non-minorities.[46] Some commentators have even blamed the government for triggering the subprime crisis, arguing that according to this pro-homeownership policy "banks were forced to lend to unqualified minorities."[47]

Where, when, and how to purchase a home, and how and from whom to borrow money to finance such a significant purchase, is traditionally regarded as an individual's choice. This is a common misperception, and there is no doubt that the state has always been involved. By a series of interventions and, more importantly, by adopting strong patterns of *non-intervention* and *de-regulation*, the state first facilitated the segregation of the housing market.[48] It then facilitated the exploitation of the subsequently segregated populations, by supporting "the booming subprime industry."[49] The growing governmental *hyper-devotion to free market ideology* created a "mortgage-

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45. *See* ALYSSA KATZ, OUR LOT: HOW REAL ESTATE CAME TO OWN US 3 26 (2009).

46. Press Release, President George W. Bush, Fact Sheet: America's Ownership Socie ty: Expanding Opportunities (Aug. 9, 2004), *available at* http://georgewbush white house.archives.gov/news/releases/2004/08/20040809 9.html.

47. Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 902 (2011).

48. *See* THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 9 10, 34 (4th ed. 1996) (describing how "government housing programs perpetuated racial divisions by placing public housing in already poor areas and bankrolling white suburbanization through discriminatory housing subsidies," and adding that "[b]ankers seldom lent to black home buyers, abetted by federal housing appraisal practices that ruled black neighborhoods to be dangerous risks for mortgage subsidies and home loans"); Thomas J. Sugrue, *The New American Dream: Renting*, WALL ST. J. (Aug. 14, 2009, 11:01 AM), http://online.wsj.com/article/SB10001424052970204099045743504326 77038184.html ("Federal housing policies changed the whole landscape of America, creating the sprawlscapes that we now call home, and in the process, gutting inner cit ies . . . . It seemed that segregation was just the natural working of the free market, the result of the sum of countless individual choices about where to live. But the houses were single and their residents white because of the invisible hand of government."); *see generally* PIERRE BOURDIEU, THE SOCIAL STRUCTURES OF THE ECONOMY 89 90 (2005) (arguing that markets are socially constructed and that the housing market is entirely constructed by the state).

49. Daniel Immergluck, *Private Risk, Public Risk: Public Policy, Market Development, and the Mortgage Crisis*, 36 FORDHAM URB. L.J. 447, 484 (2008). For a detailed review of the influence of the state on the private market of mortgages with a focus on the state's involvement in the subprime crisis, see *id. See also* Benjamin Howell, Comment, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101, 103 04 (2006) ("Subprime lending is geographically concentrated in the same minority neighborhoods once denied access to banks and excluded from federal homeownership programs because of their racial composition.").

loan system that minimized accountability and sought only bodies to sign loan documents."[50]

This free-market position has entrapped vulnerable communities: on the one hand, members of such communities have been pushed into the market and pressured to own a home, but on the other hand, while participating in the market they have been left without regulatory supervision, subject to the mercy of greedy private lenders.[51] Leo White, for instance, argued in court that the lenders employed "African-American agents such as John and Styles, who appealed to potential purchasers that their job was a 'personal mission' to help minorities achieve the American Dream of home ownership."[52] The resulting American nightmare—branded by images of gutted neighborhoods, boarded-up windows, foreclosure signs, and entire families living in their cars or on the streets—is the disastrous outcome attributed to these market practices. The victims have been crowding the courts seeking legal help,[53] while the lenders insist on the enforcement of the original (and predatory) loan agreements. The legal question now becomes whether or not the exploited borrowers deserve relief.

Disappointingly, the study of post-crisis decisions shows that borrowers frequently lose. They get caught between a rock and a hard place: between a "private" contractual analysis that ignores the background of reverse redlining, on the one hand, and a "public" analysis

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50. McFarlane, *supra* note 47, at 888*; see also* Raymond H. Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. CIN. L. REV. 1, 3 4 (2009) ("The seeds of the present financial crisis were sown in the 1980s and 1990s, mostly through deregulation and non regulation."); Immergluck, *supra* note 49, at 486 ("In the arena of financial services regulation, the shift over the last thirty years toward in creasingly deregulationist policies has been at least as political as any other phase in U.S. history.").

51. *See* THE FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xi xii (2011) (providing an official report made under the Fraud Enforcement and Recovery Act, documenting the lack of effective regulato ry oversight to protect borrowers from exploitative lending practices as one of the leading reasons for the crisis and reporting that "subprime lenders often preyed on the elderly, minorities, and borrowers with lower incomes and less education").

52. M & T Mortg. Corp. v. White*,* 736 F. Supp. 2d 538, 576 (E.D.N.Y. 2010). Compare this perspective to the words of President George W. Bush: "I believe when somebody owns their own home, they're realizing the American Dream." President George W. Bush, Ad dress to HUD Employees on National Homeownership Month (June 18, 2002), *available at* http://archives.hud.gov/remarks/martinez/speeches/presremarks.cfm.

53. Raymond H. Brescia, *Beyond Balls and Strikes: Towards a Problem Solving Ethic in Foreclosure Proceedings*, 59 CASE W. RES. L. REV. 305, 305 (2009) ("Courts across the country are being saddled with a rapid escalation of foreclosure filings due to the fallout from the subprime mortgage crisis. Millions of homeowners stand to lose their homes in the United States . . . and hundreds of billions of dollars in home equity will be lost as a result by all homeowners, not just those in default on their mortgages.").

of discrimination that tends to fail, on the other hand. It is easy to see why borrowers lose under the "private" paradigm of market transactions. From this individualistic perspective, they are perceived as having to pay the price for freely, albeit foolishly, choosing to consent to a "bad" loan agreement. It is less clear, however, why borrowers are systematically losing under the "public" view that takes the phenomenon of "reverse redlining" into account. It is the failure of this "public" framework that concerns me in this Article.

Ever since the district court's decision in *Hargraves* in 2000, courts recognize a cause of action for "reverse redlining" as a possible ground for relief to borrowers.[54] This cause of action is legally founded mainly under the Fair Housing Act (FHA) or the Equal Credit Opportunity Act (ECOA), but also under other federal and local antidiscrimination laws.[55] However, this discrimination-based cause of action seldom translates to borrowers' success. In a long line of decisions following *Hargraves*, although as of now without general confirmation of circuit courts,[56] courts have applied a four-element test—sometimes referred to as the *Hargraves* test—that borrowers seeking relief under a "reverse redlining" cause of action need to satisfy.[57]

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54. Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7, 15 (D.D.C. 2000).

55. The FHA forbids, inter alia, "discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604 (2012). It also makes it unlawful for "any person or other entity whose business includes engaging in residential real estate related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." *Id.* § 3605. Similarly, the ECOA makes it unlawful for a creditor to discriminate against a loan applicant on the basis of race, color, sex, national origin, religion, marital status, or age. 15 U.S.C. § 1691. Some borrowers have also argued under the broader antidiscrimination sections of the Civil Rights Act, 42 U.S.C. §§ 1981, 1982. *See, e.g.*, Grimes v. Fremont Gen. Corp., 785 F. Supp. 2d 269, 295 98 (S.D.N.Y. 2011). Oth ers have also relied on state and local antidiscrimination laws. *See, e.g.*, Barkley v. Olym pia Mortg. Co., Nos. 04 CV 875(RJD)(KAM), 05 CV 187(RJD)(KAM), 05 (CV) 4386(RJD)(KAM), 05 CV 5302(RJD)(KAM), 05 CV 5362(RJD)(KAM), 05 CV 5679)RJD)(KAM), 2007 U.S. Dist. LEXIS 61940, at *56 57 (E.D.N.Y. 2007) (discussing New York's anti discrimination laws). Note that such anti discrimination claims "may be prose cuted on the basis of (i) disparate *treatment*, i.e., that plaintiffs were treated differently because of their membership in a protected class, or on the basis of (ii) disparate *impact*, i.e., that the defendant's practices have a proportionally greater negative impact on minori ty populations." *White*, 736 F. Supp. 2d at 574 (emphases added).

56. Almost none of the circuits have adjudicated a case to determine what the ele ments of a reverse redlining cause of action should be or what the evidentiary require ments of those elements are. However, the eleventh circuit did hear a case involving a re verse redlining cause of action in *Steed v. EverHome Mortgage Co.*, 308 F. App'x 364, 368 (11th Cir. 2009) and later in *Steed v. Everhome Mortgage Co.*, 477 Fed. App'x 722 (11th Cir. 2012). In both decisions the court followed the *Hargraves* elements and held that Steed did not establish prima facie case of reverse redlining mainly due to failing to bring satisfying evidence of discrimination.

57. Nier & St. Cyr, *supra* note 28, at 942 43.

First, borrowers must prove they are members of a protected class. Second, borrowers need to prove that they applied for and were qualified for a housing loan. Third, borrowers must show that their loan agreement includes grossly unfavorable terms. And fourth, borrowers must prove that the lender(s) they were dealing with intentionally discriminated against them or intentionally targeted them. In addition to those four substantive elements there is a time limitation: borrowers should act fast as they only have two years to take action.

Sadly, time and time again borrowers fail in their efforts to establish "reverse redlining" as grounds for relief. For the most part, individual borrowers fail to satisfy the fourth element, and do not succeed in proving that the lender had utilized discriminatory policies. In *Grimes*, for example, an African-American couple borrowed money under a loan agreement that exhibited characteristics typical of "reverse-redlining"—as shown by the post-crisis literature—such as tempting initial payments followed by significantly higher payments and a rapidly growing ("adjusted") interest.[58] Arguing pro-se, the couple explicitly alleged that their contract should not be analyzed in isolation but rather viewed as part of a larger lending method that "targeted minority homeowner borrowers with bogus financing terms and grossly unfair lending products . . . ."[59] The court, however, granted the lenders' motions to dismiss, stating, inter alia, that the borrowers failed to prove the *concrete* discrimination against them.[60] Other courts, cited in *Grimes*, have rejected cases on similar grounds of failure to prove specific acts of discrimination, and have clarified

58. *See Grimes*, 785 F. Supp. 2d at 280; *see generally* Oren Bar Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073 (2009) (explaining how the main features of subprime mortgage contracts were designed to prey on borrowers' imperfect rationalities and to attract them to agree to problematic contracts). Similar to the Grimes' contract, those features included "two or three year 'teaser' rates followed by substantial increases in the rate and payment" and complex calculation of an adjusted interest. *Id.* at 1098. As Bar Gill maintains, minorities, women, and individuals from lower socio economic background were especially prone to paying the price of imperfect rationality and were particularly susceptible to the misleading aspects of those types of contracts. *Id.* at 1138 39.

59. *Grimes*, 785 F. Supp. 2d at 280.

60. *Id.* at 296 ("Plaintiffs do not specifically allege that Defendants took these purportedly discriminatory actions, or intended to take these actions, *because* Plaintiffs were African American. Nor do Plaintiffs provide any facts in support of their contention that intentional discrimination occurred."); *see also* Rodriguez v. Bear Stearns Cos., No. 07 cv 1816 (JCH), 2009 U.S. Dist. LEXIS 119942, at *55 (D. Conn. Dec. 22, 2009) (rejecting similar allegations made by one Hispanic and four African American borrowers, stating "[b]ecause plaintiffs have failed to offer any evidence to support the allegation that EMC's policies disproportionately impact minorities, plaintiffs have failed to 'present such evidence as would allow a jury to find in his favor,' and summary judgment for the defendants is appropriate as to the FHA disparate impact claim." (citation omitted)).

that merely arguing that particular lenders were involved in reverse redlining will not suffice.[61]

Given the mounting evidence of lenders' predatory policies, which especially targeted previously redlined areas, the question is: why are borrowers failing to prove what is generally known to all? Scholars so far have pointed out several leading reasons for such systematic failure.[62] First, many borrowers cannot afford legal representation and fail in court simply because they try to argue pro-se and lose due to their inability to satisfy procedural requirements, such as suing in a timely manner.[63] Even those who manage to find a lawyer usually get one lacking the expertise required to handle complex civil rights litigation. Second, many borrowers are lacking crucial information and misunderstand the general phenomenon of "reverse redlining." Further, they are too isolated and lack access to people who have a better understanding of the complex techniques used by sophisticated lenders. Third, the borrowers' task is almost a mission impossible due to extreme information asymmetries. Namely, how can a poor and uneducated individual-borrower successfully reveal, and then prove, that a sophisticated credit company utilized predatory marketing schemes? This difficulty is compounded by the efforts often made by credit companies to *conceal* any information regarding unsound methods.[64] Fourth, even if revealed, economic information is complex and borrowers generally cannot succeed where many experts have failed—in proving that economic data shows intentional discrimination or even intentional targeting. Fifth, borrowers are routinely failed by heightened pleading standards, which impose on them an

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61. *Grimes*, 785 F. Supp. 2d at 292 n.33 ("Plaintiffs' allegations of disparate treatment are also very generalized, as they fail to plead that any specific similarly situated non African American applicant received a better loan."); *see also* Ng v. HSBC Mortg. Corp., No. 07 CV 5434 (RRM) (VVP), 2009 U.S. Dist. LEXIS 125711, at *27 (E.D.N.Y. Dec. 15, 2009) (dismissing reverse redlining claim because the facts were "alleged in far too conclusory a fashion to satisfy the current pleading requirements" of *Iqbal* and *Twombly* and "the claims [we]re alleged with little more than buzzwords and conclusory labels, in the absence of the requisite factual allegations[] . . . ."); Williams v. 2000 Homes Inc., No. 09 CV 16 (JG) (JMA), 2009 U.S. Dist. LEXIS 65433, at *13 17 (E.D.N.Y. July 29, 2009) (allegations that the plaintiff was induced to sign less favorable loans than those given to Caucasians, and that the defendants targeted him as part of this scheme based on his race and engaged in a practice that had a disparate impact to the detriment of non white buyers, were too conclusory to state a plausible FHA claim under *Iqbal*).

62. Lichtenstein, *supra* note 15, 1373 74.

63. *See, e.g.*, *Grimes*, 785 F. Supp. 2d at 290 (rejecting reverse redlining arguments made under the FHA and ECOA, because "the limitations period for this claim expired on October 12, 2007, approximately three and a half months before Plaintiffs filed this action"). The *Grimes* court also cited various other similar cases. *Id.* at 290 91.

64. Falck, *supra* note 15 (describing the problem of information asymmetry, arguing that it is the main reason for borrowers' failure in litigating reverse redlining cases and suggesting a legal reform).

additional and heavy burden, such as a need to allege with enough particularity "that [lenders] selected [borrowers] for maltreatment solely because of their color."[65] For instance, in one case the court held that four affidavits from different African-American borrowers, who had fallen prey *to the same lender*, were insufficient.[66] Finally, the few borrowers who actually managed to overcome such obstacles and survive the early dismissal of their relief request, still failed to convince the lay people of the jury that reverse redlining took place. Even when jurors were convinced that a conspiracy to defraud vulnerable African-American borrowers indeed existed, they were still reluctant to see such conspiracy as discrimination.[67]

In short, while it is simple to prove both the borrowers' vulnerability and the predatory nature of the loan agreements, the borrowers' loss in court, for the most part, may be attributed to the discrimination argument. This severe problem, called here "the identity trap," means that borrowers cannot convince the court or a jury that it is necessarily their racial identity—and not other sources of vulnerability—that motivated and brought about the resulting unfair agreement. Based on this reasoning, the court doubted Leo White's ability to prevail when he tried to raise the reverse redlining argument.[68] Although the court acknowledged the predatory nature of the transaction, as well as White's racial identity and the fact that ninety percent of the lender's transactions were made with borrowers "in heavi-

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65. *Grimes*, 785 F. Supp. 2d at 296 n.39 (clarifying that "after *Twombly*, Plaintiffs must sufficiently plead that they 'are African Americans, describe[ ] [D]efendants' actions in detail, and allege[ ] that [D]efendants selected [P]laintiffs for maltreatment solely because of their color.' " (citing Boykin v. KeyCorp., 521 F.3d 202, 215 (2d Cir. 2008) (alter ations in original))).

66. Steed v. EverHome Mortg. Co., 477 F. App'x 722, 726 27 (11th Cir. 2012) (affirm ing the district court's decision that rejected Steed's discrimination arguments for lack of appropriate evidence. The court explained that "[w]hat Steed presented were the affidavits of three other African Americans (in addition to his own testimony) who said that Ever Home engaged in practices similar to those Steed complained of. The [district] court held that this was not enough . . . . We find no fault in the district court's holding.").

67. *See* Barkley v. United Homes, L.L.C., 848 F. Supp. 2d 248, 252 (E.D.N.Y. 2012) (noting that the jury rejected the discrimination allegations of the plaintiffs). It is im portant to note that in this case the plaintiffs were able to prove fraud and conspiracy to commit fraud claims in six similar cases of predatory lending to African Americans, all relating to properties in distressed neighborhoods of Brooklyn. *Id.* at 248. Given the evi dent pattern of the six stories, it is hard to understand how evidence that was sufficient to prove conspiracy to defraud was not enough to prove discrimination. In this case which is a very extreme case of fraud the borrowers were eventually awarded compensation and punitive damages, even despite the rejection of their discrimination allegations. *Id.* at 248 49. However, the rejection of the discrimination allegations is disconcerting for all other cases in which less extreme circumstances of fraud are available.

68. M & T Mortg. Corp. v. White, 736 F. Supp. 2d 538, 574 (E.D.N.Y. 2010) ("The plaintiffs contend, however, that the defendants practice a form of discrimination by lending or providing housing to a group of persons on less favorable terms than those borrowers would have received if they were outside that particular class of persons.").

ly minority neighborhoods," the court was skeptical of White's ability to prove that race was the *sine qua non* for the exploitation. To fully appreciate the difficulty of satisfying the fourth element of the *Hargraves* test, it is worth highlighting judicial efforts made to distinguish between harms to African-Americans that may be attributed to their race and harms to African-Americans which occur for "other" (non-racial) reasons. Describing the difficulty the court said, "[a] jury might well conclude that [the borrowers] were targeted not on the basis of being African-Americans, but because they were vulnerable . . . first-time home buyers who *happened* to be African-American."[69] These words capture the identity trap inherent in the "reverse redlining" cause of action. Borrowers relying on a cause of action that emphasizes racial discrimination by reference to the historical problem of "redlining," are probably going to fail at showing that their modern credit problem necessarily stems from their racial identity. In other words, it is precisely the borrowers' allegation that they were preyed upon *as minorities* and that these lending practices were racially motivated that fails them.

Although the vulnerability is evident and undisputed, and the lenders' exploitative practices are apparent from the terms of the predatory loan agreements and a host of other circumstances, these borrowers still battle doubt and disbelief. Courts and juries are still reluctant to accept the racial dimension of this issue and refuse to conceptualize the problem in terms of racial classification. These borrowers face a colorblind judiciary,[70] which accordingly raises the bar for proving discrimination.

The Grimes' litigation demonstrates exactly how high the bar has been set. In 2011, the court dismissed their "reverse redlining" allegations, which they argued under the FHA and ECOA. The court allowed them, however, to amend their complaint to a similar discrimination argument made under the Civil Rights Act, thereby guiding the Grimes, who still argued pro-se, to include factual proofs of discrimination in the amended complaint. The Grimes included data regarding discrimination of African-American borrowers from other litigations across the country, and in response the court dismissed the discrimination argument and declared that the "allegations lack any plausible factual basis."[71] The court's condemnation of the Grimes' efforts to tell the story of reverse redlining by relying on other cases is

69. *Id*. at 576.

70. In the legal context, the term "color blind," goes back at least as far as Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color blind . . . ."), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

71. Grimes v. Fremont Gen. Corp., 933 F. Supp. 2d 584, 600 (S.D.N.Y. 2013).

critical to our understanding of the trap and the extent of borrowers' difficulties in litigating claims based on racial discrimination:

> The Second Amended Complaints' facial characteristics—the font, the spacing, and stylistic inconsistencies, such as footnote call numbers with no footnotes—led the Court to suspect that Plaintiffs had block[-]copied and pasted paragraphs from other complaints and court documents into their complaint. A few Internet searches confirmed that suspicion.[72]

Given that reverse redlining is, to a great degree, a judge-made law, why is it so hard to convince judges that concrete discrimination has taken place when the general story of reverse redlining is so widely accepted?

B. The Impact of an Anti-Classification Age

The judicial reluctance to frame predatory loan agreements as stories of discrimination mirrors the Supreme Court's shifting jurisprudence of the Equal Protection Clause. Helping borrowers by seeing them as victims of reverse redlining requires courts to take race into account in a remedial manner, which resembles approving institutional affirmative action programs. To assist the underprivileged based on their racial affiliation, courts would be expected to award relief to African-American or Latino borrowers as victims of discrimination, while white borrowers—who consented to similar predatory agreements—would not be eligible for similar relief. This inconsistency is justified by the need to remedy the negative impact of decades of public and private subordination created by redlining policies. However, in accordance with the anti-classification principle, the current leading interpretation of the Equal Protection Clause, courts—like any other government entity—are expected to show a "commitment to protect individuals against *all forms* of racial classification, including 'benign' or 'reverse.' "[73] Some have even argued that the Court has demonstrated an "anti-antidiscrimination agenda."[74] Similarly, when faced with the reverse redlining argument, lower courts find themselves in their own version of the identity trap where they are asked to engage in race-based classifications, which conflicts with their inclination to adhere to the Supreme Court's anti-

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72. *Id.* In telling the Grimes' story I do not mean to suggest that their technique was in accordance with current legal procedure. My main goal is to demonstrate how challenging is the task of a borrower, let alone and unrepresented borrower, who is trying to prove discrimination in courts and how reliance on the general phenomenon even in 2013, after much information became public knowledge is not an option.

73. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1473 (2004) (emphasis added).

74. Rubenfeld, *supra* note 21, at 1142.

classification principle.[75] Such an identity trap leads to judicial hesitation, and leaves them reluctant to award relief based on the reverse redlining cause of action, thereby threatening to empty this cause of action from any practical meaning or utility.

Alternatively, Professor Yoshino has described these constitutional tendencies broadly as the process of "shutting down traditional equality jurisprudence."[76] This "shutting down" process has two different manifestations. The first is also the one that has drawn most scholarly attention: the Court's refusal to *add* categories of classification to the five that are currently subject to the Court's heightened scrutiny.[77] The second relates directly to the five protected categories. With regard to these categories the Court has decreased its willingness to accept classification-based arguments, even when they were founded on suspicious grounds such as race.

The most relevant feature of this judicial trend is related to the efforts to prove state discrimination in the constitutional setting and under the Equal Protection Clause. In this context, the Supreme Court established a principle very similar to the one that was applied, years later and by a lower court, to Leo White. In *Personnel Administrator of Massachusetts v. Feeney*,[78] the Court significantly constricted the ways in which discriminatory intent could be established. Although earlier cases accepted a proof of disparate impact on a protected group as a way to establish discriminatory purpose,[79] the *Feeney* court required much more, stating: " '[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[80]

Evidently, the requirement to prove the reason behind any act resulting in a disparate impact has made it much harder for victims of discrimination to win in courts. Additionally, other decisions of the Court have limited the standard of heightened scrutiny to facially discriminating actions, according judicial deference to other—less

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75. Some have noted that courts are more sensitive than other institutions to the problem of classification partially because they "find a principled way" of making distinctions among groups. *See* Yoshino, *supra* note 23, 758 59 (citing Justice White in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)).

76. *Id.* at 749 n.17.

77. *Id.* at 756 ("The Supreme Court has formally accorded heightened scrutiny to clas sifications based on five characteristics race, national origin, alienage, sex, and nonmarital parentage." (citations omitted)).

78. 442 U.S. 256 (1979).

79. Yoshino, *supra* note 23, at 764.

80. *Feeney*, 442 U.S. at 279 (emphasis added).

obviously discriminatory—acts that have a disparate impact on protected groups. As a whole, these changes had indeed "shut down" many classification-based battles and had particularly significant adverse effects on minorities. Since most acts of discrimination are concealed and not facially discriminatory, and almost all affirmative action programs are explicitly relying on race-based classifications, minorities end up losing twice. They are deprived of both their protection from discrimination and their affirmative action-based rights.[81]

To summarize: for reasons connected to broader constitutional processes, reliance on the reverse redlining cause of action and discrimination arguments creates an identity trap. This identity trap severely limits both borrowers' and courts' ability to cope with predatory lending. Therefore, in the coming section I step out of the legal arena and focus on the redlined neighborhoods related to these loan agreements. Such a geographical focus seeks to break away from an identity-based framework, and instead develop a better understanding of the borrowers' vulnerability. Shifting the focus from the lenders' discriminatory behavior to that of the problematic environment that yielded the borrowers' consent carves out a potential escape from the identity trap.

II. FOCUSING ON DISTRESSED NEIGHBORHOODS

> *Nearly 9 million Americans live in extreme-poverty neighborhoods, places that also tend to be racially segregated and dangerous.*[82]

The first Part told the story of Leo White, who failed to prove that he was racially discriminated against. Setting discrimination aside, while not denying it occurred, there remains much to learn from White's situation, which may reveal an alternative justification for awarding him relief. The judicial decision contains invaluable information about White's immediate environment, including the address of the property that Mr. White bought with the money he borrowed: 164 Macon St. in Brooklyn, NY 11216. Significantly, out of the six African-American borrowers in *Barkley,* one—an older woman named Mary Lodge—used her loan to purchase a house *at the same zip code* as Leo White, while the other five predatory loans in this litigation related to properties in neighboring zip codes, all in east Brooklyn.[83]

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81. Yoshino, *supra* note 23, 767 68.

82. Jens Ludwig et al., *Neighborhood Effects on the Long Term Well Being of Low Income Adults*, 337 SCI. 1505, 1505 (2012).

83. Barkley v. Olympia Mortg. Co., Nos. 04 CV 875(RJD)(KAM), 05 CV 187(RJD)(KAM), 05 (CV) 4386(RJD)(KAM), 05 CV 5302(RJD)(KAM), 05 CV 5362(RJD)(KAM), 05 CV 5679(RJD)(KAM), 2010 U.S. Dist. LEXIS 95060, at *7 26

When read in conjunction, the *White* and *Barkley* cases provide a clearer pattern of predatory lending in Brooklyn's distressed neighborhoods.

The most basic web search[84] of zip code 11216 offers some context regarding Leo White's (and Mary Lodge's) neighborhood at around the time White signed his loan agreement: a densely crowded and very poor urban neighborhood, predominately populated by minorities[85] and with high levels of reported crime[86]—the kind of neighborhood that sociologists regularly define as a "distressed neighborhood" or "disordered neighborhood."[87] It is the particularly harsh reality of

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(E.D.N.Y. Sept. 13, 2010). The loans of the other five African American borrowers related to three other zip codes: 11233 (three out of six borrowers), 11207 and 11212. *Id.*

84. For a discussion of conducting a judicially acceptable and even desired basic web search method, see Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts One Judge's Views*, 51 DUQ. L. REV. 3 (2013).

85. Zip code 11216 ranks fortieth in the nation in population density. *Population Den sity in Brooklyn, NY by Zip Code*, ZIP ATLAS, http://zipatlas.com/us/ny/brooklyn/zip code comparison/population density.htm (last visited Dec. 18, 2014). It is part of Brooklyn's known Bedford Stuyvesant neighborhood. Parts of this broader area have been going through gentrification in recent years, but despite this process the neighborhood it is still described as populated by many low income families. For example, one report that relates to the neighborhood states, "The income levels of our population are either non existent or derisory." Community Board No. 3, *District Needs Statement Fiscal Year 2014*, CITY OF N.Y. 6, http://www.nyc.gov/html/dcp/pdf/lucds/bk3profile.pdf (last visited Dec. 18, 2014). Another website reports that in 2004 the average Adjusted Gross Income (AGI) of residents in zip code 11216 was less than half of the state average ($27,152 versus $59,519). *11216 Zip Code Detailed Profile*, CITY DATA, http://www.city data.com/zips/11216.html #ixzz3MHjGSZFM (last visited Dec. 18, 2014). The same website reports that this zip code has a "[b]lack race population percentage significantly above state average." *Id.* Conditions were apparently even more difficult in 1999, when White signed his loan agreement and purchased his home. Relying on the U.S. 2000 Census, one website, for example, reports that income per household in zip code 11216 is currently $25,135 per annum. *11216 Zip Code*, http://zipcode.org/11216 (last visited Dec. 18, 2014). For comparison, the state mean income per household at the time White signed his loan agreement was more than double ($56,604). *Table DP 1 Profile of General Demographic Characteristics: 2000*, U.S. CENSUS BUREAU, http://censtats.census.gov/data/US/01000.pdf (last visited Dec. 18, 2014). At that time zip code 11216 had eighty five percent non white residents. *11216 Zip Code*, http://zipcode.org/11216 (last visited Dec. 18, 2014).

86. According to one website, "Brooklyn (zip 11216), NY, violent crime, on a scale from 1 (low crime) to 100, is 82. . . . The US average is 41.4. Brooklyn (zip 11216), NY, property crime, on a scale from 1 (low) to 100, is 80. . . . The US average is 43.5." *Crime in Brooklyn (zip 11216), New York*, SPERLING'S BEST PLACES, http://www.bestplaces.net/crime/zip code/new york/brooklyn/11216 (last visited Dec. 18, 2014).

87. The terms "distressed neighborhood," "disadvantaged neighborhood," and "disordered neighborhood" are used here interchangeably to refer to the most embattled neighborhoods of our country and without adopting a particular definition. *See, e.g.*, Terrence D. Hill et al., *Neighborhood Disorder, Psychophysiological Distress, and Health*, 46 J. HEALTH & SOC. BEHAV. 170, 175 (2005) (defining neighborhood disorder as the "conditions and activities, both major and minor, criminal and noncriminal, that residents perceive to be signs of the breakdown of social order."). It should be noted, however, that researchers have developed and applied a new tool to assess neighborhood disorder the "Neighborhood Inventory for Environmental Typology" (NIfETy). Adam J. Milam et al.,

these distressed neighborhoods that may later allow for a different conceptualization of the reverse redlining problem: one framed less as an identity question that hinges on racial discrimination and more as an issue of abuse of recognizable vulnerability.[88] Numerous non-legal studies can and should teach legal actors about how and why the conditions in the worst neighborhoods of our country translate into acute individual vulnerability of their residents. Focusing on a borrower's living conditions, rather than their race, allows a way out of the previously described identity trap by making it easier for judges to concretely and empathetically relate to the borrower's human context. This shift in focus provides judges with an opportunity to equally help all similarly situated borrowers without resorting to racial classification.

Moreover, emphasizing borrowers' living conditions will better answer the question of why such borrowers would ever agree to a loan that is against their interests, which remains an unresolved puzzle under rational decision-making hypotheses that are so fashionable in neoliberal legal analysis. The answer, offered by many non-legal disciplines, relates to stress as a leading cause of vulnerability, and the impact of stress on decision-making. This article develops the answer in two steps. First, it describes how residing in a distressed neighborhood imposes individual chronic stress on its residents. Next, it shows how the negative impact of chronic stress on one's decision-making process may render the borrower's consent to predatory loan agreements defective.

A. The Neighborhood Stress Process

Many studies show a strong correlation between living in distressed neighborhoods and the poor physical and mental health of these neighborhoods' residents; few studies attempt to explain this association. Is this merely a reflection of the types of individuals who live in these places, or is there an additional explanation? Surely the personal characteristics of the disadvantaged residents in these neighborhoods, such as their hereditary health problems or childhood experiences, account for some of their reported health problems. Nonetheless, the association is too strong to be exhausted by such individualized explanations.[89] Recently, researchers suggested that a neighborhood's uniquely disadvantaged social context, particularly the stress it inflicts on its residents, more strongly links neighbor-

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Neighborhood Disorder and Juvenile Drug Arrests: A Preliminary Investigation Using the NIfETy Instrument, 38 AM. J. DRUG & ALCOHOL ABUSE 598, 598 (2012).

88. *See infra* Part III.

89. Hill et al., *supra* note 87, at 170, 173.

hood conditions to their residents' health than the residents' individual characteristics.[90] Simply put, life in disordered neighborhoods causes chronic stress and chronic stress increases illness.

The leading professional understanding is that stress is a process rather than a given condition. In brief, the stress process is tripartite—comprised of (1) stressors; (2) coping mechanisms; and (3) outcomes, both physical and mental, which emerge when stressors outweigh coping resources.[91] Applying the framework of stress as a process is an invaluable component in delineating how the conditions in distressed neighborhoods expose their residents to chronic stress and its consequences. As described below, living in the worst neighborhoods exposes residents to the most intense clusters of stressors, while depleting residents' coping resources, thus leaving many with enhanced individual chronic stress and with all the resulting health problems and impaired capabilities. Understanding the important link between living conditions and individual constraints counters the public sentiment often reflected in legal analysis, that individuals are solely responsible for their situation in life.[92] This link suggests that at times an individual's status is attributable to deleterious aspects of their environment.[93] The discussion below follows the structure of the stress process and uses it to explain the unique operation of stress in the neighborhood setting. It describes the particular stressors that are a part of life in such an environment, the reasons for shortage of resources to cope with such stressors, and the outcomes of this disproportion between stressors and means of coping with them. Further, it elucidates the perpetuation of neighborhood distress, which makes the problem even more inescapable.

1. Stressors

Residents of disordered neighborhoods suffer from many *environmental* stressors, in addition to extreme poverty and any personal

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90. *See id.*; Joongbaeck Kim, *Neighborhood Disadvantage and Mental Health: The Role of Neighborhood Disorder and Social Relationships*, 39 SOC. SCI. RES. 260, 260 (2010) (describing findings which "indicate that residents of disadvantaged neighborhoods have significantly higher levels of psychological distress than do residents of more advantaged neighborhoods . . . .").

91. Leonard I. Pearlin, *The Sociological Study of Stress*, 30 J. HEALTH & SOC. BEHAV. 241, 241 (1989). What is known as "Pearlin's Stress Process" has inspired much study of stress using his model and understanding. *See, e.g.*, ADVANCES IN THE CONCEPTUALIZATION OF THE STRESS PROCESS: ESSAYS IN HONOR OF LEONARD I. PEARLIN (William R. Avison et al. eds., 2010). For a deeper discussion of the stress process, see Keren, *supra* note 30.

92. Carol S. Aneshensel et al., *The Urban Neighborhood and Cognitive Functioning in Late Middle Age*, 52 J. HEALTH & SOC. BEHAV. 163, 175 76 (2011).

93. Richard G. Wight et al., *Urban Neighborhoods and Depressive Symptoms in Late Middle Age*, 33 RES. ON AGING 28, 30 (2011).

sources of stress, such as sickness or divorce. Residents are exposed daily, and without pause, to events, conditions, and behaviors that carry a potential for danger and harm. Some stressors are social and stem from human behavior, such as a high exposure to crime, violence, drug abuse, drinking in public, loitering of unsupervised youth, vandalism, and the relentless presence of panhandlers and homeless people. Other stressors stem from exposure to negative physical conditions, such as poor sanitation, run-down and abandoned buildings, high levels of noise and pollution, graffiti, and neglected public facilities. In general, residents of such disordered neighborhoods also experience the decay of their surrounding environment and a loss of civic control. The aforementioned words fail to fully capture the daily horror that is inflicted on the people who live in any of the (too) many distressed neighborhoods across the country. Therefore, I make use of less traditional texts to vividly portray and illuminate how the stress process manifests itself in the neighborhood context.

First of all, the name. What a sociologist refers to as a distressed neighborhood is to others simply a "ghetto"—a crowded and isolated urban setting, from which escape is unimaginable.[94] In this "urban nightmare"[95] work has disappeared.[96] In this war zone "helicopters circle constantly overhead."[97] "I'm from the city of death . . ." says Lil Wayne,[98] while Ice T states, "I was born in America too. But does South Central look like America to you?"[99]

The weight that these stressors bear on residents and the resulting sense of threat they endure is a phenomenon known as the clustering of stressors—i.e., when independent stressors, such as vandalism and noise, accumulate, converge, and proliferate.[100] As one study described it, "highly impoverished neighborhoods may be the source of *numerous chronic stressors*."[101] Additionally, studies show the cu-

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94. Hence the term "ghetto loans." City of Memphis v. Wells Fargo Bank, N.A., No. 09 2857 STA, 2011 U.S. Dist. LEXIS 48522, at *7 (W.D. Tenn. May 4, 2011).

95. D. Marvin Jones, Fear of a Hip Hop Planet 38 (2013).

96. WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR xiii (1996).

97. JONES, *supra* note 95, at 3.

98. *Id.*

99. *Id.* at 99.

100. RICHARD S. LAZARUS & SUSAN FOLKMAN, STRESS, APPRAISAL, AND COPING, 113 (1984) (explaining that the situation should "be considered in the context of the person's overall functioning, and in relation to what else is going on in the person's life."); *see also* Pearlin, *supra* note 91, at 246 47.

101. Carl A. Latkin & Aaron D. Curry, *Stressful Neighborhood and Depression: A Prospective Study of the Impact of Neighborhood Disorder*, 44 J. HEALTH & SOC. BEHAV. 34, 36 (2003) (emphasis added).

mulative effect of stressors over time and indicate that the longer the exposure to neighborhood stressors, the greater their impact.[102]

By and large, residing in disordered neighborhoods creates what some scholars have called "ambient threat"—signs and cues of impending danger. Ambient threat results from living in a noxious environment, being subject to constant signals of awaiting harm, and experiencing community chaos, as well as other incivilities associated with a breakdown of social control.[103] In a rich, ethnographical account of a north Philadelphia ghetto, Alijah Anderson describes such "ambient threat:"

> Here, phrases like "watch your back" take on a literal meaning. . . . On corner after corner, young men peddle drugs the way a newsboy peddles papers. . . . As we continue down the avenue, more and more gaps in the rows of houses appear; these gaps represent places where buildings have burned down, have been torn down, or have simply collapsed. . . . We pass a large building . . . gaily decorated with graffiti art, including a freshly painted "memorial" for a young victim of street violence. . . . The idea of a war zone springs to mind. Indeed, gunshot marks are evident on some of the buildings.[104]

Needless to say, the emotional toll of this kind of life is significant and is compounded by emotions of fear, anxiety, and anger that can be interpreted as additional stressors or, as explained below, factors that work to impair residents' resilience.[105]

Finally, race surely plays a role in the neighborhood context. It does so, not as a sole factor that drags us back to the identity problem, but as an additional stressor that augments the other stressors and amplifies the individual stress of residing in a distressed neighborhood.[106] Since minorities are the majority in neighborhoods of con-

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102. *See, e.g.*, Philippa Clarke et al., *Cumulative Exposure to Neighborhood Context: Consequences for Health Transitions Over the Adult Life Course*, 36 RES. ON AGING 115, 116 (2014); *see also* LAZARUS & FOLKMAN, *supra* note 100, at 98 (explaining that where a stressful situation persists over time, it is more likely to "wear the person down psychologically and physically").

103. *See, e.g.*, Catherine E. Ross & John Mirowsky, *Neighborhood Disorder, Subjective Alienation, and Distress*, 50 J. HEALTH & SOC. BEHAV. 49, 50 (2009).

104. ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 26, 30 31 (1999).

105. *See, e.g.*, Carol S. Aneshensel, *Neighborhood as a Social Context of the Stress Pro cess*, *in* ADVANCES IN THE CONCEPTUALIZATION OF THE STRESS PROCESS 35 (Avison et al. eds., 2010).

106. *See* Elizabeth Brondolo et al., *Racism as a Psychological Stressor*, *in* THE HANDBOOK OF STRESS SCIENCE: BIOLOGY, PSYCHOLOGY AND HEALTH 167 (Richard J. Constrada & Andrew Baum eds., 2011); *see also* Shelly P. Harrell, *A Multidimensional Conceptualization of Racism Related Stress: Implications for the Well Being of People of Color*, 70 AM. J. ORTHOPSYCHIATRY 42, 45 46 (2000).

centrated poverty and mobility (leaving the neighborhood) is nearly impossible, one result is lasting racial segregation.[107] Such segregation reinforces racial differences in access to opportunities and resources outside the neighborhood. This disparity adds one more layer to any given level of stress, and increases exposure to the intense stressor of discrimination. Overall, there is a growing consensus that residents of distressed neighborhoods endure a prolonged exposure to a uniquely intense combination of stressors.

2. Coping

When people are exposed to similar stressors, the resulting stress they experience still varies, and is mainly attributed to differences in their access to the resources available for coping with such stressors. Neighborhood distress not only intensifies residents' exposure to stressors, it also has a significant negative impact on residents' ability to cope with those stressors. As studies explain, there are various ways in which neighborhood distress works to deplete residents' material, social, and mental resources—all of which are essential resources for both alleviating and coping with the impact of stressors. In fact, some scholars have defined distressed neighborhoods as areas that suffer from the "simultaneous absence of economic, social, and family resources."[108]

First, even seemingly "personal" coping resources one possesses are highly influenced by the environment in which a person lives. Neighborhoods play a determinative role in one's education, income, social ties, attitude, and level of confidence. For example, growing up in a disadvantaged neighborhood limits one's educational opportunities and may damage one's self-esteem, both of which are crucial to one's ability to cope with stressors.[109] To illustrate, when schools look and feel like high security prisons and have no libraries or even working bathrooms,[110] fewer personal coping resources are accumulated.

Second, the ambient threat discussed earlier, or the perceived dangerousness of distressed neighborhood streets, creates a fear of walking around one's neighborhood. This increases residents' tendency to retreat socially and psychologically from their communities by remaining indoors, staying away from certain sites, avoiding

107. *See, e.g.*, Sara Aronchick Solow, *Racial Justice at Home: The Case for Opportunity Housing Vouchers*, 28 YALE L. & POL'Y REV. 481, 491 (2010) (describing the "phenomenon of racial ghettoization" and explaining that "[i]n 2000, African Americans were the strong majority, constituting 60% or more of the population, in nearly half of the country's 'high poverty' areas").

108. Aneshensel, *supra* note 105, at 36.

109. Solow, *supra* note 107, at 493 95.

110. JONES, *supra* note 95, at 108 09.

strangers, and generally keeping to themselves.[111] Parents who want to keep their kids alive and out of trouble keep them at home. A twenty-five-year-old woman who grew up in a drug-infested neighborhood reflected about her social life, saying: "I didn't have too many friends in the community, because, like I said, my mother kept me inside the house. . . . I didn't really go outside."[112] The resulting isolation deprives residents of a leading resource in coping with stressors: an effective social support system. Such an impeding alienation is further enhanced by the neighborhood's physical conditions, especially by the typical scarcity of safe and inviting public gathering places that are abundant in better neighborhoods—such as lush green parks, vibrant community centers, rich libraries, shiny shopping malls, and well-maintained sports facilities. Therefore, residents of deprived neighborhoods have very meager opportunities to comfortably meet with each other and engage in conversations and other social exchanges that are a must for coping with stress.[113]

Third, many of the stressors typical to distressed neighborhoods—such as crime and decay—are beyond individual residents' control. Residents' inability to exercise control over such stressors adds to these stressors' negative impact by depleting the residents' specific ability to cope.[114] Further, the lack of control present in such chaotic conditions broadly suggests a breakdown of social control and abandonment by the authorities. In the face of such cues, residents often develop an intense sense of helplessness[115] and powerlessness[116] that further undermines their resilience. This psychological internalizing process, sometimes called "structural amplification,"[117] also sabotages hope—an affective disposition that is indispensable for any effective

111. *See, e.g.*, Allison T. Chappell et al., *Broken Windows or Window Breakers: The Influence of Physical and Social Disorder on Quality of Life*, 28 JUST. Q. 522, 522 23 (2011).

112. ANDERSON, *supra* note 104, at 54.

113. *See* Agnes E. van den Berg et al., *Green Space as a Buffer Between Stressful Life Events and Health*, 70 SOC. SCI. & MED. 1203 (2010).

114. Flora I. Matheson et al., *Urban Neighborhoods, Chronic Stress, Gender and Depression*, 63 SOC. SCI. & MED. 2604, 2612 (2006) ("Uncontrollable stressors are documented to undermine health more so than controllable ones.").

115. *See* ROBERT M. SAPOLSKY, WHY ZEBRAS DON'T GET ULCERS: THE ACCLAIMED GUIDE TO STRESS, STRESS RELATED DISEASES, AND COPING 494 95 (3d ed. 2004) (offering a review of learned helplessness literature in the context of stress and depression); *see generally* MARTIN E. P. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH (1975) (one of the most influential works in psychology in general and the definitive book on the subject of learned helplessness in particular).

116. Ross & Mirowsky, *supra* note 103, at 51 (defining "perceived powerlessness" as "the learned and generalized expectation that one has little control over meaningful circumstances in one's life").

117. Catherine E. Ross & John Mirowsky, *The Sense of Personal Control: Social Structural Causes and Emotional Consequences*, *in* HANDBOOK OF THE SOCIOLOGY OF MENTAL HEALTH 393 (Carol S. Aneshensel et al. eds., 2d ed. 2013).

coping.[118] After all, "[i]f one can't influence conditions and events in one's own life, what hope is there for the future?"[119] Most pertinent to our engagement with predatory lending to residents of distressed neighborhoods, studies show that in an atmosphere where residents constantly feel powerless, residents may also feel "unable to fend off attempts at exploitation."[120]

Finally—linked to both the problem of social isolation and the sense of powerlessness—residents of distressed neighborhoods often feel further alienated, because they cannot trust civil institutions and private members of their own community. One major problem is the residents' complex relationship with the police. While residents of affluent neighborhoods view police as symbols of law and order, the case is profoundly different in disordered neighborhoods. Despite these being high-crime areas characterized by frequent emergencies and violent events, the innocent residents "sometimes fail to call the police because they believe that the police are unlikely to come . . . ."[121] "911 is a joke", declares Public Enemy, "Don't you see how late they're reactin'[?]"[122]

Or, if the cops do come, residents are often afraid that they may "harass the very people who called them."[123] Such police misconduct is frequently described by hip-hop artists, who regularly voice the concerns of the younger residents of "the 'hood."[124] For example, Akil b STRANGe recently responded to the notorious "stop-and-frisk" policy in *American Secrets: New York City*, by explicitly referring to its resulting stress.[125] He raps: "I became aware of the inequities between them . . . and me. Like how much tenser I would be with cops in the vicinity?"[126]

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118. Kathy Abrams & Hila Keren, *Legal Hopes: Enhancing Resilience Through the External Cultivation of Positive Emotions*, 64 N. IRELAND L. Q. 111 (2013).

119. Ross & Mirowsky, *supra* note 103, at 51; *see also* Latkin & Curry, *supra* note 101, at 41.

120. Ross & Mirowsky, *supra* note 117, at 393.

121. ANDERSON, *supra* note 104, at 321.

122. PUBLIC ENEMY, *911 is a Joke, in* FEAR OF A BLACK PLANET (Def Jam Recordings 1990).

123. ANDERSON, *supra* note 104, at 321.

124. *See* MURRAY FORMAN, THE 'HOOD COMES FIRST: RACE, SPACE, AND PLACE IN RAP AND HIP HOP (2002) (describing the specific emphasis on real neighborhoods and streets in rap music and hip hop culture as an urgent response to the cultural and geographical ghettoization of black urban communities).

125. Sarah Barness, *Stop and Frisk Rap Video Sends Powerful Message About NYPD and Racial Profiling*, THE HUFFINGTON POST (Oct. 16, 2013, 12:37 PM), http://www.huffingtonpost.com/2013/10/15/stop and frisk rap n 4101842.html.

126. *Id.*

Often, there is an additional anxiety resulting from the belief that engaging with the police or seeking police assistance will be perceived by other neighbors as snitching and will trigger social condemnation or even acts of retaliation. For example, Nickie, a twenty-six-year-old resident of a distressed neighborhood and a mother of four, "is fearful of being labeled a "snitch" or "hot."[127] She explains: "Around here, if you snitch on somebody, especially if you go to court and testify, you're a done deal."[128]

Generally, sentiments of fear and distrust of the police and other legal institutions are perpetuated by a reality of lawlessness and lack of civil order, "most-notably in the presence of open-air drug dealing and the prevalence of functioning crack houses."[129] The resulting lack of civil order exacerbates feelings of isolation and on the whole takes its toll on residents. It particularly may explain why residents who faced exploitation by lenders would feel powerless to cope with the pressure and indisposed to formally complain or otherwise seek legal aid.

3. Outcomes

The link between residing in impoverished neighborhoods and suffering from individual chronic stress is not only explained by the fact that such localities are replete with excessive stressors and lack the necessary resources to buffer them. It is further validated by many findings of a strong association between such residency and the known *outcomes* of the individual condition of distress. At the individual level, prolonged stress can produce both immediate and long-term consequences, which run the gamut from the physiological, to the cognitive, and to the psychological. In many disciplines, the study of stress has focused mainly on the negative effect of distress on people's health and well-being. Years of studies have produced a body of findings too vast to be summarized here.[130] Significantly, the leading symptoms of the individual condition of distress are strikingly com-

127. Monica C. Bell, *From Legal Cynicism to Situational Trust* 13 (Harvard Univ., Working Paper, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract id=2310016.

128. *Id.*

129. ANDERSON, *supra* note 104, at 321.

130. It shows, inter alia, that distress is strongly associated with a variety of severe diseases, with speeding the aging and the death of brain cells, and with the development of mental illness. *See, e.g.*, SHAWN M. TALBOTT, THE CORTISOL CONNECTION: WHY STRESS MAKES YOU FAT AND RUINS YOUR HEALTH AND WHAT YOU CAN DO ABOUT IT 81 (2007); *see also* Keren, *supra* note 30 (reviewing and explaining the most known symptoms of distress).

mon among residents of disordered and disadvantaged neighborhoods, even when controlling for personal circumstances.[131]

Perhaps the most salient findings in this context are those regarding depression. Many works highlight the strong bond between individual stress and depression and its ties to the secretion of stress hormones.[132] Critically, numerous studies show a sound association between perceived neighborhood disorder and subsequent depressive symptoms, even after adjusting for baseline depressive indicators.[133] Indeed, at least one study offered a neighborhood-based outlook at depression, suggesting that "it may be possible to identify neighborhoods, rather than individuals, that are at risk for depression."[134] Recently, another study suggested that neighborhood context "matters to depressive symptoms *over and above* individual characteristics."[135] This finding is extremely relevant to the legal arguments made in the context of predatory lending. Indeed, some researchers have challenged the individualistic response of society to the problem of stress and the inclination to hold persons solely responsible for their health and mental condition. Instead, those researchers have suggested that society should be at least partially accountable and that a neighborhood-based intervention might be more apposite.[136]

Overall, the findings regarding neighborhood-based depression have salience in the legal context of predatory lending. When people are under stress, further compounded by depression, there is very little they can actively do to resist exploitation by others. There is a

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131. *See generally* Ana V. Diez Roux & Christina Mair, *Neighborhoods and Health*, 1186 ANNALS N.Y. ACAD. SCI. 125 (2010) (reviewing the literature).

132. *See* SAPOLSKY, *supra* note 115, at 271 309 (discussing the strong ties between stress and depression); *see also* TALBOTT, *supra* note 130, at 23 (describing the link between over and under exposure to cortisol and stress related depression); David A. Gutman & Charles B. Nemeroff, *Stress and Depression*, *in* THE HANDBOOK OF STRESS, *supra* note 106, at 353 ("It is evident that inexorable link exists between stress and depression, and new research has dramatically increased our understanding of the relationship between the two.").

133. Matheson et al., *supra* note 114, at 2604 ("[T]he daily stress of living in a neigh borhood where residential mobility and material deprivation prevail is associated with depression."); Ross & Mirowsky, *supra* note 103, at 49 (arguing that that living in such threatening, noxious, and dangerous contexts may lead individuals to experience negative affective states such as anxiety, depression, and anger); Wight et al., *supra* note 93, at 44 (reporting findings from empirical work that showed "that neighborhood socioeconomic disadvantage is significantly and positively associated with depressive symptomatology among late middle age adults, controlling for individual level sociodemographic character istics a 'main effect' finding").

134. Latkin & Curry, *supra* note 101, at 41.

135. Wight et al., *supra* note 93, at 46 (emphasis added).

136. *Id*. ("Our findings suggest that these individuals are not solely responsible for their emotional well being, but that some part of their mental health status is attributable to aversive aspects of their environment. Thus, our findings support expanding policy discussions to focus on community based interventions . . . . ").

proven connection between stress, depression, and impaired agency. A frequent feature of major depression is "psychomotor retardation"—a severe decrease in the ability to concentrate or act, which makes even simple activities, such as making an appointment or getting dressed in the morning, exhausting and nearly impossible to accomplish.[137]

To summarize: residing in a distressed neighborhood is associated with all the leading individual outcomes, which typify the chronic stress condition. While these unfortunate outcomes appear to be individual, their source is mainly social: a result of living in a toxic environment as opposed to the consequence of individual choice-making.

4. A Vicious Cycle

The distressed neighborhood's bleak reality reinforces itself in a vicious self-perpetuating cycle of stress. The conditions of the neighborhood create stressors, deplete coping resources, and create harmful outcomes that in turn function as new clusters of stressors and an additional cause of depletion of coping capabilities, leading to more outcomes of illness and impairment of agency and decision-making capabilities. Stress and depression, for example, often lead to drug use and increased alcohol consumption.[138] Drug use and alcoholism foster neighborhood disorder, which then leads to more stress and depression within the neighborhood.[139] Furthermore, the empty streets phenomenon, created by mistrust and social withdrawal, and a neighborhood's general lack of institutional control and supervision, allows for more social disorder, crime, and violence in the streets. This naturally adds to residents' apprehensions and reinforces the initial tendency to disconnect.[140] As a result of this downward spiral, residents of distressed neighborhoods are very vulnerable and particularly attractive prey for geographically based exploitation.[141]

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137. SAPOLSKY, *supra* note 115, at 275.

138. For drugs, see, for example, Milam et al., *supra* note 87. For alcohol consumption, see, for example, Terrence D. Hill & Ronald J. Angel, *Neighborhood Disorder, Psychological Distress, and Heavy Drinking*, 61 SOC. SCI. & MED. 965 (2005).

139. Latkin & Curry, *supra* note 101, at 41.

140. *See, e.g.*, Chappell et al., *supra* note 111, at 152 ("According to Wilson and Kelling's broken windows theory, physical and social disorder lead to fear and cause citizens to retreat into their homes. This breaks down informal social control mechanisms and may lead to more serious crime.").

141. Ross & Mirowsky, *supra* note 103, at 53 ("Mistrusting individuals help create and maintain the very conditions that seem to justify their beliefs. Their preemptive actions may elicit hostile responses, and their diminished ability to participate in networks of reciprocity and mutual assistance may have several consequences: Without allies they are easy targets of crime and exploitation; when victimized or exploited they cannot share their economic or emotional burden with others; and, by not providing aid and assistance to

The main take-away from a non-legal investigation of the connection between life in a distressed neighborhood and chronic stress is the social nature of the problem. Greedy lenders targeted these individuals because of their apparent vulnerability, a vulnerability which stems from social conditions for which society should be held accountable. To the legal system, this insight identifies a need to take social aspects into account, rather than framing the predatory lending issue in terms of individualistic decisions in a free-market game. Recognizing that the lenders' motivation was to make *private* profits out of a *social* problem can offer courts justification for intervention. Such justification is based on a specific reality, in a particular neighborhood. As such it does not trigger the classification problem and the identity trap that results from it. Rather, it creates a need for judicial response that discourages predatory lending. The next section will further draw on non-legal studies to explain how the social problem of distressed neighborhoods can end in defective individual decisions to agree to patently predatory contracts.

B. Chronic Stress and Impaired Decision-Making

One of the leading effects of stress is on cognitive processes. Stress is described as interfering with such processes and studies particularly show that prolonged stress can "wreak havoc with decisionmaking."[142] This is particularly true of the impact of chronic stress associated with life in a distressed neighborhood.[143] Since consenting to contracts like the predatory loan agreements discussed here is the product of a decision-making process, this symptom is especially deserving of our attention. What impact may individual chronic stress have over the effectiveness of the decision-making processes?

1. Stress and Decision-Making

Although the intersection of decision-making models and stress theories has yet to be fully developed,[144] stress theorists believe that

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others they weaken the community's power to forestall victimization and exploitation and to limit its consequences.").

142. HENRY L. THOMPSON, THE STRESS EFFECT: WHY SMART LEADERS MAKE DUMB DECISIONS AND WHAT TO DO ABOUT IT 117 (2010). This section is based on my former work regarding the general impact of stress. *See generally* Keren, *supra* note 30.

143. *See, e.g.*, Philippa Clarke et al., *supra* note 102, at 119 ("Increased stress exposure in disadvantaged neighborhoods . . . may result in a prolonged elevation of stress response systems that produces physiologic changes in a body's immune system, brain function, and inflammation[] . . . .").

144. KENNETH R. HAMMOND, JUDGMENTS UNDER STRESS 25 27 (2000) (describing the "gulf" that separates theorists of stress from decision making researchers).

"chronic stress can lead to dysfunctional decision-making."[145] Specifically, judgments made while under stress are limited, because the brain is consumed by the need to cope with the stressors and their outcomes.

For decades, scholars who research the cognitive impacts of stress have expressed a consensus of opinion that "[t]he competence of human judgment is decreased by stress."[146] However, only recent developments in neuroscience have allowed researchers access to the precise brain processes triggered by exposure to stress. The current findings, albeit not conclusive, reveal how stress impairs high-order brain abilities that are essential for effective decision-making, specifically those operations performed by the prefrontal cortex (PFC). Under non-stress conditions, the PFC orchestrates the "intelligent regulation of behavior, thought and emotion."[147] Under conditions of psychological stress, however, stress hormones interfere with that regulation. Evolutionarily geared to prepare the body for a "fight-or-flight" response,[148] those hormones limit the ability of the brain to do other, less urgent, tasks. Specifically, they limit memory and attention regulation, as well as other complex brain activities the PFC performs. Therefore, under stressful conditions, the amount and quality of information we can recall, process, and store declines.[149] On the other hand, the high levels of stress hormones strengthen the function of other regions of the brain; the hormones released under stress "switch the brain from thoughtful, reflective regulation by the PFC to more rapid reflexive regulation by the amygdala and other subcortical structures."[150] While such brain processes may be efficient when people are coping with a physical threat, when expected to make rational choices that require analysis, self-control, and long-term thinking, this type of brain function is fundamentally detrimental.[151] It can lead to dysfunctional decision-making.[152]

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145. Eduardo Dias Ferreira et al., *Chronic Stress Causes Frontostriatal Reorganization and Affects Decision Making*, 325 SCI. 621, 625 (2009).

146. HAMMOND, *supra* note 144, at 6; *see generally* IRVING L. JANIS & LEON MANN, DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT (1977) (discussing, inter alia, the impact of stress on the decision making process).

147. Amy F. T. Arnsten, *Stress Signalling Pathways that Impair Prefrontal Cortex Structure and Function*, 10 NAT'L REV. NEUROSCI. 410, 411 (2009).

148. *See id.* at 415.

149. THOMPSON, *supra* note 142, at 136.

150. Arnsten, *supra* note 147, at 415.

151. *Id.* In addition, chronic, prolonged stress may even lead to structural, longer term changes in the PFC. *Id.* at 418 19.

152. *See generally* Dias Ferreira et al., *supra* note 145.

2. Stress and the Consideration of Alternatives

Under contract law, the enforcement of predatory loan agreements signed under stress depends, inter alia, on the existence of reasonable alternatives.[153] Thus, it is imperative to understand the impact of stress not only on the final decision, but also particularly on one's ability to recognize and assess existing alternatives before signing the contract. While careful appraisal of alternatives is essential to every decision-making process,[154] it is very difficult to fully consider other options while under stress when one "can't think straight."[155] As noted, the problem stems from the release of stress hormones that cause arousal, which in turn creates hasty and impulsive patterns of behavior that lead to ineffective decision-making. Such impulsive patterns were observed in an experimental study that focused specifically on the way stress influences a person's ability to scan and consider available alternatives.

This alternatives study, which compared "the manner in which stressed and unstressed individuals consider and scan decision alternatives,"[156] is often cited in the decision-making literature to explain how stress limits the ability to choose between alternatives.[157] One hundred and one students participated in the study and took a computerized multiple-choice analogies test containing fifteen questions.[158] Students were asked to choose the correct answer out of six alternatives that were presented separately on the screen.[159] They were able to navigate freely between the reviewable alternatives and to control both the order and the speed of their review.[160] To choose

153. The doctrines of duress and unconscionability that are often considered as possible sources of relief (non enforcement) both require the party seeking relief to show lack of reasonable alternatives. In other words, when a reasonable alternative existed and one consented to a specific contract instead of following this alternative, the legal assumption is that such consent was valid and the contract should therefore be enforced.

154. Irving L. Janis, *Decisionmaking Under Stress*, *in* HANDBOOK OF STRESS: THEORETICAL AND CLINICAL ASPECTS 60 (Leo Goldberger & Shlomo Breznitz eds., 2d ed. 1993) (describing the vigilance that is required to cope with stress and stating that vigilance exists when "[t]he decisionmaker searches painstakingly for relevant information[] . . . and appraises alternatives carefully before making a choice").

155. THOMPSON, *supra* note 142, at 159.

156. Giora Keinan, *Decision Making Under Stress: Scanning of Alternatives Under Controllable and Uncontrollable Threats*, 52 J. PERSONALITY & SOC. PSYCHOL. 639, 640 (1987).

157. *See, e.g.*, HAMMOND, *supra* note 144, at 170, 172, 176, 216; Dan Zakay, *The Impact of Time Perception Processes on Decision Making Under Time Stress*, *in* TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING 59, 60 (Ola Svenson & A. John Maule eds., 1993).

158. Keinan, *supra* note 156, at 640 41.

159. *Id.* at 640.

160. *Id.*

one of the alternatives, the students had to press the "enter" key, which then prompted the display of the next question on the screen.[161] The study recorded the time that the students spent reviewing each alternative, as well as the sequence by which the alternatives were visited.[162] The main goal was to trace the method of the decision-making process, rather than to simply measure the quality of the end result.[163] The participants were randomly divided into two groups: some were only asked to do their best, while others had to take the test under stress created as part of the experiment.[164]

The results of the alternatives study were remarkable. The participants under stress demonstrated a significantly inferior performance compared to their non-stressed counterparts. First, stress had the detrimental effect of "premature closure," defined as making a decision before all available alternatives were considered.[165] Although few non-stressed participants engaged in premature closure, 80% of the cases where alternatives were ignored occurred among the distressed subjects.[166] In fact, many of those subjects "chose an answer before they had even seen the correct alternative."[167]

Second, stress also caused "nonsystematic scanning," defined as a disorganized and scattered method of review in which the stressed decision-maker "searches frantically for a way out of the dilemma, and rapidly shifts back and forth between alternatives."[168] Recording every departure from a serial sequence of review,[169] the study demonstrated significantly deficient scanning patterns in the distressed groups. Compared to the non-stressed participants, subjects under stress visited the alternative answers in a much more scattered and disorderedly fashion.[170]

Finally, in terms of "quality of performance," defined as choosing the right answers, subjects under stress decided incorrectly at a higher rate than their counterparts. Notably, the distressed did not

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161. *Id.*

162. *Id.* at 641.

163. *Id.* at 640.

164. Notably, time pressure was not used to stress the participants: they were free to review each alternative for as much time as they needed and to revisit alternatives that seemed to require more attention. Instead, this study utilized the threat of electric shock as a stressor. Keinan, *supra* note 156, at 641. While time pressure would predictably yield a rushed style of decision making, it is not as readily apparent how being under a different kind of stress impacts one's ability to analyze alternatives.

165. *Id.* at 639.

166. *Id.* at 642.

167. *Id.* at 643.

168. *Id.* at 639 (citing Janis, *supra* note 154, at 72).

169. *Id.* at 641 (explaining the measurement of that aspect of the performance).

170. *Id.* at 642.

simply choose the wrong answer more often. Rather, the study showed a strong correlation between incomplete patterns of the scanning of alternatives and decreased quality of performance; 67% of the cases of premature closure, for example, led to choosing an incorrect answer.[171] The alternatives study thus demonstrates that stress significantly impairs the ability to consider alternatives and leads to flawed decision-making.[172]

3. Back to the Neighborhood

To reside in a distressed neighborhood potentially increases the cumulative impact of stress on cognitive functioning. The neighborhood's challenging conditions not only result in *individual* chronic stress, which interferes with cognitive functioning, but also directly operate at the environmental level to constrain cognitive performance. As researchers of neighborhood distress have compellingly argued, "impoverished neighborhoods foster poor cognitive functioning because such neighborhoods restrict opportunities for socially derived cognitive stimulation."[173] Importantly, such lack of stimulation is tightly linked to the previously discussed neighborhood stressors. To illustrate, when residents isolate themselves socially in response to environmental threats, it limits their interaction with others, and often causes reduced cognitive performance.[174] The limited stimulation available to residents of distressed neighborhoods can be further attributed to the lack of other institutional sources, which are commonly available in more affluent neighborhoods, such as public libraries, concert halls, and museums.

Thus, when we combine the findings regarding the impact of both individual and neighborhood stress on cognitive functioning, it becomes apparent that residents of distressed neighborhoods are especially prone to manipulation by sophisticated and powerful actors. Since this particular susceptibility is *not* the product of individual flaws, but rather a socially created phenomenon that has been facilitated by long years of public neglect, it necessitates measures of protection.

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171. *Id.*

172. Although the nature of the experiment did not require lengthy consideration of each of the alternatives other works also demonstrate that stress shortens the time dedicated to the assessment of each alternative. *See id.* at 640, 642 43 (discussing "temporal narrowing").

173. Carol S. Aneshensel et al., *The Urban Neighborhood and Cognitive Functioning in Late Middle Age*, 52 J. HEALTH & SOC. BEHAV. 163, 164 (2011).

174. *Id.*

III. AN ALTERNATIVE: PROTECTION WITHOUT CLASSIFICATION

Identity has become local, defined less by race than by whether or not you are from the hood.[175]

If the reverse redlining cause of action creates an identity trap (as argued in Part I) for those in need of relief, and historically redlined neighborhoods contribute to individual vulnerability (as argued in Part II), how should the legal system respond to exploitation that occurs as a result of such vulnerability? To answer this complex question I find it necessary to deviate from the neoliberal paradigm and draw on the vulnerability theory. The neoliberal paradigm conceptualizes people as autonomous, self-sufficient, freethinking, and rational beings, who therefore should be held accountable for their mistakes and not rely on the state for help.[176] In contrast, the vulnerability theory creates a causal relationship between the conditions of individuals in their respective communities and the state's actions and deficiencies (or inactions), which therefore require the state to respond to such inequalities and vulnerabilities.[177]

As a starting point, it is imperative to identify an effective legal reaction to predatory lending, because the state has a duty to respond in a manner that recognizes its accountability for the creation and enhancement of socially produced vulnerabilities. In fact, one court has even stated, albeit in a different context, that the state has more than a duty: "the State has *an interest* in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes."[178] A responsive state ought to find legal solutions to the problem of predatory loan agreements; it should not leave people who were preyed upon, like Leo White, to fend for themselves after they were exploited due to their vulnerability.

As shown in Part III, the state played an integral part in creating borrowers' vulnerability by failing to rehabilitate distressed neighborhoods and allowing them to grow unchecked. In addition, the state has deregulated the financial markets and has therefore permitted and even incentivized the use of predatory lending techniques against the residents of these distressed neighborhoods. Moreover, the state simultaneously acted to urge poor residents of these neighborhoods to take out loans and become homeowners. In the same

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175. JONES, *supra* note 95, at 4.

176. *See, e.g.*, Fineman, *The Responsive State*, *supra* note 33, at 251 52 ("[I]n the United States, the state is restrained from interference in the name of individual liberty, autonomy, and paramount principles such as freedom of contract.").

177. Fineman, *The Vulnerable Subject*, *supra* note 33, at 10 (explaining the vulnerability theory).

178. Washington v. Glucksberg, 521 U.S. 702, 731 (1997) (emphasis added).

vein, reverse redlining can be seen as governmental "greenlining,"[179] where a green light is given for any "creative" method of lending.

Accordingly, since the state has played its part in creating the problem, a responsive state should intervene, take legal action, and seek to alleviate the resulting consequences. Notably, by not responding appropriately, the state is not simply refraining from interfering in the market, as suggested by the neoliberal paradigm. Rather, a lack of intervention means that the state plays both an active and negative role: it exacerbates inequalities and promotes exploitation. Accordingly, when the anti-classification approaches have decreased the use of reverse redlining as a cause of action, another doctrine must be found to facilitate a response to predatory loan agreements.

To avoid the identity trap, an alternative legal theory should be based on a contextual analysis of the conditions that allowed the proliferation of predatory loan agreements. One essential component, which was explained in Part II with compelling scientific support, is the association between the areas that were targeted by lenders and the vulnerability of the borrowers residing in those areas. To focus on vulnerability as a universal human condition—the fact that as human beings we are all vulnerable but in different ways—may allow important progress.[180] It can free us from the jurisprudential concerns that are increasingly ascribed to the traditional categories of classification. Beyond this, courts can then truly examine the concrete condition of the borrower seeking relief and take into account a combination of circumstantial factors which are not captured by the borrower's racial identity. To illustrate, and without denying the conditions unique to women or minorities, a vulnerable borrower who deserves legal help may as well be an elderly white man who resides in a distressed neighborhood, even if the neighborhood is admittedly primarily consists of minorities.

Therefore, a more promising approach is a context-based analysis of borrowers' vulnerability and the ways in which it was exploited by lenders, especially given the poor results of the efforts to utilize a reverse redlining cause of action.[181] The field of law that both fits the

179. I borrow the term from Hernandez, *supra* note 39, at 188.

180. This insistence on "beyond identity" analysis is an essential component of the vulnerability theory. *See* Fineman, *The Responsive State*, *supra* note 33, at 254 (explaining the "troubling aspects of the identity approach to equality," especially since "in the United States there is no constitutional guarantee to basic social goods, such as housing, education, or health care" and proposing the broader concept of vulnerability as an alternative).

181. Reverse redlining could have been interpreted on geographical basis as referring to the conditions in the historically redlined areas and therefore not as an identity based cause of action. However, courts have systematically required that borrowers will prove belonging to a minority group. See *supra* Part I for a description of elements.

problem of predatory agreements and offers doctrines that allow a contextual legal response to the problem, is contract law. Thus, the next section introduces a new contractual framework and discusses its pros and cons in comparison to the existing anti-discrimination model.

A. Using Contract Law to Address Exploitation

How can contract law help deal with predatory loan agreements struck between sophisticated lenders and borrowers who reside in distressed neighborhoods? I have elaborated elsewhere on the interplay of contracts and stress and the ways in which contract law should take into account the fact that stress can impair consent to a degree that justifies not legally enforcing the contract.[182] Following this general framework, I now suggest that courts can and should engage in evaluating each borrower's concrete level of stress-based vulnerability at the time of consent to an exploitive loan agreement. Focusing on the personal vulnerability at a specific point in time, rather than on fixed categories of identity, can facilitate a judicial review that is uniquely tailored to the individual seeking relief, while—and this is crucial—not failing to consider the social context to which this individual was subjected.

To accomplish this individualized but socially-sensitive review, a "totality of circumstances" style test should be carefully developed. It should include the neighborhood's conditions and the impact of living in such a challenging and disempowering environment. These environmental aspects should be combined with any personal information, such as the health or age of the borrower. Since "[i]dentity has become local,"[183] attention should be given, for example, to the length of exposure to the neighborhood's environment; the conditions of the specific neighborhood; the existence or absence of social services; and the individual symptoms of distress, such as diagnosed depression or medically treated insomnia, and so on.[184] The more the analysis of the circumstances depicts the borrower's vulnerability, the greater the willingness to award relief. Most relevant to the problem of the identity trap discussed in Part II is that engaging in such concrete evaluation will free courts currently reluctant to consider discrimination arguments under the "reverse redlining" framework.

Using contract law to cope with an exploitation of vulnerability that was done via use of *contracts* is a natural and candid legal re-

182. *See* Keren, *supra* note 30.

183. JONES, *supra* note 95, at 4.

184. For a detailed discussion of why and how courts could pay attention to depression and insomnia as leading signs of stress, see Keren, *supra* note 30.

sponse. It is also attainable and conveniently requires no legal reform. Courts can utilize existing doctrines that are already designed to prevent market misbehavior to directly deny the enforcement of inappropriately achieved contracts. The leading doctrines that serve this purpose are, in no particular order: duress, undue influence, unconscionability, and misrepresentation. Without delving into their particular elements and related case law, they all share three leading features: a gap of power between the parties; inappropriate behavior by the stronger party; and a resulting consent of the weaker party to a harmful agreement. By offering deserving weaker parties' relief in the form of non-enforcement or partial enforcement of contracts,[185] courts have at their disposal both the authority and the tools necessary to properly respond to exploitation of vulnerability. Thus, they can prevent the exploiters from enjoying the fruits of their misbehavior.

A judicial review that focuses on the exploitation of borrowers' vulnerability (for now, without regard to which specific contractual doctrine is used), should have yielded, for example, some relief in the case of Leo White. Without solely relying on White's race, but at the same time without ignoring it in a colorblind fashion, the court could have recognized White's vulnerability. In fact, such vulnerability was indeed expressly acknowledged by the court, which described White as a "vulnerable, low-income, unsophisticated, first-time home buyer," in addition to being African-American. Other parts of the decision detail White's limited education, his young age, his need to support his family, his occupation as a hotel bellman who earns only $2100 a month, and so on. And yet, without proof of the intent to discriminate against White based on his race, the court doubted that legal meaning could be assigned to the above details. In contrast, under a contractual regime that forbids exploitation of vulnerability, those circumstances would be highly significant to any effort to evaluate White's vulnerability. Other circumstances should be taken into account as marking the exploitation of such vulnerability, even if the theory of intentional discrimination is rejected. Even if the lenders were not motivated by racial concerns, they were surely abusing White's depleted resources by convincing him to use their appraisal service, inflating the appraisal of the purchased property, exaggerating the income he could get from renting out parts of the house, and making hollow promises regarding the value-enhancing repairs.

185. That is, to the extent that courts are willing to employ these protective doctrines. *See, e.g.*, Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 184 (2009) ("Modern contract law precluded the policing doctrines from protecting the victims of contractual coercion.").

Moreover, even if Whites's racial identity cannot in and of itself justify judicial relief, the racial aspects of his vulnerability are not meaningless. Race and segregation have been playing a major role in the story of distressed neighborhoods. They can limit residents' ability to escape stress by leaving their neighborhood for a better one. A comment in the court's decision in White's matter reflects some awareness of that reality: "It is no accident that Better Homes was not selling real estate on Park Avenue or Central Park West."[186] In fact, Leo's loan related to a building in 164 Macon St. Brooklyn, which is part of a zip code that is populated by 89.9% minorities: 79% African-Americans and 10.9% Hispanic.[187] Furthermore, 90% of the loans made by the lenders in White's case were made to African-Americans in distressed neighborhoods.[188] As a result, the racial dimension ought not to disappear and the review cannot be colorblind. Rather, race should be taken into account as one of many factors that created Leo's vulnerability and subsequent exploitation.

Overall, after reading the case and supplementing it with basic information regarding Leo's address, we know that Leo White was a resident of one of the distressed neighborhoods of our country.[189] We also know that not only was he black, but he was also very young, uneducated, poor, inexperienced, and pressured by the need to take care of his family. Although the court doubted that intentional race-based discrimination occurred, it should be easier to prove that the lenders exploited Leo's vulnerability. We know that the lenders used sharp techniques to make it difficult to evaluate the economic meaning of the loan's terms, such as telling Leo that part of the payments could be funded by finding paying tenants who would probably rent part of the property and allow him to repay the loan. We also know that the agreement's terms, all dictated one-sidedly by the lenders, were unreasonably harsh and were seemingly based on a grossly inflated appraisal of the value of the property. Leo White, I suggest, was vulnerable and his vulnerability was exploited. Although I think it all had much to do with him being a poor African-American man trying to function in a capitalist world dominated by elites, I believe there is an alternative legal way to analyze the situation. This way does not ignore race. It is not colorblind. It does, however, put race in a richer and more nuanced context with the aim of finding a path to possible relief for vulnerable populations, within the means of al-

186. M & T Mortg. Corp. v. White, 736 F. Supp. 2d 538, 576 (2010).

187. *11216 Zip Code*, http://zipcode.org/11216 (last visited Dec. 18, 2014).

188. *White*, 736 F. Supp. 2d at 566.

189. *See supra* Part II.

ready existing legal doctrines, especially after finding antidiscrimination claims are no longer viable.

B. Utilizing the Unconscionability Doctrine

Among the possible contractual doctrines (defenses) that can be used to take neighborhood stress into account, and more broadly legally restrain the exploitation of vulnerability, I would like to highlight here the potential of the unconscionability doctrine.[190] I focus on unconscionability for three main reasons. First, it is the broadest doctrine out of the four relevant ones, whereas each of the other three has a more specific focus (threat for duress, fraud for misrepresentation, and abuse of dependency for undue influence). Second, there is more uniformity among jurisdictions regarding the tests and elements of unconscionability, and thus the model suggested here can be more easily applied in different states. Third, as opposed to undue influence, unconscionability applies more readily to the commercial setting in which predatory loans belong. Additionally, I believe that at its core, economic exploitation is an issue of conscience and a transgression of morals on the part of the exploiters[191] an issue that is explicitly addressed by a doctrine whose name is "unconscionability" with its roots in the "courts of conscience."[192]

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190. Note, however, that stress sensitive courts have unsystematically used a variety of those doctrines to analyze consent that was given under distress and to award relief when consent was impaired. *See* Keren, *supra* note 30.

191. It is important to note that another valuable doctrine that relates to morality might be the doctrine of good faith. Although not understood as a contractual defense, good faith similar to unconscionability enjoys a broad scope and direct link to issues of morality. Unfortunately, however, the current condition of the good faith doctrine is making it a less pragmatic solution to the problem at hand, mainly due to the general weakness of the idea in Anglo American legal systems. A specific difficulty in applying a good faith analysis to predatory loan agreements is that such analysis requires extending the doctrine to the pre contractual phase, where there is even less consensus regarding its applicability. That being said, I strongly believe that courts could and should use the standard of good faith more frequently. I also believe that exploitation of vulnerability via contracts, such as the use of predatory loan agreements, is outright bad faith behavior that should be treated as a breach of the duty of good faith. For a suggestion to use good faith in the context of the subprime crisis, see Chunlin Leonhard, *Subprime Mortgages and the Case for Broadening the Duty of Good Faith*, 45 U.S.F. L. REV. 621 (2011). For a suggestion to use good faith in the context of pre contractual discrimination to bypass problems related to anti discrimination laws, see Hila Keren, "*We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional To Say?*, 11 MICH. J. RACE & L. 133, 171 72 (2005).

192. *See, e.g.*, Dennis R. Klinck, *The Nebulous Equitable Duty of Conscience*, 31 QUEEN'S L.J. 206, 208 n.9 (2005) ("The courts of equity in England are, and always have been, courts of conscience." (citing Ewing v. Orr Ewing, (1883) 9 App. Cas. 34, 40)); *see also id.* at 211 ("[N]o doubt historically conscience and equity were intimately allied, even syn onymous."); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 76 90 (2006) (describing the history of the unconscionability doctrine as rooted in ideas of equity and fairness).

How would the idea of unconscionability work in the context of predatory loan agreements? Although it might vary, most jurisdictions divide the discussion of unconscionability into two aspects, or two "prongs:" the procedural, and the substantive.[193] The procedural prong of unconscionability relates to the *process* of making the contract. Under this, courts should review the individual vulnerability of the borrower to determine whether they were able to make a meaningful choice under the circumstances, especially given the cognitive difficulties imposed by chronic stress. The court should also review the lender's behavior prior to the finalization of the loan agreement (I deliberately do not use the word "negotiation" as there is usually none in the process of finalizing predatory loan agreements),[194] and check how exploitive the lender was in dealing with the vulnerable borrower. Here, targeting efforts, as well as every nondisclosure, hollow promise, inflated income or value, and tempting (too-good-to-be-true) entry rate—to name a few common tactics used by lenders—should be taken into account. These are all manipulative techniques used to exploit the borrowers' vulnerability by intentionally reducing their ability to evaluate the quality of the offered transaction. Note that under such review, whether or not these manipulations were motivated by discriminatory beliefs or intentions matters less than the fact that they were used to take advantage of the borrower's isolation, limited financial means, and relative weakness. Evidence, for example, that the lenders reassured Leo White that he would be able to pay his loan despite his low income because he would have three tenants paying $1200 each per month, while in fact he could only legally have two tenants at any one time, could be one concrete way of satisfying the procedural prong.

Under the substantive prong of unconscionability, courts review the contract's specific terms and the overall fairness of the transaction. Courts should search for all the signs of predatory lending that mark the agreement as unfair and render the terms of the loan significantly worse than other loans available to less vulnerable borrowers. For that purpose, post-crisis literature can supply very clear, albeit disheartening, lists of "creative" terms that were in use during

193. Melissa T. Lonegrass, *Finding Room for Fairness in Formalism The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L. J. 1, 6 (2012) (offering a detailed description of the procedural and substantial prongs and their interaction under the case law of different jurisdictions).

194. Leo White, for example, testified that there was no negotiation of the terms of the loan agreement. M & T Mortg. Corp. v. White, 736 F. Supp. 2d 538, 546 (2010) ("White was not represented by an attorney when he signed the contract of sale, and does not remember speaking with or consulting anyone about its terms prior to signing. He did not object to any of the contract terms, and testified that he had read through and understood the document.")

the subprime crisis. As the government investigates and settles with more lenders, these lists, and others to come, can assist judges in recognizing and evaluating the concrete unfairness of the agreement and assess the need for relief. This list includes a very low or zero down payment accompanied by a very high loan-to-value (LTV) ratio, payment increases which start as teaser rates for the first few years, a first period of "interest only" or "below interest" rates followed by steeply escalating and changing ("adjusting") rate, prepayment penalties, and a long list of origination and post-origination fees.[195]

Therefore, I suggest applying existent tools of contract law to the contractual issue of predatory loan agreements as an alternative to the reverse redlining cause of action. This alternative need not be restricted to borrowers in distressed neighborhoods,[196] but could be particularly valuable when coping with an argument that at its core relies on intentional targeting by stronger lenders. Cases of borrowers who couldn't prove race-based discrimination fall right within the conventional analysis of unconscionability, with abundant evidence of both procedural and substantive unconscionability to justify relief.

As a matter of fact, there is indistinguishable litigation against the same lenders who exploited White, which can demonstrate the effectiveness of utilizing the unconscionability doctrine. In that case, the borrowers, Cedric and Elizabeth Miller, an African-American couple from another distressed neighborhood in Brooklyn, argued for relief using the unconscionability doctrine.[197] Rejecting a motion to dismiss by the lenders, the court explained how the Millers' unconscionability argument may be successful if the necessary facts could be proven at trial. Dividing the analysis into the customary two-prong test, the court decided that both appeared to be satisfied. In regards to procedural unconscionability, the court said:

> A contract is procedurally unconscionable where the contract formation process is tainted by fraud or misrepresentation . . . and can be demonstrated through a showing of, among other things, "high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance in the understanding and acumen of the parties." Here, Private Defendants actively sought out buyers like the Millers who lacked business experience and then effectively prevented the Millers

195. OREN BAR GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 135 45 (2012) (offering a data based description of the typical subprime contracts).

196. I elaborate elsewhere on the idea of using contractual doctrines such as unconscionabilty to release other distressed victims of exploitation, in other contexts, such as release agreements made upon termination of employment relationships or last minute pre nuptial agreements. Keren, *supra* note 30.

197. M & T Mortg. Corp. v. Miller, 323 F. Supp. 2d 405, 412 13 (E.D.N.Y. 2004).

> from avoiding harm through the use of competent counsel or an independent lender.[198]

Next, moving on to the prong of substantive unconscionability, the court added that lenders' artificial inflation of the purchased home's value could satisfy the requirement.[199] Then, concluding the two-prong analysis, the court emphasized how appropriate it is to employ the unconscionability doctrine in this context. It explained that "[w]hile a contract is not rendered unconscionable merely because one party made a poor business decision, where, as here, that decision was induced through fraud that effectively limited, if not eliminated, the aggrieved parties' ability to make an informed decision, a claim of unconscionability is proper.[200]

Although the court did not take into account the effect of life in a distressed neighborhood, as suggested above, the Millers' case demonstrates that the use of the unconscionability doctrine in the predatory lending context flows naturally and might work well, especially when lenders have exploited the borrowers' impaired decision-making capabilities. Despite the fact that some other courts have refused to find potential unconscionability in reverse redlining scenarios,[201] the path undeniably exists.[202] The coming section further discusses the advantages of utilizing unconscionability and considers possible objections.

C. Evaluating the Suggested Framework

1. Advantages

First and foremost, utilizing contract law and its existing doctrines to invalidate the contractual exploitation of vulnerability is both a natural and feasible legal response and can be instantaneously applied.[203] As such, it would efficiently establish an explicit norm,

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198. *Id.* at 413 (internal citations omitted).

199. *Id.* ("A contract is substantively unconscionable where its terms are unreasonably favorable to the party against whom unconscionability is claimed. Here, the Millers paid a sales price that represented a 60% premium over [the] purchase price, which [the lenders] knew (as demonstrated by their misrepresentations in the mortgage insurance application) the Millers could not afford and which the Millers immediately defaulted on." (internal citation omitted)).

200. *Id.* (emphasis added).

201. *See, e.g.*, Levey v. CitiMortgage, Inc., No. 07 C 2678, 2009 U.S. Dist. LEXIS 70210 (N.D. Ill. Aug. 10, 2009).

202. *See* Frank Lopez, Note, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. POVERTY L. & POL'Y 73, 86 88 (1999) (recognizing the possibility of using unconscionability in this context but criticizing this path).

203. *See, e.g.*, Arthur Allen Leff, *Unconscionability and the Code The Emperor's New Clause*, 115 U. PA. L. REV. 485, 537 (1967) (explaining the emergence of the doctrine as a

with expressive powers, against such market behavior.[204] Once clearly established it can have a significant impact: many would simply obey the law for moral and/or economic reasons and the explicit existence of a legal norm would further support the already existing social norm against such behavior.[205]

Furthermore, the proposed alternative offers protection without classification. As opposed to the reverse redlining cause of action, the contractual analysis does not rely on race-based categories and thus does not trigger the tension between the requested judicial intervention and the growing anti-classification tendencies discussed earlier. Indeed, "[u]nconscionability is an open-ended, undefined concept subject to judicial definition case-by-case."[206] By its own definition the standard of unconscionability never depends on one factor. To the contrary, it "[t]ypically . . . results from a complex, variable set of grounds for relief, which causes the court to make a judgment in sum."[207] In this "sum," race is at least one factor out of many, if not "a factor of a factor of a factor" to use the now-famous language used by the Supreme Court in *Fisher*.[208] For example, through the lenses of

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response to overreaching market behavior against vulnerable owners of land: "It is out of these special attributes of land, making up the *Gestalt* of real property (as opposed to the 'goods' of the Code), that there arise those repeated dramatic vignettes with which the Chancellors were continually faced the abused old and unsophisticated young, the slicker and the farmer, the money lender and the expectant heir. This cast of characters, to a large extent determined by the nature of the commodity, led to the various forms of overreaching which, while not quite adding up to fraud or duress, formed the pictures of bargaining pro cesses which the chancellors declared 'unconscionable.' "). For a suggestion to use the doc trine of unconscionability to protect property rights of African Americans, see McFarlane, *supra* note 47, at 917 ("Another place from which to construct or assemble a more open recognition of the implied right to keep should be through contract's unconscionability doc trine.").

204. Compare this perspective to the European ban of contractual exploitation. For example, Article 51 of the European Commission's Proposal for a Common European Sales Law focuses on "unfair exploitation." The article reads as follows: "A party may avoid a contract if, at the time of the conclusion of the contract: (a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair ad vantage." *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, EUROPEAN COMMISSION 52 (Nov. 10, 2011), http://eur lex.europa.eu/legal content/EN/TXT/?uri=CELEX:52011PC0635.

205. LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 21 (2011) (arguing that most people will obey "instructions from authority").

206. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004).

207. 1 10 Virginia Remedies § 10.11 (2012).

208. Compare the two variations in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). According to Justice Kennedy, "[t]he University of Texas at Austin considers race as *one of various factors* in its undergraduate admissions process." *Id.* at 2415 (em phasis added). Justice Ginsburg chose to cite the lower court's famous expression:

unconscionability a middle class African-American borrower who used the loan to buy a home in an upscale neighborhood may not deserve relief while a poor white resident of a distressed neighborhood may deserve it.

In fact, a move towards drawing on contract law as an alternative to the anti-discrimination paradigm mirrors recent shifts in the jurisprudence of the Equal Protection Clause, shifts that not only break away from classification, as described earlier, but also include an emergence of alternative solutions. Indeed, the injustice of predatory loans is not sustainable, and when the classification door is shut, another door must open. Scholars writing in the constitutional arena have suggested different descriptions and names to such progression.

Instead of the dichotomous split between the anti-classification and anti-subordination voices at the Supreme Court (with the former having the upper hand), Professor Reva Siegel has identified a third approach. She named it "the anti-balkanization perspective," a name that alludes to the fact that, for some, the resistance to classification comes from a fear of social balkanization.[209] Siegel's anti-balkanization lies in the space between disregarding racial issues (nothing is about race) and emphasizing them (everything is about race). This approach, carved by "centrist" Supreme Court judges, aspires to help these populations and yet still resists treating people based on racial classifications. However, these judges do not resist taking race into account as part of a broader quest for diversity, where race is only one factor among others and is used to fully understand the effect of a segregated past and present.

Anti-balkanization judges, who allow carefully-tailored classifications but resist general classifications, would probably feel better taking race into account in a contextual manner, as one out of many factors rather than as an independent source of relief. Consequently, even anti-classification judges, who usually find it difficult to award relief based on race (or other identity-based classifications), may feel comfortable applying a contractual doctrine to a variety of facts that have established a concrete and unique vulnerability.

Like the anti-balkanization approach, the suggested contractual alternative does not advocate for, or require, colorblindness. Since race is a major individual stressor for minorities of all walks of life, no comprehensive legal response should try to deny its place in understanding the impact of distressed neighborhoods on their resi-

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"[UT] . . . considers race only as *a factor of a factor of a factor of a factor* . . . ." *Id.* at 2434 (citing Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009) (emphasis added)).

209. Siegel, *supra* note 22, at 1283.

dents' wellbeing. Rather, one of the advantages of applying unconscionability, in this context, is the distinction and space it offers between anti-classification and colorblindness.

Although contributors to the constitutional discourse sometimes use the terms anti-classification and colorblindness interchangeably, anti-classification does not and should not mean colorblindness. The case of *Illinois v. Wardlow* demonstrates how judges' analyses can refrain from colorblindness and still adhere to anti-classification by utilizing the space between the two.[210] Although written in the criminal context, the case navigates relevant issues of race and distressed neighborhoods. The Supreme Court reviewed the forcible stop-and-frisk of Mr. Wardlow, who ran when he noticed the police. Justice Rehnquist wrote an analysis that confirmed the legality of the stop and omitted Mr. Wardlow's race, despite an amicus brief submitted by the NAACP that defined him as "a middle-aged African-American male."[211] Taking the colorblindness approach, the Court decided in an abstract way that "[h]eadlong flight–wherever it occurs" justified "suspecting that Wardlow was involved in criminal activity."[212] The Court explained that inferring guilt from an unprovoked flight is "based on commonsense judgments and inferences about human behavior."[213] Dissenting—and demonstrating the ability to avoid both colorblindness and classification—Justice Stevens resisted the generalization. Instead, he insisted that Warldlow's "human behavior" must be *contextualized* and the analysis should take into account both his neighborhood's conditions and his race. Without classifying but without ignoring the reality, Justice Stevens explained that "[a]mong some citizens, *particularly minorities and those residing in high crime areas*, there is also the possibility that the fleeing person is entirely innocent, but[] . . . believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence."[214] Similar to Justice Stevens' approach, applying an unconscionability analysis to reverse redlining

210. Illinois v. Wardlow, 528 U.S. 119 (2000).

211. Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 452 (2012).

212. *Wardlow*, 528 U.S. at 124 25.

213. *Id.* at 125.

214. *Id.* at 132 (emphasis added). As opposed to the majority, Justice Stevens had relied on more than "common sense" in describing the impact of race. In a footnote attached to the sentence quoted above he referenced studies and reports that offer a fuller and more empirical description of the context. This method can be adopted in applying unconscionability analysis to exploitations of vulnerability. Responding to the majority's suggestion that the high crime area makes the fleet more suspicious he concluded that, "because many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas, the character of the neighborhood arguably makes an inference of guilt less appropriate, rather than more so." *Id.* at 139.

cases can offer judges the freedom to take an "anti-balkanization" path. Judges can refrain from both classification and colorblindness by examining race as a factor in a nuanced and thoughtful way. Aiming understanding *a concrete situation* rather than establishing an overarching conclusion regarding intentional discrimination, the court can help borrowers on a contextual basis.

Professor Yoshino's "new equal protection" offers an alternative way to analyze the meaning of current anti-classification trends. Similar to Siegel's anti-balkanization, it suggests that anti-classification does not necessarily mean colorblindness.[215] The phrase "New Equal Protection" captures an emerging judicial approach that still cares about equality, but is reluctant to use group-based legal tools to achieve it. Influenced by the work of Professor Tribe,[216] Yoshino suggests that the Supreme Court's new emphasis on human dignity is the way in which it increasingly avoid classifications, while still vindicating equality concerns. He argues that since issues of inequality have not disappeared, "the Court has shut doors in its equality jurisprudence in the name of pluralism anxiety and opened doors in its liberty jurisprudence to compensate."[217] Under this analysis, the main doors in the Court's liberty jurisprudence are based on dignity claims.

A leading example is the decision in *Lawrence v. Texas*,[218] where the Court refused to take the classification path and add sexual orientation to the list of protected categories. Nonetheless, the Court still found a way to support gay people, who were the main victims of sodomy statutes, in their quest for equality. Although the challenged sodomy statute in this case was sex-specific, prohibiting same-sex, but not different-sex sodomy,[219] the *Lawrence* Court struck it down on liberal grounds. It did so by broadly acknowledging "the fundamental right of all persons — straight, gay, or otherwise — to control their intimate sexual relations."[220]

The judicial approach formulated in *Lawrence* promotes equality as part of a universal right to dignity, shared by all human beings

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215. Yoshino, *supra* note 23, at 748 50.

216. Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897 98 (2004).

217. Yoshino, *supra* note 23, at 750. Importantly, at least in the employment context, legislators also reacted to the Court's refusal to recognize sexual orientation as a protected class. *See* Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1357 (2013) ("[A]t least nineteen states plus the District of Columbia have already passed legislation that[] . . . prohibits employment discrimination . . . based on sexual orientation.").

218. 539 U.S. 558 (2003).

219. Yoshino, *supra* note 23, at 777.

220. *Id.*

regardless of group-identities. In an anti-classification age, to conceptualize equality in such a manner has the advantage of being facially neutral. Therefore, the focus on dignity as an organizing concept allows judges to take equality concerns into account, without harming the social cohesion they feel is threatened by classification.[221]

In the same vein, treating the exploitation of vulnerability as unconscionable market behavior can fit the profile of a dignity claim. Like the right to control our intimate life, we all should have a right to not be exploited by others when we are vulnerable. Exploitation of vulnerability in the market not only causes devastating economic damage, it also harms dignity. It shames the vulnerable party, leaving him helpless and looking pathetic and unable to take care of his own matters. Therefore, the accumulative consequences of exploitation pose a direct threat to human dignity and courts should be allowed and even encouraged to intervene.[222] Of course, dignity and equality are intertwined, and group-based protection is not really extinct.[223] As Yoshino reminds us, "[i]n finding all thirteen sodomy statutes unconstitutional, *Lawrence* clearly helped gay people more than it helped straight people."[224] This point is pertinent in our context as well, because establishing a norm against exploitation of vulnerability in the market would clearly assist weaker market players of disenfranchised groups more than their stronger counterparts. In that sense, predatory loan agreements cannot–and should not–be divorced from their socio-economic context. Indeed, as Siegel points out, working in the space between colorblindness and classification "entails practical, contextual judgments attentive to the concerns of differently situated members of the polity."[225]

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221. Siegel, *supra* note 22, at 1308 (describing the judicial preference of Justice Kennedy to vindicate "equal protection in ways that promote social cohesion a sense of attachment shared by all in the community . . . .").

222. Martijn W. Hesselink, *Unconscionability, Unfair Exploitation and the Nature of Contract Theory: Comments on Melvin Eisenberg's "Foundational Principles of Contract Law*" 2 (Ctr. for the Study of European Contract Law, Working Paper No. 2013 03), *available at* http://ssrn.com/abstract=2209752 ("[A]s free and equal citizens we owe respect to each other's dignity, and that it is not right for the state to lend its power for the enforcement of bargains that are so disproportionate that they become exploitative and therefore disrespectful of the other party's human dignity.").

223. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2433 n.2 (2013) (Ginsburg, J., dissenting) ("The notion that Texas' Top Ten Percent Law is race neutral calls to mind Professor Thomas Reed Powell's famous statement: 'If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind.' Only that kind of legal mind could conclude that an admissions plan specifically designed to produce racial diversity is not race conscious." (internal citation omitted)).

224. *See* Yoshino, *supra* note 23, at 778 79.

225. *See* Siegel, *supra* note 22, at 1308.

The vulnerability theory calls upon the state to be more responsive, and therefore serves as additional theoretical support for utilizing unconscionability where reverse redlining has failed. Accordingly, as a measure of help to vulnerable subjects, this theory underscores the state's deep commitment to a proactive countering of inequalities instead of a minimalistic engagement in keeping formal equality intact. Such an expectation reflects a giant step beyond what is allowed under the private/public dichotomy, where private loans are marginally scrutinized by the public legal system. Further, it echoes a belief, shared by many (albeit not all), that contract law—despite its "private" image—has a meaningful public role to play in the social arena and "is a mode of social regulation whose rules ought to serve social goals."[226]

Furthermore, the use of an extensive contractual doctrine, like unconscionability, is strategically advantageous in the context of economic exploitation. Using specific legislation to forbid particular kinds of abuse, such as the ban on notorious pay-day loans, does not defend against greedy market players who will simply identify loopholes and find ways to continue to profit from exploiting others' vulnerability, such as lending via the internet to avoid state regulations.[227] At least one state has explained the special value of the unconscionability doctrine as a "blanket rule," stating, "[t]he legislative process is too slow to keep up with market practices, so the courts must have power to monitor the market for the protection of all participants."[228] Although the law cannot totally stop people from trying to make more profits by taking advantage of others, it can make it harder for them to succeed and discourage them from further attempts. This goal can be achieved by utilizing the concept of unconscionability to send a clear and general message, that *any form of*

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226. Roy Kreitner, *Fault at the Contract Tort Interface*, 107 MICH. L. REV. 1533, 1549 (2009); *see also* Danielle Kie Hart, *Contract Law Now Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 45 47 (2011) (arguing that contract law is indeed public law).

227. Leah A. Plunkett & Ana Lucia Hurtado, *Small Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31, 38 (2011); *see also* William M. Woodyard & Chad G. Marzen, *Is Greed Good? A Catholic Perspective on Modern Usury*, 27 BYU J. PUB. L. 185, 216 (describing a "Texas loophole that allows title loan lenders to be classified as a 'credit service organization' rather than as a lender[]" and explaining that such "loophole allows Texas title loan 'credit service organizations' to charge triple digit interest rates").

228. 1 10 Virginia Remedies § 10.11 (2012); *see also* David Ray Papke, *Perpetuating Poverty: Exploitative Businesses, the Urban Poor, and the Failure of Reform*, 16 SCHOLAR 223, 225 (2014) ("The business models and concomitant contractual agreements of rent to own outlets, payday lenders, and title pawns are so sophisticated and adjustable as to make them virtually *impervious to regulation*. As a result, rent to own outlets, payday lend ers, and title pawns continue not only to exploit the urban poor, but also to socioeconomically subjugate the urban poor by trapping them into a ceaseless debt cycle. *A blanket proscription* of these tawdry businesses might be the only way to drive them from our midst and to elimi nate their active role in the perpetuation of urban poverty." (emphases added)).

exploitation is forbidden regardless of the concrete method used. At least one court that had dismissed a reverse redlining argument but allowed an unconscionability argument to proceed referred to this "residual" or "catch-all" attribute of the doctrine, explaining that "[i]t also seems to the court that the purpose of the unconscionability doctrine, in providing protection to vulnerable, unsophisticated parties, is to *plug the gaps left open by applicable statutory provisions* when they do not afford consumers adequate protections."[229] This is the known advantage of broad standards like good faith and unconscionability over specific rules: it is much harder to escape their coverage.[230] A clear and general message against exploitation will support and strengthen social and moral norms that disapprove of such behavior, which can encourage stronger market players to exercise more self-restraint.

Moreover, in the context of predatory loan agreements, proving neighborhood-related vulnerability may be easier than trying to prove discrimination. In some cases it is possible that the failure to prove intentional race-based discrimination had less to do with the judicial discomfort with classifications and more to do with the fact that discrimination was not the lenders' leading motivation. Some lenders may have been indifferent to questions of race and were equally interested in all the residents of such distressed areas because of their tendency to have a high need for loans and low ability to cope with lenders' unscrupulous schemes. If the practice of predatory lending is more attributable to greed, which fosters ruthless business ethics, than to a "taste" against minorities, it is of little surprise that it is difficult to prove racial discrimination.

This is so not because race is irrelevant, as argued by colorblind approach, or no longer relevant, as suggested by post-racialists. This is because race only partially overlaps with the story of predatory loans sold to residents of previously redlined neighborhoods. Many lenders who focused on potential subprime borrowers ignored affluent suburban areas and concentrated on those residing in distressed areas, including the admittedly few white dwellers. These cases identify that it is exactly people's aggregate vulnerability that attracts the exploitation, because it suggests that extra profit may be made by capitalizing on others' desperation and lack of alternatives. The fact that residents of distressed neighborhoods are overwhelmingly African-Americans is relevant, because race is recognized as an independent stressor which adds to vulnerability and impairs resilience.

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229. Ng v. HSBC Mortg. Corp., No. 07 CV 5434 (RRM)(VVP), 2009 U.S. Dist. LEXIS 125711, at *63 (E.D.N.Y. Dec. 15, 2009) (emphasis added).

230. For the differences between standards and rules in general, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

Yet, according to this perspective, the lenders themselves are not necessarily driven by discriminatory preferences. They are "merely" exploiting the effects of years of "distributive injustice"[231] and discrimination *by others*. After all, "[e]xploiters are typically opportunists; they extract advantage from situations *that are not of their own making*."[232]

Even when the intent to discriminate exists, it is typically difficult to prove. Therefore, although these cases have a clear discriminatory effect, because the lenders are possibly motivated by other reasons, it might be even harder to prove the intent to discriminate. Thus, it might be easier to show evidence that borrowers were targeted based on their residence in "the wrong zip code,"[233] or neighborhood. To prove people residing in a specific area were targeted, tempting ads in a local newspaper can serve as evidence, even if some can doubt that using images of minorities in those ads proves an intention to discriminate them based on their race.[234]

A final point of practical salience is the remedial flexibility provided by unconscionability as a contractual cause of action. While courts can refuse to enforce the entire loan agreement, they are also authorized to take a more nuanced and contextual step, and to "so limit the application of any unconscionable clause as to avoid any unconscionable result."[235] In short, courts can use unconscionability to "undo"

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231. Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 135 36 (2008) ("While the doctrine of unconscionability is not explicitly framed in distributive terms, its distributive aspects have been often noted. . . . [C]ourts usually do not apply the doctrine to the benefit of rich victims.").

232. JOEL FEINBERG, HARMLESS WRONGDOING, 4 THE MORAL LIMITS OF THE CRIMINAL LAW 177, 183 84 (1988) (emphasis added); *see also* ALAN WERTHEIMER, COERCION 39 40 (1987) (offering a contrast between *causing* the one's lack of options and *taking advantage* of such lack of options and suggesting that the doctrine of unconscionability is the one that fits the latter category).

233. JONES, *supra* note 95, at 12.

234. The Federal Trade Commission has published a guide to help consumer recognize such ads. FEDERAL TRADE COMMISSION, DECEPTIVE MORTGAGE ADS (2012), *available at* http://www.consumer.ftc.gov/articles/0087 deceptive mortgage ads. Publications of this sort assist lawyers in proving and judges and juries in finding unconscionability.

235. Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements,* 97 MARQ. L. REV. 751, 756, 764 69, 781 92 (2014) (quotation omitted) (citing legislated ver sions of the doctrine as follows: OHIO REV. CODE ANN. § 1302.15(A); *see also* ALASKA STAT. § 45.02.302(A); ARK. CODE ANN. § 4 2 302(1); COLO. REV. STAT. § 4 2 302(1); 810 ILL. COMP. STAT. ANN. § 5/2 302(1); ME. REV. STAT. ANN. tit. 11, § 2 302(1); MD. CODE ANN., COM. LAW § 2 02(1); MINN. STAT. ANN. § 336.2 302(1); MISS. CODE ANN. § 75 2 302(1); MO. ANN. STAT. §400.2 302(1); MONT. CODE ANN. § 30 2 302(1); NEB. REV. STAT. § 2 302(1); NEV. REV. STAT. ANN. § 104.2302(1); N.H. REV. STAT. ANN. § 382 A:2 302(1); N.M. STAT. ANN. § 55 2 302(1); N.C. GEN. STAT. § 25 2 302(1); OR. REV. STAT. § 72.3020(1); R.I. GEN. LAWS § 6A 2 302(1); S.C. CODE ANN. § 36 2 302(1); VT. STAT. ANN. tit. 9A, § 2 302(1)).

the extra-profit made by exploitation without invalidating the entire economic process.

2. Possible Objections

The main predicted criticism of using contract law, and the defense of unconscionability in particular, is based on thirty years of criticism of the unconscionability doctrine and the seminal decision in *Williams v. Walker-Thomas*.[236] Following law and economics commentators, such as Richard Posner and Richard Epstein, it can be argued that a responsive state does little good to vulnerable subjects if it gives them relief due to their condition since such relief will cause lenders to refrain from lending money to vulnerable people due to the risk that their loan agreements would be rendered unenforceable.[237] Robin West has recently paraphrased the conclusion of such anti-intervention critiques as follows: "[i]f you want to help poor and uneducated buyers, for heaven's sake, hold them to their contracts."[238]

There are, however, several important responses to this conventional anti-intervention line of reasoning. At the most basic level it should be clear that decades after the prediction was made, no one has proved, or even tried to prove, the apocalyptic hypothesis that lies at the core of the critique. In other words, there is no evidence, despite years of experience, that knowing that the court may protect people from exploitation will cause exploiters to cease their engagement with the protected parties (and people similar to them). While the prospect of protection may deter some market players from contracting with the "protected," in other cases it may not. It is at least as probable that the prospect of legal relief will incentivize market players to behave more reasonably even if only in order to selfishly avoid the invalidation of their contracts and costs of litigation.

In fact, many transactions are made despite continuing and sometimes growing legal measures taken against exploitation of vulnerability. For example, employees continue to initiate consensual separation agreements as an alternative to one-sided termination of the employment relationship even after courts have awarded relief to employees who were pressured into signing release agreements.[239]

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236. *See* Williams v**.** Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

237. Selmer Co. v. Blakeslee Midwest Co., 704 F.2d 924, 928 (7th Cir. 1983) (Judge Posner stating: "It is a detriment, not a benefit, to one's long run interests not to be able to make a binding commitment."); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 306 08 (1975).

238. Robin West, *The Anti Empathic Turn*, *in* PASSIONS & EMOTIONS 243, 258 (James Fleming ed., 2013).

239. *See, e.g.*, Meyers v. Trugreen, Inc., No. 03 C 7570, 2004 U.S. Dist. LEXIS 9200, at *12 13, 17 (N.D. Ill. May 21, 2004) (invalidating employee's consent to release her employer

Similarly, businesses have not stopped selling computers using electronic methods even after some courts released buyers from unfair terms hidden in the contracts that were put into the boxes of those computers.[240] Or, as one commentator writing in the context of predatory prenuptial agreements noted: "[t]he potential husband might be interested in marrying even if the terms of his proposed premarital agreement must be made more fair."[241]

In fact, much support can be found for the opposite hypothesis, that judicial protection can reduce exploitation by both clarifying that it is not an acceptable market behavior and demanding it be replaced by more pro-social behavior. There are experimental and real-life examples that strongly suggest that many people would respond to an authoritative order to behave morally and pro-socially by obeying the order rather than by acting selfishly. In one experiment, for example, one group of players in a social dilemma game that involved money transfers was told that it is going to play the "Community Game," while the other was told that the game is called the "Wall Street game."[242] Even though the contrasting names given to the game carried a somewhat implicit message, far weaker than a clear order from an authority, the groups played the otherwise identical game with significant differences.[243] Players of the so-called community game demonstrated much less selfish decisions than those who played the so-called Wall Street game.[244] Applied to the legal context, since courts and judges are certainly respected sources of authority in our society, more exploiters are likely to stop or at least restrain their selfish efforts if told to do so. What was noted with regard to good faith can be applied with similar force to unconscionability: "[c]ontract law serves a type of expressive function by communicating to tradesmen that certain standards of decency will be required of their conduct."[245]

Perhaps most importantly, the risk that protecting a weaker group will eventually harm the members of the group is not relevant,

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based the fact that the latter took advantage of the employee's heightened vulnerability at the end of her employment with same employer).

240. *See, e.g.*, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574 75 (N.Y. App. Div. 1998) (using unconscionability to release consumer from an unfair arbitration term that was in included in a contract that was put in the box of a delivered computer).

241. Brian H. Bix, *Contracts*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 251, 260 (Franklin G. Miller & Alan Wertheimer eds., 2010).

242. STOUT, *supra* note 205, at 105.

243. *Id.*

244. *Id.* ("[P]eople change their behavior in social dilemmas in response to mere hints about what the experimenter desires.").

245. Erin Ann O'Hara, *Trustworthiness and Contract*, *in* MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 173, 186 (Paul J. Zak ed., 2008).

or at least significantly less relevant, outside the anti-discrimination framework. When protection is awarded without relying on group identity, but rather on contextual and individual considerations, exploiters cannot predict whom they should avoid. This is exactly why using the doctrine of unconscionability as a defense can solve the problems that emerge while trying to utilize the anti-discrimination norm of reverse redlining. In order to escape judicial scrutiny in their transactions, some market players may prefer not to deal with an identified group of people,[246] however it is much harder to systematically avoid parties who are under stress, even if they reside in certain zip codes. This conclusion arises from the fact that stress, as discussed earlier, is universal and can hit anyone anywhere.[247] Put simply, unless lenders are willing to give up their subprime lending activity entirely, they cannot crudely cross-out people who reside in distressed areas and suffer from stress. Since the proposed judicial protection on the basis of stress is drawing on a beyond-identity analysis[248] and is carefully calibrated to context, it can encounter exploitation without risking the ability of any particular group to create binding contracts. In this context, it is also worth remembering that unconscionability-based relief depends not only on the vulnerability of the borrower, but also on the specific behavior of the lender and the degree to which the terms of the contract are predatory. Therefore, rather than abandon their business altogether, it is feasible that lenders will prefer to decrease the chances of legal intervention in their business by modifying elements that are under their full control: their own pre-contractual behavior and their own choice in terms.

Finally, we should all remember that an anti-interventionist response, of the kind considered here, is a political approach that can be questioned and indeed has been heavily criticized. From scholars who directly criticize the liberal "extremely individualistic and privatized" assumption and call for proactive repair of socioeconomic injustices,[249] to those who are usually more willing to show deference

246. I have argued elsewhere that such preference is discriminatory and that contract law, in addition to other laws, should ban it. *See* Keren, *supra* note 191, at 171 72 (explaining why and how contract law has an essential role to play in the context of discrimination even when anti discrimination laws are available and may apply).

247. In making this argument I am drawing again on Martha Fineman's compelling vulnerability theory with its insistence on beyond identity analysis. *See* Fineman, *The Responsive State*, *supra* note 33, at 266 69.

248. *See* Fineman, *The Vulnerable Subject*, *supra* note 33, at 17 (referring to "post identity paradigm"). Since I do not agree that the identity based problems are part of the past I prefer using the term "beyond identity" rather than the original "post identity" phrase.

249. *See, e.g.*, Martha A. Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1747 (2012) (arguing against the neoliberal paradigm which is centered around "liberal subjects" and a

to the market and accordingly propose to "nudge" instead of interfering,[250] many agree that the market simply cannot fix systemic inequalities. As Cass Sunstein has recently stated:

> In free markets, some sellers attempt to exploit human errors, and the forces of competition may turn out to reward, rather than punish, such exploitation. In identifiable cases, those who do *not* exploit human errors will be seriously punished by market forces, simply because their competitors are doing so and profiting as a result. Credit markets provide many examples in the domains of cell phones, credit cards, and mortgages.[251]

And so, even if some commentators frame predatory lending as either "efficient," and thus worth keeping, or "inefficient," and therefore about to disappear without costly intervention, numerous others—holding a range of political viewpoints—disagree.

Notably, Professor Eisenberg reminds us that the particular intervention proposed here—via the doctrine of unconscionability—is a very mild form of intervention, the minimum the state owes its citizens: "[u]nder that doctrine the government forbids nothing and commands nothing. It simply says to the promisee, 'If you can accomplish your ends without our assistance, fine. But don't ask us to help you recover a pound of flesh.' "[252] In the meantime, while commentators debate the need and justification for intervention, human suffering accumulates. A norm that clearly forbids the exploitation of vulnerability, any vulnerability, is long overdue.

CONCLUSION AND FUTURE IMPLICATIONS

This Article has focused on two questions: (1) why do victims of "reverse redlining" so often fail in courts and (2) is there an alternative way to comprehend their problem to allow recovery? The Article has answered the first question by identifying and portraying the identity trap faced by borrowers who argue for discrimination in an anti-classification age in which lower courts follow the Supreme Court in hesitating to base decisions on group-based arguments. In order to deal with this jurisprudential difficulty, the second answer

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"restrained state" and suggesting the opposite approach that focuses on "vulnerable subjects" and a "responsive state").

250. *See, e.g.*, CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 151 (1997) (arguing that capital markets will not prevent discrimination without regulation); *see* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (explaining the "nudging" approach and its advantages as a moderate form of intervention).

251. Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L. J. 1826, 1832 (2013).

252. MELVIN EISENBERG, BASIC PRINCIPLES OF CONTRACT LAW (forthcoming 2015).

should be tailored around an individual right to *dignity* that includes *the right not to be subject to economic exploitation*. This new framework requires an effort to better understand the impact that residency in distressed neighborhoods has on the contractual process and the quality of consent to predatory loan agreements. Drawing on studies of distressed neighborhoods and individual stress, I suggest here that many lenders took advantage of borrowers' evident vulnerability and steered them into signing agreements detrimental to them.

The law of contracts directly applies to these agreements, and therefore the normative recommendation made here is to use its existing doctrine of unconscionability to respond to such exploitation. This new framework for judicial response has many advantages, the most significant of which is the freedom it allows courts to correct some injustices that stem from inequalities without relying on racial or other group-based categories and without concerns regarding their own limitation under the Equal Protection Clause.

More broadly the Article raises, via the close examination of predatory loans, the question of the legal limits of hyper-capitalism. It seems that one of the important lessons to be learned from the tragic subprime crisis is how urgent it is to engage in a conversation about the appropriate legal response to market exploitation of vulnerable individuals. Thus, the contractual framework suggested here is also useful for the handling of other so-called "ghetto loans," such as: pay-day loans, auto-title loans, and other "abusive small-dollar products."[253] Further, this proposed framework will prove valuable both beyond the lending context and outside the context of distressed neighborhoods, and therefore can be used to cope with other greed-motivated attempts to take advantage of a variety of vulnerabilities.

Used along the contextual lines marked in this Article, the doctrine of unconscionability can then become instrumental in defining and declaring the immoral nature of *any form of market exploitation*, regardless of regulatory loopholes.[254] Moreover, given the expressive power of law, setting a norm that would void profits earned by exploitation and publicly condemn such behavior by labeling it "unconscionable" can also discourage (at least some) future opportunistic attempts. Given the ongoing growth of socioeconomic ine-

253. Plunkett & Hurtado, *supra* note 227, at 55; *see also* Jim Hawkins, *Credit on Wheels: The Law and Business of Auto Title Lending*, 69 WASH. & LEE L. REV. 535, 604 (2012) ("[S]tates should enact laws specifically directed at title lending that preserve the equity borrowers have in their vehicles.").

254. As mentioned before, this is a significant advantage of using broad standard as opposed to concrete regulations that only ban specifically defined behaviors and by that incentivizes a never ending search for loopholes.

quality in our society,[255] establishing an anti-exploitation norm in the market seems more important than ever.

255. Larry Elliot & Ed Pilkington, *New Oxfam report says half of global wealth held by the 1%*, THE GUARDIAN (Jan. 19, 2015, 4:31 AM), http://www.theguardian.com/business/2015/jan/19/global wealth oxfam inequality davos economic summit switzerland.