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Unconscionability and Poverty

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UNCONSCIONABILITY AND POVERTY

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ABSTRACT

Matthew Desmond made the claim in *Evicted*, his powerful work on housing insecurity, that those concerned with alleviating poverty should focus not merely on ensuring that poor people have higher disposable incomes, but on countering the exploitative price gouging that depresses the value of whatever income they have. This suggests the possibility that it might be a worthwhile anti-poverty strategy for courts to use the unconscionability doctrine to regulate exploitative contracts.

Three main issues follow from considering this possibility: (1) Do the poor actually pay more for goods of the same quality? (2) If they indeed pay more, do they do so because prices are exploitative? How should we define an exploitative price, and how can we identify that any particular group of buyers is indeed exploited? (3) Could courts seeking to make use of the unconscionability doctrine realistically identify cases in which poor people generally are overcharged, or will courts successfully invoke the doctrine to challenge unwarranted prices only when the price a particular seller charges exceeds some benchmark (e.g., the price charged before an emergency or the price charged to other buyers in highly similar transactions)?

While there is (reasonably) good evidence that the poor pay more for equal quality goods and it is possible (but very hard to determine) that exploitative pricing is a genuine issue as well, efforts to use the unconscionability doctrine to solve the problem of exploitative contracts are quite unlikely to succeed. Doctrinal and practical constraints make this solution a bad fit. If we worry, for example, that small stores in urban areas with high concentrations of poor residents overcharge, we should probably look to establishing and sustaining

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less exploitative suppliers, not to using common law courts to police price gouging.

INTRODUCTION: UNCONSCIONABILITY ISSUES

Those of us teaching first-year Contracts classes face some obvious, and some less obvious, issues if we choose to devote some time to teaching our students about unconscionability. We must typically alert students to some familiar fundamentally doctrinal debates about whether courts should (as a normative matter) or do (as a descriptive matter) find contracts unconscionable only if the contracts are *both* substantively inequitable *and* defectively formed. If we must find procedural defects in formation, we must recognize that such defects come in many flavors: the parties claiming the contracts they have assented to are procedurally unconscionable may be (at least) somewhat underinformed about the content of the deal they have struck (problems of "unfair surprise" most frequently created by unread or incomprehensible online or in-paper "form contracts"); they may lack some measure of capacity or prudence (either across the board or in the particular circumstances in which they assented); or they may rightly perceive that they have inadequate alternatives to assenting to the agreement that they struck (they are dealing with someone with some measure of monopoly power and they contracted to gain something they cannot readily forego).[1] We should also note some familiar disputes (fundamentally of the sort one would associate with "Law and Society" scholarship) about whether the doctrine of unconscionability is of much importance in the real world—whether it is merely "law on the books" with little impact on the "law in action."[2] Many

1. For a strong argument that courts should not—and frequently do not—demand strong independent showings of both procedural unconscionability and substantive unconscionability but rather employ a sliding scale (finding contracts unconscionable without finding that there were especially bothersome defects in the formation process so long as the terms are markedly inequitable), *see* Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 810–16 (2020). McCall's piece is also an excellent source for those interested in an account of the historical development of the unconscionability doctrine and the academic arguments that were especially prominent as commentators tried to interpret UCC § 2-302 and its vague injunction that the doctrine was designed to prevent some mix of "oppression" and "unfair surprise." *Id.* at 778–89. At the same time that we try to describe how unconscionability works as a free-floating independent defense that a party who breached contractual obligations might offer, many of us teaching the introductory Contracts class would observe that judgments about the substantive unfairness of particular contracts influence how we make all sorts of ostensibly distinct judgments about the acceptability of contract formation—e.g., we are more likely to be worried about a party's competency (or about information asymmetries, misrepresentation, duress, or the absence of assent) if we view the contract we are examining as inequitably one-sided. *See generally id.* at 786.

2. Some argue that the doctrine is of little practical importance and that very few litigants raise the defense successfully. *Compare* 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, 756–57 (2014) (stating that the doctrine is rarely used to invalidate contracts in state courts), *with* Babette E. Bulick, *Upgrading Unconscionability: A Common Law Ally for a Digital World*, 81 MD. L. REV. 46, 83–89 (2022) (agreeing that the doctrine is rarely used but is due for an upgrade under modern law), *and* Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 977, 980 (2019) (arguing that there was a drastic increase, particularly after the 2008 financial crisis, in the use of the doctrine to strike down loans with unconscionably high interest rates). These pieces (and others

of us would also feel obliged to make sure that our students consider the remedies that courts employ if finding the contract as a whole or some of its terms unconscionable, both from a doctrinal perspective (when will a court merely substitute equitable terms for unconscionable ones and when will it refuse enforcement entirely?) and a policy perspective (will parties who persistently draft unconscionable contracts be deterred from doing so if the worst thing that happens to them when they do so is that in the relatively rare cases where breaching parties challenge the deal, they receive only what they would have had the deal been fair in the first instance?).[3]

It is possible that we would draw a distinction between conscience-shockingly inequitable price terms and other potentially troublesome terms.[4] If, though, one strongly believes all end-states are readily commensurable, then any unconscionable term could best be understood (and criticized) as overpriced. In this view, if a merchant drafts a term effectively stripping a consumer of an implied or express warranty, the problem could be said to be that the consumer paid too much for a warranty-free product. Similarly, compulsory arbitration clauses—particularly those that bar aggregation of claims—could be seen to diminish the value of warranties if we see arbitrators as too beholden to repeat player merchants, or we may see them as depriving consumers of the sort of participatory procedural justice they seek. However, if one is fully wedded to the idea that all end-states are commensurable, the problem with these contracts is that the consumer paid too much for a contract that lacked an impartial decision-maker or the desired opportunity to get a fair hearing.[5]

Even if one is skeptical that it is helpful to think that all end-states are fully commensurable[6] and that, concomitantly, all unconscionability cases would best

studying the use of the doctrine) focus on appellate decisions. For a summary of some of the most prominent of these studies, *see* McCall, *supra* note 1, at 789–92. There is no good empirical literature assessing how frequently the doctrine is employed at the trial court level, or whether the threat that a breaching party will invoke it as a defense frequently influences settlement negotiations, so the question of whether the doctrine influences behavior "on the ground" seems fundamentally unstudied from my vantage.

3. This concern is articulated in, for instance, MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 126–28 (2013). Along similar lines, we might raise the issue of whether the doctrine should evolve so that it is not just used as a shield by defendants seeking to avoid being held responsible for a breach, but as a sword permitting those who have assented to unconscionable contracts to get damages that compensate them if they have suffered undue losses from performing an unconscionable contract. *See generally* George M. Cohen, *The Negligence-Opportunism in Contract Law*, 20 HOFSTRA L. REV. 941 (1992). But absent either some form of super-compensatory punitive damages (whether collected by individuals or imposed by the state) or reputational losses that "sharp dealers" might incur, it will be in the self-interest of those who draft unconscionable contracts to do so as long as aggrieved parties do not always avail themselves of the formal right to be free, *ex post* or *ex ante*, from unconscionable terms. *See id.*

4. Courts often explicitly articulate the position that judges will interrogate non-price terms but not price terms for unconscionability, and many commentators have argued that courts stopped scrutinizing price terms in the mid-1970s. For a fuller discussion (and rejection) of these claims, see Russell, *supra* note 2, at 976–77, 979–81.

5. Terms forbidding claim aggregation may also strip customers of substantive rights that they are nominally granted; it might cost more for any individual to pursue a small claim than the claim is worth to her alone.

6. I express some of my hesitations about claims that all end-states are commensurable in MARK KELMAN, THE HEURISTIC DEBATE 182–83 (2011).

be characterized as price gouging cases, there are distinct ideas about who might be deemed to overpay (and why we might see some agreed-to exchange price as an *over*payment) even in cases that are plainly focused at some level on unfair pricing. Take the canonical price gouging unconscionability case, *Williams v. Walker-Thomas Furniture Co.*,[7] in which the furniture seller extended credit to buyers, cross-collateralizing the credit purchases. All payments made by the purchaser were credited pro rata on all outstanding installment sales debts incurred in purchasing each item of furniture so that no item was fully owned until all purchased items were fully paid off.[8] The debt incurred at the time of purchase of each item was secured by the right to repossess all of the items previously effectively leased by the same buyer.[9] The purchaser in the case owed $164 from her prior purchases and defaulted shortly after purchasing a $514 stereo set.[10] She had paid $1,400 of the $1,800 she owed to purchase all of the items.[11] However, because of the cross-collateralization provision, she kept nothing.[12]

In thinking about whether Williams paid "too high a price," consider several distinct accounts of the interaction between the customer and the seller: Assume that a furniture seller like Walker-Thomas can legitimately act both as a seller of the furniture and an (implicit) lender by selling furniture on an installment plan. The buyer gets the goods before she has paid full price and has, in essence, borrowed money to purchase the very goods that collateralize the loan. Assume, too, that some of the "borrowers" will default and that default is costly to the seller. For instance, if Buyer *B* buys a $1,000 item on credit and defaults after paying only $300 of the "debt," the collateral—the furniture that the seller sold—will be worth less than $700, net of repossession costs, when the seller repossesses it.

Assume further that sellers can do three very different things if they *correctly* perceive[13] that a would-be purchaser poses an atypically high default risk:

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7. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 445–50 (1965).

8. *Id.* at 447.

9. *Id.*

10. *Id.*

11. *Id.* at 448.

12. *Id.* at 447.

13. There are obviously significant issues, both philosophical and conceptual—the familiar old debates about whether probability judgments about future events as opposed to existing samples are objective or merely best subjective bets—as well as empirical, to be raised about what it means to perceive correctly that a particular party is atypically likely to default. Is the seller's judgment that a particular buyer is a high default risk acceptable if the seller lumps a buyer together with other buyers with the same income and asks how often those with that income historically defaulted? The same credit history? Other demographic traits? What if some factors that the seller might account for—e.g., credit history—may themselves be partly impacted by factors (including demographic factors) that are themselves a product of unjust practices? Think of the parallel problem in algorithmic determinations of eligibility for bail, based on predictions of recidivism, when recidivism itself may be dependent on race-dependent arrest rates rather than simply on the rate of committing further offenses. Even if sellers perceive risk accurately, the policy question remains whether it is acceptable for sellers to use "finer-grained" estimates of default risk (charging those posing "lower risks" of non-payment less than they charge those posing "higher risks"). Should we instead mandate that all buyers of a particular sort of product pay a uniform price for that product? In the medical insurance market, of course, the Affordable Care Act ("ACA" or

- A seller can refuse to sell on credit to that buyer. (Option One).
- It can simply charge a higher dollar price to that buyer for the good bought on installment than it would charge someone perceived to be at a lower risk of default for the same good bought on installment. (Option Two). Higher default risk buyers will pay *more* than lower risk buyers, but it is by no means clear that the higher price is unconscionable or even bothersome. Nonetheless, one can imagine some making the argument that paying more for a good even when one has not defaulted because one is part of a group that is *predicted* to default at an atypically high rate unconscionably burdens non-defaulting customers.
- It can insist on a term that implicitly sets a still-higher price for those who actually default. (Option Three) (That is one fairly persuasive view of what the cross-collateralization agreement does.) If one looks *ex post* at what a defaulting buyer has paid, she has unquestionably drastically overpaid for the goods she receives. However, it is a more complicated question whether she has been overcharged at the relevant time—the time she signed the initial contract—since she might rationally prefer to pay less unless she defaults and then pay much more if she does (perhaps believing that she won't).[14] We

"Obamacare") forbids finer-grained estimates of projected pay-out costs (mandatory community rating of insurance prices) when it forbids price differentials (or refusing to sell insurance) based on a customer's pre-existing conditions. *See What is Community Rating?*, HEALTHINSURANCE.ORG, https://www.healthinsurance.org/glossary/community-rating/ [https://perma.cc/V3ZK-23XE]. Under the ACA, people predicted to make fewer health care claims could be said to cross-subsidize those predicted to make more (or more expensive) claims. *See, e.g., id.* Is this sort of state-mandated cross-subsidization through community rating ever sensible, and if so, is it more sensible in the medical care context than it would be in other settings? Is it more sensible to say that access to medical care shouldn't depend in any way on underlying health conditions than to say that access to furniture shouldn't depend on income? Might one say that the impact of income should be limited to the ability to afford the "standard price" for the good? We may think that community rating will redistribute to the poor in a variety of settings (e.g., pricing auto or life insurance or bank loans because the poor may be more expensive to serve or more likely to make claims). It *may* (but obviously may not; this is the subject of intense empirical controversy) have a variety of costs as well, most obviously that the insurance seller or explicit or implicit lender won't sell or lend at all to those who are "under-paying" if paying the community-rated price. Or, perhaps, sellers located in high-default areas required to sell at community-rated prices will go bankrupt, decreasing product availability in areas that are already under-served. This seems to be the worry that partly animates the dissenter in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (Danaher, J., dissenting). But the further policy issue we will have to face is that even if we assume that community rating does redistribute to poorer buyers and borrowers, it is not obviously a more sensible means of redistribution than money transfers. Does it make more sense to lower the price of certain goods for Williams than to ensure that she has more money? Does it make sense only if she is paying more because she is exploited?

14. Naturally, we might prefer that (at least a significant portion of) people in her position not be given this option, believing that they are under-informed about the odds that people with their income default, that they make irrational decisions owing to optimism bias or myopia, or that the large losses they incur if they default will have more serious welfare impacts both on themselves and their households than the accumulation of smaller losses from overpayment. For an excellent account of the failure of many homeowners who took out sub-prime second mortgages to account properly for default risk (and, for that matter, to avoid taking on arguably unconscionably overpriced loans), *see* Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 711–12 (2006). It may not be possible to protect those at risk of making imprudent decisions without stripping those who are making perfectly

> *might* well say that customers generally have been overcharged if the group of those who purchase with cross-collateralization agreements end up paying more for the goods than those who simply pay higher prices *ex ante*, though it is no more costly to sell to the cross-collateralizing pool of buyers. Relatedly, any individual making such an agreement is exploited if unable to "purchase" the cross-collateralization option at its competitive price if we view super-competitive prices as prima facie unconscionable.[15]

What I want to focus on though in this Essay is the relationship between unconscionable contracts and unwarranted social inequality. In *Evicted*, his masterful work on the prevalence and consequences of severe housing insecurity, Matthew Desmond argues that the poor (and particularly poor people of color) are exploited by unfair contracts, that they pay too much for the housing they rent and the goods they buy, that they get paid less for the casual labor they do than they should, and that inequality and poverty are in a significant sense a product of that exploitation.[16] Here is the cleanest statement of his view:

> [P]overty is not just a product of low incomes. It is also a product of extractive markets. Boosting poor people's incomes by increasing the minimum wage or public benefits, say, is absolutely crucial. But not all of these extra dollars will stay in the pockets of the poor. Wage hikes are tempered if rents rise along with them, just as food stamps are worth less if groceries in the inner city cost more—and they do, as much as 40 percent more by one estimate. Poverty is two-faced—a matter of income and

reasonable self-interested decisions to take on the risks associated with cross-collateralization in exchange for a lower-priced good or lower interest of the option to make that self-interested decision. *See generally id.* at 726 (some borrowers would rationally accept home loan terms that are predatory and oppressive for most borrowers).

15. The arguments for and against Options Two and Three parallel arguments that might well be made in relation to the use of predictive job performance tests: those who "fail" the test but who would perform adequately on the job will argue that the use of predictive (but imperfectly predictive) screening devices does not comport with a commitment to treating job-seekers in accord with merit, since the relevant "merit" is doing the job well, not being predicted to do the job well. Similarly, the non-defaulting purchaser will argue that she should not pay more for being predicted to default even if it is fair to charge her the very high costs associated with default. On the other hand, ignoring a predictor will likely be costly; employers will hire more people who "fail" if they disregard the test results (and it may be far easier to collect cost-covering revenues from the pool of high-risk borrowers than to devise ways of covering the losses from default by going after the defaulters). In the *Williams v. Walker-Thomas Furniture Co.* context, though, the seller can impose some (if not inexorably most) of the *ex post* costs of "failure" on defaulting buyers through mechanisms like cross-collateralization; it may be harder to impose any of the excess costs associated with hiring a workforce of lower overall quality on the factually lowest quality workers (e.g., by having them post a bond that the employer collects if the failing worker is laid off for cause). For a far fuller discussion of these issues, see Mark Kelman, *Concepts of Discrimination in 'General Ability' Job Testing*, 104 HARV. L. REV. 1157, 1222–45 (1991).

16. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 305–06 (1st ed. 2016).

> expenses, input and output—and in a world of exploitation, it will not be effectively ameliorated if we ignore this plain fact.[17]

Desmond's argument, focused on systematically unconscionable prices, crystallizes several distinct issues that those teaching about unconscionability who care about combating poverty must face.

First, is it the case that the poor often pay more to obtain the same quality-adjusted commodities or services, even if they do not pay more because they are victims of price gouging? If this is the case, are there appropriate policy responses to price disparities, even if they are outside of Contract law and the aggressive use of the unconscionability doctrine?[18] If, instead, poor people cannot obtain important goods and services simply because they cannot afford their uniform fair market price, we still have yet another series of conventional policy issues to face, but we clearly do not typically face them in a Contracts course.[19]

Second, we come to a question that is more central in the context of Contract law: if the poor indeed pay more, do they do so because they are exploited by

17. *Id.* I want to emphasize that the critiques I focus on in this Essay of Desmond's efforts to demonstrate that the renters he is most concerned with are exploited do not, in any way, undermine my deep admiration for this extraordinary book. It is an astonishing ethnography that profoundly sharpens our understanding of the prevalence and horrific consequences of eviction in the lives of poor tenants. *Id.*

18. Here, we face the issue of whether we should mandate, in some fashion, that sellers charge uniform prices to all consumers, even when it is more costly to provide goods or services to a subset of consumers. Such cross-subsidization is obviously a hallmark of the ACA's prohibition of accounting for customers' (presumably cost-increasing) preexisting conditions. *See generally What is Community Rating*, *supra* note 13. We may think that as a matter of distributive equity, no one should pay more simply because it is atypically likely that she will be costlier to serve, particularly if the prediction is based on demographic factors that are both out of her control and associated with social subordination generally. For a parallel argument, see Kelman, *supra* note 15, at 1222–23, 1230. It is also the case that the mandatory use of community-rated prices saves consumers from needing to engage in costly and wasteful efforts to demonstrate to sellers that they, in particular, are cheaper to serve or less risky buyers than the seller would assume based on easily observable (e.g., demographic) facts. For comments on analogous situations in which it may be efficient to prevent parties from negotiating contracts based on individual traits that they must signal they possess or lack, see Phillipe Aghion & Benjamin Hermalin, *Legal Restrictions on Private Contracts Can Enhance Efficiency*, 6 J. L. ECON. & ORG. 381, 399–400 (1990).

19. This scenario raises conventional issues about the appropriateness of specific egalitarianism, of policies that ensure that the distribution of particular "important" goods (e.g., medical care) are more equal than the general distribution of spending power. Should we distribute housing vouchers or food stamps rather than cash that the poor could choose to spend on housing or food? For an excellent summary of the debates, see Janet Currie & Firouz Gahvari, *Transfers in Cash and In-Kind: Theory Meets the Data*, 46 J. ECON. LIT. 333, 333–34, 338 (2008). Conventional neo-classical economists were typically wary of redistributing particular goods rather than income, believing that poor people (like other consumers) would maximize their utility if permitted to allocate their income to the items they preferred, rather than those the redistributing body thought were more important. *Id.* at 333. There were innumerable qualifications to the basic anti-paternalist position as well as defenses of paternalistic specific egalitarianism in the literature. *Id.* There are a host of other arguments that have been made on behalf of using in-kind transfers rather than cash as well (e.g., arguments that we can better target those we most want to distribute to—those lacking market endowments—by distributing goods of use only to those lacking endowments; arguments that we are protecting third parties from the misuse of cash by direct beneficiaries of redistribution; and arguments that in-kind provision may effectively transfer resources from an otherwise difficult-to-tax group to the recipient group). *Id.* at 334.

their contracting partners? Poverty may be a result not simply of inadequate access to resources (garnered through wages—which themselves may be exploitatively suppressed—or government transfer payments), but of conveyances of some portion of these resources to parties who have no legitimate claim to all they have received. If this is the case, there is no obvious a priori reason that the public generally should ameliorate poverty caused by exploitation through a tax and transfer system. Those who have improperly garnered resources ought to "return" them both because they are holding them illegitimately and because they bear an atypical relationship to the poverty of those they deal with—a relationship that citizens or taxpayers generally do not have.[20] To answer this question, we must both define what we mean when we say that a contract is exploitative and determine what sorts of empirical evidence we could gather to determine if exploitation, appropriately defined, were afoot.

20. For a far fuller discussion of the reasons that we might distinguish parties with a particular causal relationship to a social problem, such as poverty or pollution, that others lack in figuring out whether they should be subject to regulation that they experience as costly to comply with in the same way that they would experience any state-imposed tax, see MARK G. KELMAN, WHAT *IS* IN A NAME? TAXATION AND REGULATION ACROSS CONSTITUTIONAL DOMAINS 117–19, 134–36 (2019). The need to distinguish situations in which general tax-funded transfers are appropriate to solve a social problem from those in which a particular party should be regulated (whether through tort law, price controls, or other regulations of contractual terms, presumably including the invocation of unconscionability doctrine) is central to the late Justice Scalia's dissent in *Pennell v. City of San Jose*. *See* Pennell v. City of San Jose, 485 U.S. 1, 15–17 (Scalia, J., dissenting). An analogy might be helpful in thinking about the particular responsibility of price gougers to be singled out to remedy the poverty that they cause: while it would plainly be *permissible* for medical expenses borne by tort victims to be financed through a collectively financed universal health insurance system, there are perfectly good reasons to think that tortfeasors should pay the medical bills that their misconduct generates. To the extent that the elementary lesson in both basic public finance courses and at law schools is read to be that distributive concerns should be public law or tax-and-transfer system concerns, while private law should be oblivious to distributive justice, that lesson is simply not compelling, prima facie, if unwarranted poverty is a result of particular wrongful private actions readily and properly regulated in the private law realm. This is true even if it were the case that altering damages for fixed wrongs solely based on defendant wealth was irrational. There is an enormous literature debating whether it is appropriate to ignore defendant wealth in resolving cases *once one has determined what legal rule is otherwise efficient or desirable*; this voluminous literature is summarized extraordinarily capably in Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1500–06 (2018). But all baseline legal rules (about what information must be shared, what prices one can justly charge constrained buyers, etc.) are inexorably distribution-determinative: we do not simply *apply* these rules to defendants and plaintiffs who happen to be poorer or richer than is typical, but the uniform application of the rules help determine who is richer or poorer and by what degree in the first instance. This point is emphasized in a somewhat different form and for different purposes in David Blankfein-Tabachnick & Kevan A. Kordana, *Kaplow and Shavell and the Priority of Income Taxation and Transfer*, 69 HASTINGS L.J. 1, 81 (2017). I take it that Kaplow and Shavell, the legal academy's strongest proponents of relegating all distributive concerns to the tax-and-transfer system, believe we can decide whether a contract is unconscionable (and hence inefficient?) or whether an expanded information-sharing obligation is appropriate (because efficient) without regard to the distributive impacts of doing so. *Id.* at 5–6, 35. I take it though that from their vantage, even if an unconscionable contract were deemed bad in part because it further impoverished a disadvantaged party, it would not be sensible to undo that further disadvantage through an efficiency-distorting wage tax destined to fund transfers. Rather, it could be funded simply by ensuring that the contract be deemed unenforceable, which would cause no distortion at all. In that sense, private law doctrine would, as a matter of fact, be part of antipoverty policy, even if it could be defended without reference to the poverty of the beneficiaries.

Even if we decide that exploitative contracts indeed exacerbate poverty and that their elimination would be a welcome anti-poverty step, we would still need to figure out whether courts employing the unconscionability doctrine will be able to significantly restrain the use of exploitative contracts, whether by refusing enforcement in a reasonably large number of cases or by deterring the formation of unconscionable contracts. Are courts institutionally competent to identify contracts that are exploitative in the relevant ways, and are they competent to administer remedies that restrain the use of the contracts?[21]

I. CONCEPTUAL AND EMPIRICAL PROBLEMS IN DEFINING AND IDENTIFYING EXPLOITATIVE CONTRACTS

I have a very modest claim to make that I think is, despite its modesty, quite important to consider. I think one of the questions that I have posed about the interaction between poverty and the varied contracts that buyers make might conceivably be relatively readily answered, though I think the actual empirics are far less clear than one would hope: do the poor (or people of color) indeed pay more for identical goods? But my core claim is that every other question, both conceptual and empirical, is extraordinarily difficult to answer. At the conceptual level, it is very difficult to agree on how we ought to define an exploitative contract. At the empirical level, it is harder still to know that a particular contract, or set of contracts, is exploitative even given some particular definition of what an exploitative contract is.[22] And it may well be hardest of all to figure out how a court might determine that a particular contract is substantively unacceptable outside of a small handful of situations, not especially germane in the context of contracts arguably exploiting the poor, in which contract prices depart from benchmark prices. I discuss how difficult these issues are in significant part by reflecting on Desmond's efforts in both *Evicted* and a subsequent empirical piece on excess profits in the lower end of the housing market[23] to answer them. My criticisms go far more to the difficulty of the underlying task than to what I see as the particular shortcomings in his analysis.

A. DO THE POOR, PEOPLE OF COLOR, OR BOTH PAY MORE FOR IDENTICAL

21. While I comment in this Essay on what I see as the *likely* barriers courts would face in using unconscionability doctrine in these contexts, I recognize that we might be best off to encourage "experiments" across jurisdictions in the use of the doctrine that will better permit us to see what innovations do and do not work.

22. If one looks at the literature on whether the poor do or do not actually pay more for groceries in general and for food in particular, it is quite striking that even those who think the poor pay more do not typically attribute the higher prices they purportedly pay to exploitative contracts or price gouging. *See* Yesim Orhun & Michael Palazzolo, *Frugality Is Hard to Afford*, 56 J. MKTG. RES. 1, 1–2 (2019). So, for instance, an author who notes that the poor pay more because they are too illiquid to buy in bulk, even though buying in bulk saves money, is not attributing higher prices to exploitation. *Id.* (finding that the poor pay more for toilet paper due to illiquidity).

23. *See* Matthew Desmond & Nathan Wilmers, *Do the Poor Pay More for Housing? Exploitation, Profit, and Risk in Rental Markets*, 104 AM. J. SOCIO. 1090 (2019).

GOODS?

For the better part of the late twentieth century, there was a standard answer to the question of whether the poor paid more for groceries and, more particularly, for food. The answer, crisply stated in the title of a widely read 1963 book called *The Poor Pay More*,[24] was reaffirmed in any number of studies.[25] But the studies were methodologically problematic in a variety of ways: they focused considerably more on whether groceries in the stores located in poor neighborhoods sold items at higher prices than they focused on the question of whether poor shoppers actually bought those higher priced items;[26] they had

24. DAVID CAPLOVITZ, THE POOR PAY MORE (1963).

25. *See, e.g.*, PHILLIP R. KAUFMAN ET AL., DO THE POOR PAY MORE FOR FOOD? ITEM SELECTION AND PRICE DIFFERENCES AFFECT LOWER-INCOME HOUSEHOLD FOOD COSTS, 1, 16 (1997) (reviewing fourteen prior studies and concluding that the prices poor people face for identical items are higher, largely because poor people are less likely to be found in suburbs where lower price supermarkets are located, though poor people spend less per unit of a given good because they more frequently buy both lower quality items and buy more economically-sized packages); *see also* Chanjin Chung & Samuel L. Myers, Jr., *Do the Poor Pay More for Food? An Analysis of Grocery Store Availability and Food Price Disparities*, 33 J. CONSUMER AFF. 276, 276, 292 (1999) (demonstrating poor people in the Minneapolis and St. Paul metropolitan area are more likely to be relegated to shopping in higher-cost stores). For a more recent study affirming the older conventional wisdom, *see, e.g.*, Orhun & Palazzolo, *supra* note 22, at 12. Similar studies also find that Black, as well as female, consumers pay more for identical items. *See, e.g.*, Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 828–30 (1991) (finding that salesmen at car dealerships offer otherwise identical Black customers higher price quotes than they offer white customers); Kathryn Graddy, *Do Fast-Food Chains Price Discriminate on the Race and Income Characteristics of an Area?*, 15 J. BUS. & ECON. STAT. 391, 401 (1997) (noting that meal prices at fast food restaurants rise by 5% for each 50% increase in the proportion of the population that is Black within the restaurant's ZIP code).

26. At the a priori theory level, one would find conflicting stories plausible if one worried that the poor would pay more because they typically live farther from stores that sell lower-priced goods. On the one hand, the financial cost of traveling to a more remote store might well be higher for those poor people who live in poor neighborhoods. On the other hand, the opportunity cost of spending time to get to the store might be lower. If the cost of shopping is indeed higher, consumers could pay higher costs for two fundamentally distinct reasons, only the second of which raises the issue of unconscionable contracts. On the one hand, poor consumers may be stuck shopping at stores that charge more because their costs are higher—e.g., small convenience stores located in poorer urban neighborhoods cannot store cheaper bulk items or get charged more by wholesalers because they buy less. But it is also possible, of course, that retailers facing fewer mobile customers charge super-competitive, arguably exploitative prices because their customers cannot shop around. In studying racial and gender discrimination in the retail market for new cars, Ayres focused on the possibility that dealers charged more to buyers they perceived as less able to shop at a different dealer, in part because they are trapped in urban neighborhoods, as one explanation for the disparities he observed in offered prices. *See* Ayres, *supra* note 25, at 848–50. In the thirty plus years since Ayres's auditor-test based findings of discrimination were published, there has been a fairly rich literature both questioning and sustaining his claim that demographic factors influenced the prices that customers paid. *Compare* David W. Harless & George E. Hoffer, *Do Women Pay More for New Vehicles? Evidence from Transaction Price Data*, 92 AM. ECON. REV. 270, 278 (2002) (concluding there is considerable price dispersion in new car sales, but women as a group are not systematically disadvantaged) *with* Ambarish Chandra et al., *Who Loses When Prices Are Negotiated? An Analysis of the New Car Market*, 65 J. INDUS. ECON. 235, 235, 265 (2017) (arguing that demographic factors explain 20% of price dispersion and older women perform especially badly in the absence of fixed prices). Some claim that the poor pay more for food, particularly for more nutritious food typically sold in supermarkets as compared to the less healthy food typically sold in convenience and drug stores most available to shoppers living in poor neighborhoods. A common claim made alongside this is that class-correlated nutrition deficits are significantly caused by unwarranted price disparities. *See generally* Marianne Bitler & Steven J. Haider, *An Economic*

difficulty sorting out whether the poor appeared to be paying less than they were because they purchased lower-quality items treated as identical to higher quality items in the researchers' surveys;[27] they made hard-to-defend assumptions about how to summarize a wide range of purchasing decisions (for example, if some items are cheaper and some more expensive, how does one figure out if the "appropriate basket" of goods is more expensive);[28] and they relied to an undue extent on consumers' highly fallible memories about the purchases that they had made.[29]

The consensus view was challenged in the past quarter century by researchers arguing that access to better data tracking the actual purchases of people at different income levels revealed either no price disparities or revealed that the poor paid less in dollar terms, largely because they invested more in shopping than did richer consumers (e.g., buying more often when items were on sale, shopping more often at "superstores" with especially good prices as well as the atypically expensive convenience stores located closer to where they lived) and because richer consumers might pay not only for groceries but bundled amenities (e.g., nicer stores) and shop in places where higher rental costs outweighed the cost advantages traditionally associated with suburban stores.[30] Other recent researchers have counterclaimed that even in situations in which store prices are identical for identical items, poor people will still pay *more* because they are too illiquid to buy in bulk at discounted bulk or sale prices.[31]

View of Food Deserts in the United States, 3 J. POL'Y ANALYSIS & MGMT. 153, 155–57 (2011). This claim is briefly explicated in a good literature review of the work on food deserts. *See id.* The claim is often blended with the claim that healthier foods are simply more expensive and have become relatively more expensive over the last few decades, whether or not these foods are particularly expensive for the poor. *See* Roberto Pancrazi et al., *How Distorted Food Prices Discourage a Healthy Diet*, 8 SCI. ADVANCES 1–2 (2022). The contention that price differentials are responsible for the observed nutrition gap between rich and poor has been contested. *See* Hunt Allcott et al., *Food Deserts and the Causes of Nutritional Inequality*, 134 Q. J. ECON. 1793, 1839–40 (2019) (contending that class-correlated distinctions in *demand* for healthy food drives the class-based nutrition gap, and that the eating habits of people in poor neighborhoods shift little when supermarkets move into their neighborhoods or when stores that fail to provide healthy food face more competition). Their claim is in turn countered in the afore-cited Pancrazi piece. *See* Pancrazi et al., *supra* note 26.

27. For a discussion of these methodological problems, *see* Michael S. Finke et al., *Do the Urban Poor Pay More for Food? Issues in Measurement*, 9 ADVANCING CONSUMER INT. 13, 13–14 (1997).

28. *See id.*

29. There is a voluminous literature on the unreliability of consumer reports of their expenditures (whether on food or other items, whether consumers keep diaries or merely try to recall what they have spent). For a reasonably representative piece, see Matthew Brzozowski et al., *A Comparison of Recall and Diary Food Expenditure Data*, 72 FOOD POL'Y 53, 53, 60 (2017).

30. *See* Christian Broda et al., *The Role of Prices in Measuring the Poor's Living Standards*, 23 J. ECON. PERSP. 77, 77–78 (2009). For parallel findings, *see, e.g.*, Anthony Koschmann & Brian Wansink, *Food Security, Store Access, and Prices Paid: Do the Poor Pay More for Groceries?*, 17 J. HUNGER & ENV'T NUTRITION 642, 645–47 (2022). Of course, even if these findings are empirically true, it leaves a conceptual question open: do the poor expend more than the rich if we measure the true total cost of obtaining a good as the sum of the money outlay for the good and the value of the time spent suppressing the money outlay even if the money outlay is lower? Similarly, are the poor paying less for Item I if they do not get the amenities associated with the purchase of Item I (e.g., more aesthetically pleasing displays, more helpful staff) that richer consumers enjoy?

31. This is the explanation offered in *Frugality Is Hard to Afford* for why the poor pay more for toilet paper. Orhun & Palazzolo, *supra* note 22, at 1–2, 5.

B. ARE THE POOR EXPLOITED?

In order to determine whether the poor are exploited, we must define what we mean when we say that a party has been exploited. We must first do this at a fairly high conceptual level and then, more importantly, in operational terms. Neither task is easy. At the high conceptual level, there are long-standing debates about whether exploitative deals necessarily harm the exploited party (relative to no deal at all? relative to the "fair" deal they should have been offered?). There are also debates about whether exploitation can be structural or whether an identifiable individual must exploit another.[32] In my view, the neo/post-Marxist sociologist Erik Olin Wright has given us what I take to be the most persuasive high order account of what we mean when we say that some party *X* exploits some party *Y*.[33] Although he does this in the context of discussing the exploitation of workers by employers, the high order conceptual points readily translate into any contractual relationship (including seller/buyer).[34]

> Exploitation, as I will define the concept, exists when three criteria are satisfied . . .
>
> *The inverse interdependent welfare principle*.—The material welfare of exploiters causally depends upon the reductions of material welfare of the exploited.
>
> *The exclusion principle*.—This inverse interdependence of the welfare of exploiters and the exploited depends upon the exclusion of the exploited from access to certain productive resources.
>
> *The appropriation principle*.—Exclusion generates material advantage to exploiters because it enables them to appropriate the labor effort of the exploited.[35]

32. For a pithy statement of the conventional Marxist view that exploitation is better seen as systemic rather than a product of the relationship between identifiable parties, *see* John. E. Roemer, *Should Marxists Be Interested in Exploitation?* 14 PHIL. & PUB. AFFS. 30, 31 (1985) ("It is important to note that exploitation is not defined relationally. The statement, 'A exploits B' is not defined, but rather 'A is an exploiter' and 'B is exploited.' Exploitation, as I conceive it, refers to the relationship between a person and society as a whole as measured by the transfer of the person's labor to the society, and the reverse transfer of society's labor to the person, as embodied in goods the person claims.").

33. Erik Olin Wright, *Class, Exploitation, and Economic Rents: Reflections on Sorensen's "Sounder Basis,"* 105 AM. J. SOC. 1559, 1562–63 (2000).

34. *Id.* at 1568–70.

35. For clarifications on these basic observations, *see id.* at 1563–65. In my mind, the key observations are the first and the third: It is the key initial defining feature of an exploitative relationship that the exploiter is better off *because* the position of the exploited has worsened. But that would be true if exploiters simply appropriated valuable property from the exploited. In this way, Wright notes, North American settler colonialists are better off because they seized the land of indigenous occupants whose lives were worsened because they lost land they previously used. *Id.* at 1564. Indigenous people are *exploited* (as they were according to Wright in South Africa), not just *oppressed* (as they were in the United States) when the loss of property causes them to enter work relationships in which they are underpaid. *Id.* So, to take the example of contractual exchange of goods and services, the seizure of needed water from indigenous people may be oppressive but it only becomes part of a system of exploitation if water is then sold to the indigenous

But even if one is persuaded by the high-order conceptual claim that exploitation is afoot when the advantaged party gains because the disadvantaged party loses and that the relevant losses come from direct appropriation, we still need to determine what indicia reveal that the advantaged party gains in this particular way. It seems most natural to believe that *X* gains from *Y*'s deprivation if *X* does better dealing with *Y* than with some hypothetical, more privileged *Z*s because *Y* pays more for what *X* sells than *Z* would or is paid less to provide *X* some services or goods. In such cases, *X* is better off *because Y* is worse off in the relevant way. But we still must know what it means to say that *Y* has overpaid (or has been underpaid) to draw any conclusion about whether a relationship is exploitative. Again, the most natural intuition is to say that if *X* earns abnormal profits on a particular sales transaction with *Y*, then *Y* is exploited. But this may well be question-begging in all of the relevant cases. In *Williams v. Walker-Thomas Furniture Co.*, for instance, we would not know if the furniture sellers earned excess profits on a sale without knowing whether *Y* was part of a pool of buyers whose aggregate contribution to firm revenue was abnormal.[36]

In *Evicted*, Desmond does not directly engage the high-order conceptual question, but I am reasonably confident that he is implicitly working with a high-order definition of exploitation that assumes that exploitation is not merely systemic, but involves gains for particular exploiters at the expense of particular exploited parties from whom resources are appropriated as a result of price gouging. But, alas, he is neither clear about how we should define prices that are "too high", nor does he offer persuasive evidence that prices exceed the level that they would be set at absent exploitation. He does not, for instance, tell us

people at prices that are (in some sense not well-defined by Wright in the labor context in assuming there is some obvious value that laborers produce and are entitled to) "unfair." *Id.* In Wright's view (and mine), a contract can be exploitative (perhaps counter to common notions about the conflict between the idea of Pareto superiority and exploitation) even if the contract makes both parties better off. *Id.* at 1566. The key is that the exploiting party captures transaction surplus that she would not capture unless dealing with the exploited party, and that the exploited party is incapable of capturing a reasonable share of the transaction surplus because she lacks access to the resources the exploiter possesses (e.g., means of production in the labor context or outlets for distribution in the consumer goods context). *Id.* at 1567.

36. It might be possible instead to say that the seller ought not to make an abnormal rate of return on an appropriate "set" of sales and that we therefore ought to be looking to the rates of return on the "set" of sales rather than trying to ascertain whether the risk of non-payment by a particular borrower was appropriately priced. Later in this Essay, I express hesitations about the possibility of inferring exploitation from high profits. *See infra* note 80. But for now, I wanted to express a different hesitation—a hesitation about whether we should expect lenders dealing with risky borrowers to need to be compensated for the risk of default. The typical first-line answer would be no. Even if each of the particular buyers or borrowers is atypically risky, the risk the firm faces making loans to each of these borrowers with abnormal credit risks is unsystematic (i.e., related to the particular loan or "investment project") and could, at least as a first approximation, be dealt with through diversification. While the risk is plainly unsystematic, I am dubious about the possibility that quasi-lenders like Walker-Thomas diversify adequately by extending credit to multiple customers. For that to be true, we would have to believe that the risk of default within the customer base is not correlated, and I suspect that macroeconomic shifts and changes in government transfer policies impact many borrowers at once in the same way. It is also the case that the seller or lenders are not diversifying in the way an investor can diversify in creating a portfolio; even if they implicitly "invest" in many borrowers, they are not investing in a wider range of non-correlated enterprises. If these propositions are true, then the business itself is atypically risky, and we would expect that returns, not adjusted for this risk, would need to be atypically high.

whether they are acceptable in his view so long as landlords serving the poor earn a risk-adjusted rate of return that is no higher than those serving those who are materially better off (nor does he tell us whether or not the evidence he is working with shows that rates of return are indeed excessive by this standard). He does not tell us whether he thinks the market for rental housing is non-competitive in the most straightforward sense that there are few suppliers of rental housing. The fact that he does note that landlords plainly discriminate, relegating Black tenants to the North Side of Milwaukee[37] plainly does not mean that there is an insufficient number of sellers of housing services to Black renters to wipe out super-competitive profits. Nor does he address the possibility (a possibility that would be favorable to his underlying thesis that landlords are indeed price gouging) that even providers in multi-seller markets might find it profitable to charge customers who are unwilling or unable to "shop around" prices that are higher than other sellers might offer them, to extract economic rents from a smaller group of customers rather than to sell at competitive prices to a larger group.[38] It is certainly plausible that discrimination-constrained renters might be particularly prone to accept high prices rather than search for lower-price options.

At times, Desmond seems to imply, though inexplicitly, that he thinks prices must be exploitative even if the market is competitive simply because buyers are, in some general sense, "desperate" for even bad housing given the ongoing shortage of cheaper units,[39] but people clearly pay "fair" prices for things that they very much need. Thus, absent a fuller account of the mechanisms by which desperation translates into price gouging, this argument is (to put it kindly) thin.[40] And while he cites work that, in part as a result of option-limiting discrimination, Blacks pay more for identical housing,[41] he does not engage literature suggesting precisely the opposite.[42]

37. Desmond, *supra* note 16, at 75, 249–52.

38. There are certainly perfectly conventional neo-classical models that have been around for roughly a half-century in which prices in multi-seller markets converge on a monopoly price in the presence of search costs; sellers in multi-seller markets are able to price discriminate and overcharge the subset of identifiable non-shoppers or price-insensitive buyers. (There are different views of whether these rents are dissipated over time not by price competition but by excessive entry). See Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 312–18 (1984) for a general discussion of this point, and two of the canonical pieces cited therein: Steven Salop & Joseph Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUD. 493 (1977); John W. Pratt et al., *Price Differences in Almost Competitive Markets*, 93 Q. J. ECON. 189, 191 (1979). It seems especially plausible that landlords might engage in some price discrimination within the class of poor tenants, treating the many apartment seekers who have been evicted in the past as especially unwilling or unable to shop around.

39. For his descriptions of low-vacancy rates and desperation, see DESMOND, *supra* note 16, at 47, 182.

40. Prices for medicines (many of which are desperately needed, of course) typically fall precipitously when patents expire, though the desperation of patients to get the drugs remains unchanged. *See* Geoffrey Joyce et al., *Generic Drug Price Hikes and Out-of-Pocket Spending for Medicare Beneficiaries*, 37 HEALTH AFF. 1578, 1578 (2018) ("Previous studies indicate that prices fell by about one third within the first year after generic entry and by three quarters after two years, and the magnitude and speed of price declines depends largely on the number of competitors.").

41. DESMOND, *supra* note 16, at 75.

42. *See, e.g.*, DIRK W. EARLY, RACIAL AND ETHNIC DISPARITIES IN RENTS OF CONSTANT QUALITY UNITS IN THE HOUSING CHOICE VOUCHER PROGRAM: EVIDENCE FROM HUD'S

Desmond hints—but it is no more than a hint—that we know that prices are set too high because one of the two landlords he focuses on, the owner of a dilapidated trailer park, earns an income putting him in the top 1% of the nation's earners.[43] Another makes enough money to have a net worth of over $2 million[44] and an income that permits her to vacation in Jamaica.[45] But both of these landlords own a lot of units,[46] and it is not at all clear from anything that Desmond reveals that the "per unit" profits are especially high.

What I think Desmond relies on most in *Evicted* to convince readers that prices are exploitative[47] is the observation that the gap between rental rates for the dilapidated units his subjects inhabit are not as extreme relative to higher quality units as one would expect absent exploitation.[48] But, first, it is not clear on its face what gap one ought to expect in a competitive market (what *are* the increased costs associated with higher quality?) and, relatedly, it is unclear whether there are indeed high costs associated with owning run-down, low-income housing (high risk of non-payment; high turnover; high-cost upkeep demands, even if these demands are often unmet).[49]

Far more telling, in my view, is that it is also almost surely the case that gaps are particularly low in Milwaukee because scarcity rents for land most desired

CUSTOMER SATISFACTION SURVEY 138 (2011). In the report's conclusion, Early states, "For most areas, the results provide little or no evidence to support the notion that minorities pay more to live in equally good housing." *Id.*

43. DESMOND, *supra* note 16, at 175–76.

44. *Id.* at 152.

45. *Id.* at 144.

46. *Id.* at 175.

47. He switches to a more formal effort to measure excess prices in Desmond & Wilmers, *supra* note 23, at 1095–96.

48. DESMOND, *supra* note 16, 74–75 (noting, at the time, the most expensive units in Milwaukee cost roughly $750, which was only $270 more than the least expensive units, with rents in the poorest neighborhoods being just $50 less than the city median).

49. In his generally favorable review of *Evicted*, Jason DeParle noted that Desmond's implication that rents would take up a reasonable proportion of poor tenants' income but-for price gouging is simply false: he claimed that the most efficient non-profit housing provider cannot provide code-level housing that is "affordable" (absorbing no more than 30% of gross income) for households earning less than $32,000 a year. *See* Jason DeParle, *Kicked Out in America!*, N.Y. REV. BOOKS (Mar. 10, 2016), https://www.nybooks.com/articles/2016/03/10/evicted-kicked-out-in-america/?lp_txn_id=1461282 [https://perma.cc/X6EY-H964]. He noted further that one-third of American households make less than that. *Id.* DeParle argued that excessively demanding codes and restrictive zoning laws partly, but not fully, account for the high-cost problem. *Id.* He also argued that the housing "affordability" crisis bubbled up largely because squalid housing disappeared to a significant extent between 1970 and 1990. *Id.* I suspect that he would be enormously suspicious of the claim Desmond might make that the reason there were a million more affordable units in 1970 than the number of poor households and five million fewer decades later is that landlords suddenly decided to be exploitative. It is important to note that Desmond's profiles themselves contain many examples of cost-increasing behavior by tenants. *See, e.g.*, DESMOND, *supra* note 16, at 107, 256 (stating tenants clog sinks, tenants don't fix or seek repair for broken plumbing, leading to a host of other problems). Desmond is understandably sympathetic to cost-increasing behavior and notes that it is difficult not to become depressed by badly dilapidated units: "The Hinkstons expected more of their landlord for the money they were paying her. Rent was their biggest expense by far, and they wanted a decent and functional home in return. They wanted things to be fixed when they broke. But if Sherrena wasn't going to repair her own property, neither were they. *The house failed the tenants, and the tenants failed the house. The worse the Hinkstons' house got, the more everyone seemed to become withdrawn and lethargic, which only deepened the problem." Id.* at 256 (emphasis added).

by more affluent (generally white) property buyers are so low.[50] Higher property acquisition costs are caused in Period One by excess demand for both owner-occupied and rental units in "desirable" neighborhoods; the higher prices for property acquisition by landlords in Period One would be borne in Period Two by well-off tenants. This initial intuition that rent disparities would be especially low in Milwaukee (because richer renters need not pay for scarce land in desirable neighborhoods) may also be supported by the further possibility that fewer relatively high earners in Milwaukee rent (and bid for high amenity rental property) than rent in cities in which owning is more out of reach, particularly for younger well-off people who have not had time to save for hefty down payments.[51]

At any rate, in cities where there *are* plainly scarcity rents for property more desired by wealthier households, rent disparities are far larger than the several hundred dollars per month gaps (roughly 25%–35%) that Desmond reports for Milwaukee.[52] If one searches rentcafe.com for apartments in New York City in 2023, one finds that rent gaps across neighborhoods (in both percentage and absolute dollar terms) dwarf the "price gap" data Desmond reports for Milwaukee,[53] though there is no reason to believe New York City would have a shortage of landlords willing (if able) to "price gouge" the poor. Nonetheless, the median rent in lower-price Manhattan neighborhoods (on February 5, 2023) ranged from $2,243 per month (Washington Heights) to $2,982 per month (East Harlem) while rents were radically higher in the most expensive neighborhoods ($5,800 per month in Tribeca, $5,941 per month in Battery Park).[54] Monthly rents in poorer neighborhoods in the "outer boroughs" are frequently quite a bit lower as well (e.g., $1,745 in Gerritsen Beach and $2,298 in Brighton Beach and

50. We know generally that scarcity rents paid by those seeking land in desirable places, not incremental costs, are the key determinant of prices for both owner-occupied housing and rent. Rent in fancy Manhattan neighborhoods are not nearly seven times the rents in the most prosperous Milwaukee neighborhoods because the incremental costs of providing housing services in Manhattan are radically higher. For data on Manhattan rents, see *Manhattan, NY Rental Market Trends*, RENTCAFE, https://www.rentcafe.com/average-rent-market-trends/us/ny/manhattan [https://perma.cc/YJ5Z-WZER]. For data on Milwaukee rents, see *Milwaukee, WI Rental Market Trends*, RENTCAFE, https://www.rentcafe.com/average-rent-market-trends/us/wi/milwaukee/ [https://perma.cc/LKQ7-G7DU].

51. In heavily gentrified Manhattan, only 25% of housing units are owner-occupied, compared to the national average of 65.4%. *See State of Homeowners and Their Homes*, NYU FURMAN CTR., https://furmancenter.org/stateofthecity/view/state-of-homeowners-and-their-homes [https://perma.cc/ZK7X-BTZQ]. In largely middle- and upper-income Santa Monica, only 28.5% of homes are owner-occupied (the city's median household income, in 2021 dollars, is $99,472, and the poverty rate is 10.6%). *See QuickFacts Santa Monica City, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/santamonicacitycalifornia [https://perma.cc/Z83G-RQQW]. In Milwaukee, home ownership has declined, but it is still 40.9% (median household income, in 2021 dollars, is $45,318 and 24.1% of the population lives in poverty). *See Quick Facts Milwaukee City, Wisconsin*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/milwaukeecitywisconsin/PST045222 [https://perma.cc/7XV3-BFEH].

52. *See* DESMOND, *supra* note 16, at 74–75.

53. *See Manhattan, NY Rental Market Trends*, RENTCAFE, https://www.rentcafe.com/average-rent-market-trends/us/ny/manhattan [https://perma.cc/YJ5Z-WZER].

54. *Id.*

Manhattan Beach,[55] $1,130 in Hollis and $1,962 in Jamaica Estates).[56] Whatever Desmond's implicit theory might be of how modest rent gaps "prove" exploitation, one might think the marked absence of such low gaps outside of Milwaukee would give him considerable pause about thinking that low gaps demonstrate exploitation absent a theory of why Milwaukee's poor tenants are especially vulnerable to price gouging.

In later work, Desmond (in an article co-authored with Wilmers) does attempt both to give a more tractable operational definition of exploitation—poor tenants are exploited if they pay higher rent relative to the market value of property than more affluent tenants—and to demonstrate that as an empirical matter, the poor *are* exploited in the ways he deems relevant.[57] The authors are explicit that tenants could be exploited, given their measure, even if the market for housing were competitive.[58] They assert that the inability of the poor to buy the high-rent, low-value homes that landlords buy could result from the inability of the poor to get the needed mortgage credit.[59] They further note that it is not inevitable that (what they call) exploitative landlords earn higher net profits than those renting to more affluent renters, because they may face higher costs other than the costs associated with buying the (relatively low value) rented units.[60] Nonetheless, they find that the profits earned per unit are in fact higher in poor neighborhoods.[61] Landlords could, they believe, *in theory* simply be charging poor tenants a premium to account for both risk (e.g., of nonpayment) and higher expenses (e.g., maintaining dilapidated buildings, paying fines for non-compliance with codes, paying expenses associated with tenants who misuse the premises)—in which case the complaint a subset of poor tenants might have

55. *See Brooklyn, NY Rental Market Trends*, RENTCAFE, https://www.rentcafe.com/average-rent-market-trends/us/ny/brooklyn [https://perma.cc/7XPC-2GCF].

56. *See Queens, NY Rental Market Trends*, RENTCAFE, https://www.rentcafe.com/average-rent-market-trends/us/ny/queens [https://perma.cc/ARB6-X5Q7]. Looking at data from 2020, one sees far larger gaps than Desmond observes in Milwaukee wherever there are neighborhoods that upper-middle class and richer renters seek to inhabit. *See, e.g.*, Ashley Singleton, *Average Rent in Los Angeles, by Neighborhood*, APARTMENTGUIDE (Nov. 30, 2020), https://www.apartmentguide.com/blog/average-rent-in-los-angeles [https://perma.cc/92YU-ZU4P]. In Los Angeles, for instance, rents ranged from $4,054 in Oakwood (proximate to the beach and high-end shopping) to $1,785 in Crenshaw and $1,796 in Northridge. *Id.* Even in Detroit, the "gentrifying" areas of the city like West Side Industrial were markedly more expensive ($2,528 per month) than the cheaper neighborhoods like Brooks ($611 per month). *See* Justin Becker, *Detroit Neighborhoods by Average Rent Prices*, APARTMENTGUIDE (Sept. 2, 2020), https://www.apartmentguide.com/blog/detroit-neighborhoods-average-rent-prices [https://perma.cc/6ALS-53J9]. Additionally, it is worth noting that troubling non-price terms seem to be more common in wealthier, predominantly white neighborhoods in Philadelphia as compared to their counterparts in poorer, predominately Black neighborhoods. *See* David A. Hoffman & Anton Strezhnev, *Leases as Forms*, 19 J. EMPIRICAL LEGAL STUD. 90, 103 (2022). However, there are some troubling terms that residents of Black neighborhoods are more likely to confront, e.g., permitting eviction for any drug use, even by non-tenants, in the leased premises. *Id.* at 125–27. Bad terms, in this view, are grounded more in the widespread use of landlord-favorable form contracts with high revision costs than the ability or desire to identify readily exploited renters. *Id.* at 120.

57. *See* Desmond & Wilmers, *supra* note 23, at 1096, 1104.

58. *Id.* at 1096.

59. *Id.*

60. *Id.*

61. *Id.* at 1105–08.

would be that they are cross-subsidizing other renters, paying costs that are in fact associated with other poor tenants.[62] Though Desmond and Wilmers believe that this is theoretically plausible, they found that the net accounting profits earned on each rental unit are far higher for those renting to the poor, reaching this conclusion by calculating (as best as they can) both rents and expenses. They found that net accounting profits are higher for those renting to affluent tenants than middle class ones, which they believe approach zero.[63]

Frankly, I find the conceptual definition that they use wholly unpersuasive: if costs *besides* initial building "value" are indeed higher when renting to the poor, it is not exploitative in my view in the "relational" sense that most attracts both Desmond and myself (that is, disadvantage bearing specifically on the poor redounds to the benefit of a more privileged group) for the poor to bear those costs. If profit margins are no higher for landlords who rent to the poor than to the well-off, the landlords' privilege is simply not caused (or increased) by appropriating from the poor.[64] Even setting aside whatever residual neo-classical economist's skepticism I have that there is a long-run gap in risk-adjusted profit levels in a competitive market, I suspect (in part based on landlord statements that Desmond reports in *Eviction*) that measuring profit per month on rental units overstates the profits that "slumlords" earn relative to those renting to more affluent tenants. Doing so fails to account for the fact that assets in more affluent neighborhoods appreciate in value while the more dilapidated housing that poorer tenants occupy appreciate more slowly or decline in value.[65] The authors ultimately do acknowledge[66] that any reasonable measure of the accounting profits that a landlord or property owner makes over the life of the asset must account for capital appreciation or depreciation, but note that at least in the case of Milwaukee—an atypically economically declining city—appreciation of property rented by more affluent renters in the post-2008 era has not been high enough to wipe out the short run profit advantage in renting to the poor.[67] The authors might be correct that *ex post*, it has turned out that appreciation-based profits have fallen short of *ex ante* expectations, but Desmond and Wilmers ought, in my view, to have been very suspicious of their findings that equilibrium rent-based accounting "profits" on middle-class housing

62. *Id.* at 1108.

63. *See id.* at 1108.

64. I am leaving aside the important statistical discrimination and cross-subsidization issues that beset non-costly poor tenants who bear costs that others around them are more responsible for, and the associated idea that because the poor are unable to purchase the relatively low-value housing assets, they would be forced to bear the costs associated with being lumped into a pool of costly renters.

65. *See* DESMOND, *supra* note 16, at 152 (quoting one landlord who noted that the cash flow on units in Milwaukee's North Side, occupied by poor Blacks, was better than in Brookfield, which is predominantly rich and white, but that on the North Side, "You don't buy properties for their appreciative value. You're not in it for the future but for now."). Similarly, one of the two landlords Desmond follows in *Evicted*, Sherrena, notes that equity is "icing on the cake" compared to rents. *Id.*

66. Desmond & Wilmers, *supra* note 23, at 1113–15.

67. *Id.* at 1113.

approached zero in their calculations;[68] once more, expected asset appreciation is almost surely the answer if simple mismeasurement is not.[69]

As I said, my point here is not nearly so much to criticize the work Desmond has done to demonstrate that the poor face exploitative pricing as to note that even scholars who are most laser-focused on the issue have a great deal of difficulty both giving an operational definition of an excessive price and, even more trouble, demonstrating that we are actually observing such prices.

II. COULD COURTS IDENTIFY AND POLICE EXPLOITATIVE CONTRACTS?

Even if one believed that the poor pay more for the same goods, that they pay more because they are frequently exploited, and that this exploitative pricing significantly contributes to their poverty, one would still need to believe two other things before one could conclude that poverty is relevant to the unconscionability doctrine or, more importantly, that the unconscionability doctrine is relevant to poverty: first, one must believe that courts are institutionally competent to identify instances of overpricing and second, that they can provide a readily enforced remedy in a significant number of situations where overpricing occurs.[70]

I will largely set aside some of the ways in which the cases we would be concerned with fit awkwardly with conventional unconscionability doctrine. Still, it is worth noting that the many courts still drawn to the idea that contracts are not unconscionable absent particular forms of procedural unconscionability are likely to emphasize that the price terms that we would worry most about (such as rent or groceries) are not hidden or difficult to calculate as they might

68. *Id.* at 1108.

69. Oddly, perhaps, I think that Desmond and Wilmers could understate (as well as overstate) the degree to which the poor were exploited by focusing on the relationship between rental price and home value. *See id.* at 1113. They do not try to determine whether the poor pay more for housing of the same hedonic quality (the same stream of "services") but only whether they pay more relative to unit cost. *Id.* at 1098. But if landlords competed with one another to buy properties, they would drive up the price of low-quality housing properties rented to the poor, dissipating the economic rents earned from overpayment by presumably captive poor tenants. In such a case, exploitative profits would be earned by the Period One owners of low-quality housing whose price was bid up above its hedonic value because it was uniquely amenable to leasing at exorbitant prices; Period Two landlords, however, would not earn abnormal profits. Again, Desmond and Wilmers have an explanation for why the low-quality properties rented to the poor do not inflate in value when they are ostensibly so profitable to own—there is some sort of information gap that precludes many would-be buyers from being aware of the profits that can be made exploiting the poor. *Id.* at 1118. This explanation could be supplemented both by their observation in the article that some potential buyers are wary of being branded a slumlord or confronting deep social disadvantage. *Id.* It could also be supplemented by ethnographic material in *Evicted* to the effect that many landlords do not believe they could manage buildings, collect rent, and serve eviction notices in poor Black communities. *See* DESMOND, *supra* note 16, at 29–30. But there is no reason they have offered to believe that there is too thin a pool of informed and willing landlords to bid up property prices (and dissipate excess profits in that, among other ways).

70. I do not mean to suggest that the alternatives to the use of the unconscionability doctrine are by any means ideal either, but I offer some tentative suggestions at the end of this piece's Conclusion. *See infra* Conclusion.

be in some of the lending cases (in which interest rates are often opaque)[71] and even the medical billing cases (in which innumerable fees for distinct services might contribute to the final bill) where courts have found price gouging.[72] There are arguably "quasi-duress" procedural infirmities in these cases to the extent that we view many impoverished buyers as subject to (weak) spatial monopolies (in the case of groceries) and both spatial and discrimination-based monopolies (housing). Still, few courts would invoke the unconscionability doctrine to protect those who sign contracts when shopping for better deals is simply "atypically expensive."[73]

Even if we are willing to forego procedural unconscionability analysis either wholly or largely, in part because we might think that other doctrines (e.g., duress, misrepresentation, undue influence) deal adequately with formation problems, the question would remain whether courts could ascertain when the price itself is high enough to make it substantively inequitable to enforce. The basic problem is straightforward: a court can most readily label a price inequitably high when it substantially departs *in the particular case* from the price charged in what are deemed to be similar cases. This sort of finding is most readily made in cases in which prices have substantially risen inter-temporally because of an emergency or temporary shortage, or cases in which a readily exploited buyer is hoodwinked into signing a far more unfavorable deal than other similarly situated buyers assent to. Of course, even in cases in which the court can observe a substantial disparity between the "benchmark" price (pre-emergency, price paid by other buyers),[74] the court must still evaluate whether

71. For one of the clearest explorations of interest rate opacity that survive in a post-mandatory disclosure world, see Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1266–70 (2002).

72. *See, e.g.*, Moran v. Prime Healthcare Mgmt., Inc., 208 Cal. Rptr. 3d 303, 307, 318 (Cal. Ct. App. 2016). For a fuller summary of hospital billing cases in which courts found the prices unacceptable, see George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L.J. 101, 124–28 (2003). Nation, who favors an increase in judicial aggressiveness in the supervision of medical care contracts, argues that there is an obvious benchmark to use to determine whether an uninsured patient is being overcharged: the charges paid by Medicare. *Id.* at 136. Whether one should treat the prices paid by a monopsonist as the presumptively proper one is not all that obvious to me; it is not implausible a priori that providers would fail to earn a reasonable rate of return if forced to charge all patients what they charge Medicare patients. This could be true even if it were the case that Medicare's most virulent critics were right that the program has led to an explosion of health care spending in situations in which the benefits of increased spending are dubious.

73. Shopping costs are obviously on a continuum. Price dispersion would presumably disappear if shopping costs were literally zero—if, for instance, as one were about to buy Item I at Store *S* for \$x, you see that same Item I would be delivered to you instantaneously for \$.5x. Yet price dispersion is ubiquitous. *See* Kelman, *supra* note 38, at 318.

74. For a discussion of price gouging laws, using the three-part typology that I am drawing on here, see Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KY. L.J. 535, 543–50 (2006). Statutes forbidding price gouging during emergencies are most typically readily judicially administered in precisely the way that unconscionability doctrine is not: the most common emergency price gouging prohibitions (what Rapp calls a "percentage increase cap" model) limit price increases to 10%–25% above pre-emergency levels. Drawing the conclusion that price is excessive is especially easy in such cases. *Id.* at 543. The second type (what Rapp calls unconscionability laws) forbid any price increase that the seller cannot attribute to a cost increase; but once more, since the courts are adjudicating a presumptively questionable *change* in prices under these laws, problems of

the shift is defensible because costs are differentiated.[75] But courts can readily put the burden on the party seeking to enforce the contract to prove that costs have changed or are atypically high in the case at bar, rather than putting the burden on the party seeking to avoid the contract that the price she has agreed to pay is, in some more general sense, out of line with costs, thus generating the sort of exploitative excess profits that we are worried about.

If, instead, the court must establish directly that a whole group of consumers is paying too much (e.g., the poor in a particular neighborhood)—though none is paying more than she did in the past nor more than anyone else most obviously identically situated—it will need a substantive theory of what a fair price is, and that price may often be untethered to an alternative benchmark price. This is quite a daunting task for any number of reasons. It is not plausible that the court will find all prices charged by imperfectly competitive sellers to be excessive (even setting aside the issues that public policy may either explicitly allow, if not encourage, monopoly pricing,[76] that ascertaining when sellers operate in a market that is "not competitive enough" is infeasible, and that it might be more appropriate to combat insufficiently competitive markets with other policy tools rather than attack the contracts made by the imperfectly competitive seller). Where products are markedly heterogeneous (e.g., rental units), it will be difficult to determine if the party claiming prices are excessive paid too much given hard-to-measure quality differentials.[77] Even in cases in which the party

administration are muted. *Id.* at 544–46. The third type (what Rapp calls no-increase laws) most closely mimic free-floating unconscionability doctrine, but even then, they refer more directly to an unconscionable *increase* in price rather than an abstractly unduly high price. *See, e.g.*, IDAHO CODE § 48-603 (2022) (prohibiting "exorbitant or excessive increased price"). In their tremendously insightful piece on distinct approaches that could be taken to regulating excessive prescription drug prices, Mello and Wolitz note that the hardest challenge for those seeking to identify unconscionably high prices for prescription drugs is that they may well be too high but are not too high compared to what they have been in the past or what they are sold for in other comparable settings. *See* Michelle M. Mello & Rebecca E. Wolitz, *Legal Strategies for Reining in "Unconscionable" Prices for Prescription Drugs*, 114 NW U. L. REV. 859, 903–05 (2020).

75. *See, e.g.*, CAL. PENAL CODE § 396(b) (2020) (forbidding price increases of more than 10% during declared states of emergency but providing a defense for entities that charge more because of rising costs).

76. This is especially obvious in cases—think about patented pharmaceuticals—where public policy is designed to use monopoly pricing as an incentive to develop beneficial products. That is, of course, one of the reasons that pharmaceutical price gouging statutes are legally problematic: they arguably are preempted by federal patent law. *See* Robin Feldman et al., *The Patent Act and the Constitutionality of the State Pharmaceutical Regulation*, 45 RUTGERS COMPUTER & TECH. L.J. 40, 51–53 (2019).

77. Obviously, there are many situations in which economists attempt to estimate the hedonic quality of housing (e.g., to determine for purposes of constructing a consumer price index whether there has been inflation in prices or quality shifts; to try to ascertain how people value particular features of housing, such as extra bedrooms, environmental amenities, or demographic composition of a neighborhood). Whether these hedonic pricing models would permit a court to infer whether a particular consumer overpaid for the bundle of housing attributes she purchased is a difficult question to answer. Even if one thinks the models accurately permit us to infer broad effects (e.g., lower air quality negatively impacts price), it is not at all clear that more precise variations are either well-measured or observed for particular units (how bad, precisely is the air quality at this particular address?) or that general hedonic pricing models hold constant enough across neighborhoods to allow us to infer price gouging in a particular case. For a good accessible summary of some of the literature on hedonic housing models, see G. Stacy Sirmans et al., *The Composition of Hedonic Pricing Models*, 13 J. REAL EST. LITERATURE 3 (2005).

claiming price gouging paid more for an identical product (e.g., a particular brand of food or detergent) or where we are confident enough that we have solved the problem of measuring the relative quality of two distinguishable products, we would still need to determine that the seller's costs are not atypically high before finding that prices are excessive.[78] Placing the burden on the seller to prove costs are atypically high absent a finding that the prices the seller charges depart from historical or community norms[79] may well be troubling.

If, instead, the court attempts to ascertain whether the rate of return the seller earned was excessive, it must first deal with difficult accounting measurement issues to determine how profitable some particular sale or set of sales really was. It must also establish both what risk-adjusted rate of return is excessive (any profit above the competitive level?) and what level of *ex ante* non-diversifiable risk the seller actually faced.[80]

Litigating these issues on a case-by-case basis is radically harder than ascertaining whether a price departs significantly from a benchmark price; it is

78. Measuring costs is hardly an easy task; this problem arises, of course, when we try to measure profits (revenues *minus* costs). These problems are raised *infra* note 80.

79. For a discussion of the possibility of using community norms to determine that prices are unconscionably high, *see* Christopher Bucccafusco et al., *The Price of Fairness*, 84 OHIO ST. L.J. 389, 397, 401 (2023). The authors present experimental findings countering the standard views of behavioral economists that people view demand-driven but not cost-driven price increases as unfair, and find that views of fairness are (at least arguably) both reasonably widely shared and somewhat insensitive to how the views are elicited (though elicitation may matter in the sense that prices are adjudged more fair if a price increase is accompanied by apology and if presented alongside scenarios in which price hikes were even steeper).

80. Many believe that there are innumerable problems inferring monopoly power (and by extension other forms of excess prices) from profitability data. First, there are gaps between relatively readily measured accounting profits (the difference between revenue and historical costs) and economic profits (focusing more on the opportunity costs of utilizing resources as the firm utilizes them, the economic profit rate is simply the discount rate that equates to the present value of the expected future income stream to the initial outlay). *See, e.g.*, Franklin M. Fisher & John J. McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 AM. ECON. REV. 82, 82 (1983). The distinction could play out in many ways: for instance, a firm earning high accounting profits could actually be economically unprofitable if it were the case that the opportunity cost of employing some of its inputs is far higher than its historical cost. Second, measuring even accounting profits is extremely difficult. *See, e.g.*, Richard Schmalensee, *Another Look at Market Power*, 95 HARV. L. REV. 1789, 1805–06 (1982). It is especially difficult to determine whether the rate-of-return on the sale of a specific item has led to atypical profits without solving the knotty problem of allocating fixed costs to particular products. *Id.* (If, for instance, we were trying to figure out whether a hospital overcharged for a particular operation, we would need to know not just the marginal costs associated with performing the surgery—e.g., the surgeon's time, the cost of materials used in the surgery itself—but how to allocate the multiple fixed costs of the hospital, such as facilities and diagnostic equipment, for instance, to the particular operation.) For an accessible summary of the virtues and imperfections of activity-based costing ("ABC") management accounting system, one of the most prevalent efforts to develop less arbitrary techniques for allocating fixed costs to particular outputs within the firm, *see, e.g.*, Tahereh Khodadadzadeh, *A State-of-Art Review on Activity-Based Costing*, 1 ACCT. 89, 89 (2015). When fixed costs are high, profit margins (measured by the gap between the selling price and marginal costs) may appear high even though the firm does not have a monopolist's power to set prices. *See, e.g.*, J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 603 (2009). Third, of course, a firm might be atypically profitable not because it overprices but because it is atypically well-managed or because of exogenous shocks or distinctions in its cost structure. *See, e.g.*, Robert H. Bork & J. Gregory Sidak, *The Misuse of Profit Margins to Infer Market Power*, 9 J. COMPETITION L. & ECON. 511, 513–19 (2013).

arguably simply inappropriate as well as a way of dealing with relatively low-stakes individual complaints by particular consumers. But thinking about the cost of case-by-case litigation, of course, raises yet a last knotty issue that common law courts would face if attempting to use the unconscionability doctrine to counteract the systematically excessive prices that contribute to poverty. Will particular victims have adequate selfish incentives to defend against breach of contract suits[81] if they must bear the costs of hiring the experts needed to prove any but the simplest forms of overcharging? Or will those complaining about price gouging bring claims that are factually similar enough to be consolidated through intervening in suits[82] in a procedural environment that is hardly inviting to aggregated actions? Procedural consolidation may work best where all consumers face an unreasonable price, but we are, by hypothesis, dealing with situations in which only the poor, a subset of consumers, face price gouging.[83] Naturally, there is a wide range of possible ways to overcome the free rider problem in *regimes* that *refer* to unconscionability—e.g., in state statutes forbidding unfair trade practices—but leave enforcement powers in the hands of public officials.[84] But, again, this takes us outside the realm of common law contract.

III. CONCLUSION

It may well be the case, though it is by no means unambiguously true, that the poor pay more for goods of the same quality. It is plausible as well, though far harder to determine, that they pay more not because the costs that sellers face when selling to poorer customers are higher but because sellers overcharge poorer buyers. I examined Matthew Desmond's claims that poor renters face

81. It is also the case that it might not deter price gougers if all that happened when they failed in their efforts to enforce an exploitative contract is that they collected only the fair price; absent substantial punitive sanctions, contract law is rather toothless. *See* Radin, *supra* note 3.

82. Generally speaking, unconscionability is a shield, not a sword; parties can raise it as a defense to a breach of contract action but not sue to recover overpayments or receive damages for having been subjected to unconscionable terms. For a discussion of traditional and emerging case law urging that courts be more favorable to its use as a sword, *see* Brady Williams, *Unconscionability as a Sword: The Case for an Affirmative Cause of Action*, 107 CALIF. L. REV. 2015 (2019). Even if potential defendants subject to "similarly" unconscionable contracts were legally *permitted* to intervene in cases where sellers sued to enforce problematic contracts, they would still need to overcome free rider problems. Future defendants would benefit (through issue preclusion) if any earlier defendant prevailed on their claim that the contract the plaintiff sought to enforce was unconscionable, so if acting as self-interested actors, each would hope others would bear the costs of proving unconscionability. And early defendants would be unable to bring in later defendants through compulsory joinder since these later parties are not necessary to the resolution of the suit nor will any of the potential parties' interests be compromised if the suit is resolved without the presence of all possible parties.

83. Assume for argument's sake that the poor customers of Store *S1*, in a ZIP code where poverty is highly concentrated, are in a jurisdiction in which unconscionability can be used offensively to sue for rebates. Can all the customers be joined in the same lawsuit? Can the owners of Store *S1* defend by pointing to parallel prices in Store *S2* in a different high-poverty ZIP code? And could the customers of *S2* join in as well, even though the facts that would be needed to prove price gouging *must* differ for *S1* and *S2*?

84. *See* N.M. STAT. ANN. § 57-12-3 (forbidding unconscionable trade practices); N.M. STAT. ANN. § 57-12-15 (providing for enforcement by the state attorney general or delegates thereof).

exploitative prices and found them quite unpersuasive. The point of analyzing his justifiably well-known claims was not so much to criticize his efforts but to show just how difficult it would be to prove or disprove claims that a particular group of buyers pays too much for some bundle of goods or services. Desmond neither does an adequate job defining what an exploitative price really is nor does he demonstrate that the prices we observe are exploitative given a range of possible definitions of price gouging. Finally, it is possible not only that the poor pay too much and that they do so because they buy from sellers who charge them unreasonably high prices, but also that their poverty is significantly, though by no means exclusively, caused by having to overpay for the things they purchase. They not only have too few resources to expend in the first instance but the resources they have get transformed into a less valuable bundle of goods and services.

Even if we are deeply concerned with combating poverty and believe it is significantly exacerbated by price gouging, it is unlikely that the expansive use of common law unconscionability doctrine will prove to be an important anti-poverty tool. The doctrinal and administrative fit is weak. The poor may well pay too much in situations in which the most powerful indicia of procedural unconscionability (e.g., opaque terms, high-pressure sales tactics, purchases made in emergency situations) are missing. And while it is reasonably easy to identify substantively "excessive" prices when a seller's price is substantially above some benchmark—prices charged *before* an emergency, prices charged others by the same seller in factually indistinguishable circumstances—we will rarely have benchmarks to rely on if the poor are ostensibly overcharged by sellers who deal fairly exclusively with poor buyers and charge them uniform prices. Efforts to establish that a price is too high more directly by trying to establish that it is too high relative to costs, or that profits earned in exchanges with the poor are excessive, will strain the fact-finding and conceptual capacities of trial courts in routine contract cases. It is inconceivable that a court will be able to ascertain whether a particular seller's rate of return was unduly high since it cannot observe underlying non-diversifiable risk, even if we heroically assume that it could observe either the accounting profits or the economic profits that arose from particular sales transactions accurately.

If we believe, for instance, that small stores located in areas with concentrated poverty are exploiting their customers, efforts to establish a regime that effectively precludes them from enforcing the contracts they make with customers (or even allowing customers to use unconscionability as a sword as well as a shield so that they could recover for past overpayments) is unlikely to be the answer. And the difficulty is not just the problem inevitably inherent in relying on private litigants bringing or defending suits when only a small subset of exploited parties are likely to avail themselves of buyer-favorable doctrine; the problem is that it is hard to imagine an administratively viable version of substantially more buyer-favorable doctrine.

There may well be a very wide range of interventions more likely to combat the underlying problem than contract law reform. At the most general and conceptual level, if existing sellers work within a system in which their privilege significantly depends upon taking advantage of others, we need either to shift incentives for those selfishly motivated or work to create sellers working outside this system of privilege maintenance.

One could imagine a regime in which the government establishes some system of prizes or incentives granted to those who serve rather than exploit the poor where the selfishly appropriated gains from winning the prizes exceed the selfish gains from exploitation. The monitoring problems and potential for corruption in such a system seem, to put it mildly, daunting. On the negative incentives side, of course, we could also imagine systems levying high fines for exploitative prices that make exacting them in the first instance a selfishly irrational strategy. This seems to me the obvious administrative substitute for the aggressive use of the unconscionability doctrine, and while it would suffer from many of the same problems—could we administer a system relying on identifying overcharges?—it seems to dominate the contract law solution both because it does not rely on private parties who experience relatively small losses in particular transactions to fight the losses and because it more readily permits punitive sanctions as well as simple compensation for loss.

More promising still, in my view, though by no means readily implemented, if we think these small stores are exploiting customers, we should work (whether through direct governmental backing, subsidy, or NGO support for existing community organizations) to establish new, community-owned and community-managed stores or to bolster existing non-exploitative institutions.[85] Each form of organization—fundamentally operating outside the selfish maximizing paradigm that can make exploitative pricing seem like the seller's best solution—would not just serve as a new source of properly priced goods and services but compete with and arguably then modify the behavior of today's price gougers.

85. I don't mean to suggest that it is easy to establish stores (e.g., co-ops) that meet community needs and counter overpricing. For examples of academic studies trying to determine the conditions needed to improve access to lower-cost food, with a particular emphasis on the importance of enlisting existing community resources rather than relying on entry by large, pre-existing sellers, *see, e.g.*, Catherine Brinkley et al., *"If you Build it* with them*, they will come": What Makes a Supermarket Intervention Successful in a Food Desert?*, 19 J. PUB. AFF. 1 (2019); Catherine Brinkley et al., *Culturing Food Deserts: Recognizing the Power of Community-Based Solutions*, 43 BUILT ENV'T 328 (2017). For a fairly pessimistic review of efforts to expand access to fairly priced and healthier food, see, e.g., Rachel Engler-Stringer et al., *An Examination of Failed Grocery Store Interventions in Former Food Deserts*, 46 HEALTH EDUC. & BEHAV. 749 (2019).