Buffalo Law Review

VOLUME 71 | APRIL 2023 | NUMBER 2

The Bitter Ironies of *Williams v. Walker-Thomas Furniture Co.* in the First Year Law School Curriculum

DUNCAN KENNEDY†

INTRODUCTION

This Article is about the famous contracts case of *Williams v. Walker-Thomas Furniture Company*,[1] decided in 1965 in the U.S. Court of Appeals for the District of Columbia with an opinion by Judge J. Skelly Wright. Ora Lee Williams, the appellant, was Black and, according to the brief, was "a person of limited education and separated from her husband . . . maintaining herself and her seven children by means of public assistance."[2] She lived in a poor Black neighborhood in the District. Williams had signed an installment sales con-

† I delivered an earlier version of this Article as a James McCormick Mitchell Lecture at the SUNY Buffalo School of Law on September 16, 2022. Thanks to Heather Abraham, Matthew Dimick, and Athena Mutua for their comments on that draft. Thanks to Oren Bar Gill, Karl Klare, and Pascal McDougall for comments and to Rama Hyeweon Kim for invaluable research and editorial assistance. Errors are mine alone.

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

2. Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor*,*"* 102 GEO. L.J. 1383, 1413 (2014).

Electronic copy available at: https://ssrn.com/abstract=4371842

tract containing a "cross-collateralization" clause (hereinafter, "the clause"). The clause gave the seller/lender the right to repossess, on missing a payment on the most recent purchase, all prior goods purchased under the contract, even if the buyer/borrower had long since paid enough to cover what was owed on them.

Skelly Wright's opinion remanded the case for determination as to whether the clause was unconscionable with a new definition of the concept. He listed unequal bargaining power, the meaningfulness of Williams' consent, the one-sidedness of the term, and its possible violation of commercial practice as factors to be taken into account.[3] If the clause was invalid, future lenders would be unable to obtain security interests in previously purchased goods. This limit would become a compulsory term regardless of what the seller might have written into the contract.[4] As it turned out, Williams

3. *See Williams*, 350 F.2d at 449–50. It is an obvious question for laypersons why it was necessary to create a new doctrine of unconscionability to deal with the apparent inequity of the commercial practice in question. The answer is that the contract was insulated from judicial revision or invalidation by, first, the "duty to read" doctrine, which holds the signer to a written contract regardless of whether s/he has read it. *Williams* creates a tightly limited exception to the doctrine. Second, the legal doctrine of duress invalidates contracts (not terms) when some act or threat of the aggressor "overcomes the will" of the victim. Taking advantage of the other party's lack of bargaining power, even in a case where the contract is for absolute necessities, does not constitute common law duress. Again, *Williams* creates a limited exception. The case is important because it was one of a classic set of the 1960s and 1970s cases that chipped away at these two limiting doctrines in one situation after another. The most famous of these is *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), creating a limited but non-disclaimable warranty of fitness for new cars no matter what was in the fine print of the sale contract.

4. There was no clearly defined default rule for this situation, as painstakingly demonstrated in James W. Bowers, *Some Economic Insights into Application of Payments Doctrine:* Walker-Thomas *Revisited*, 89 CHI.-KENT L. REV. 229, 254–56 (2014). On Bowers' critique of *Wil-*

Electronic copy available at: https://ssrn.com/abstract=4371842

settled and the rule was never applied to the facts of the case.

This Article is part of a larger project exploring the economics of housing and credit in poor Black neighborhoods. That project defends the range of legal initiatives that legal services lawyers and clinicians, with progressive lawyers and academic allies, have undertaken on behalf of poor Black neighborhoods against the perennial neoliberal accusation that they "hurt the people they are supposed to help."[5] The goal is to explain and justify the ways legal rules can and should redirect transactional surplus from landlords, merchants, banks, and gentrifiers toward the housing and credit needs of poor Black neighborhoods. It is meant to be a contribution to critical race theory[6] and to the Black capitalism

---

liams, see *infra* note 20. U.C.C. § 9-103 does not apply to consumer contracts. U.C.C. § 2-302(2) and Comment 2 leave the court considerable discretion in defining the remedy after holding a clause unconscionable in fact or as a matter of law. The remedy might seriously penalize the lender by invalidating all his security interests or adopt a milder alternative, merely requiring return of seized goods, for example.

5. For an overview and critique of the "hurt the people" argument, see Timothy M. Mulvaney, *Compulsory Terms in Property*, 117 NW. L. REV. 191 (2022).

6. *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). For a discussion of law school pedagogy from a critical race theory perspective, see *infra* notes 25–26 and accompanying text; Kimberlé Williams Crenshaw, *Foreward: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1988) [hereinafter Crenshaw, *Race-Conscious Pedagogy*]; Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199 (2022). Although not about race, see also Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985), for another critical analysis of contracts pedagogy. In recent years, there seems to be an interest among Contracts teachers around the country, with a renewed urgency, to incorporate insights from critical race theory in the law school classroom. *See, e.g.*, Deborah Zalesne, *The (In)Visibility of Race in Contracts: Thoughts for Teachers*, CONTRACTSPROF BLOG (July 8, 2020), https://lawprofessors.typepad.com/contractsprof_blog/2020/07/deborah-

Electronic copy available at: https://ssrn.com/abstract=4371842

critical approach,[7] as well as to the critical legal studies literature on law's distributive role in economic and social life.[8]

The *Williams* case is important, even central, to such a project for several overlapping reasons. Along with the *Javins* case creating a meaningful warranty of habitability for low-income rental housing (another opinion authored by Skelly Wright),[9] *Williams* is one of the few cases that has

zalesne-the-invisibility-of-race-in-contracts-thoughts-for-teachers.html.

7. *See, e.g.*, Donald J. Harris, *The Black Ghetto as "Internal Colony": A Theoretical Critique and Alternative Formulation*, 2 REV. BLACK POL. ECON., no. 4, 1972, at 3; CEDRIC ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (Univ. N.C. Press 3d ed. 2020) (1983); Walter Johnson, *Ferguson's Fortune 500 Company*, ATLANTIC (Apr. 26, 2015), https://www.theatlantic.com/politics/archive/2015/04/fergusons-fortune-500-company/390492/.

8. *See generally* Duncan Kennedy, *Law Distributes I: Ricardo, Marx, CLS in* THE FUTURE OF WORK (Karen Engle & Neville Hoad eds.) (forthcoming 2023), https://ssrn.com/abstract=3813439; Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) [hereinafter Kennedy, *Distributive and Paternalist Motives*]; DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016); Janet Halley, *Conclusion: Distribution and Decision: Assessing Governance Feminism*, *in* GOVERNANCE FEMINISM: AN INTRODUCTION 253 (Janet Halley et al. eds., 2018); Libby Adler & Janet Halley, *"You Play, You Pay": Feminists and Child Support Enforcement in the United States*, *in* GOVERNANCE FEMINISM: NOTES FROM THE FIELD 287 (Janet Halley et al. eds., 2019); LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM 175–211 (2018); Iain Ramsay, *Consumer Law and Structures of Thought: A Comment*, 16 J. CONSUMER POL'Y 79 (1993); Iain Ramsay, *Consumer Credit Law, Distributive Justice and the Welfare State*, 15 OXFORD J. LEGAL STUD. 177 (1995); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

9. *See generally* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

Electronic copy available at: https://ssrn.com/abstract=4371842

stimulated sustained scholarly analysis of the distributive consequences of attempting to help the poor by regulating their consumer "choices." The part of that scholarly literature oriented to law and economics has leaned heavily to the conclusion that unconscionability law as defined in the case does indeed "hurt the people it is supposed to help." The critique of *Williams* is a template for generalizing the "hurt the people" argument to the whole array of compulsory contract terms that comprise the bulk of the law of consumer protection. It serves as a younger sibling to the better known (and equally flawed)[10] critiques of rent control and minimum wage legislation.

In this piece, I first describe the dissemination of "hurt the people" through the inclusion of the case and its critique in the first-year course in Contracts that is required in all American law schools (Part I). I then describe the ways in which liberal legal scholarship has largely avoided direct confrontation with the argument (Part II). Then I develop a strictly neo-classical marginalist model of the circumstances in which compulsory pro-consumer terms should and should not "hurt the people" (Part III). The final sections apply the model to the specific facts of the *Williams* case and conclude that it is overwhelmingly likely that in its specific circumstances, the banning of the clause helped poor Black neighborhood residents as a group (Parts IV and V).

The key to the model is building in recognition that the poor Black neighborhoods of 1965 were characterized by racial housing and job segregation, concentrated poverty, economic isolation from the mainstream economy, and oligopolistic household goods markets with widespread "low road"

10. *See* Duncan Kennedy, *In Defense of Rent Control and Rent Caps (Part I of II)*, LPE PROJECT (Feb. 3, 2020), https://lpeproject.org/authors/duncan-kennedy/; Duncan Kennedy, *In Defense of Rent Control and Rent Caps (Part II of II)*, LPE Project (Feb. 4, 2020), https://lpeproject.org/blog/in-defense-of-rent-control-and-rent-caps-part-ii-of-ii/; TITO BOERI & JAN VAN OURS, THE ECONOMICS OF IMPERFECT LABOR MARKETS (2008).

Electronic copy available at: https://ssrn.com/abstract=4371842

practices. In the Conclusion, I suggest some ways in which both the general analysis and its application to the historical circumstances of *Williams* are useful in assessing the (usually bogus) "hurt the people" argument as applied to poor Black and Latinx neighborhoods today. The welfare economic analysis of housing and credit in those neighborhoods is still sharply distinct from what it is for racially mixed or middle-class Black neighborhoods, and for White neighborhoods.[11]

I. IRONIES OF THE CRITIQUE: FROM THE LAW REVIEWS TO THE LAW SCHOOL CLASSROOM

Given the overall economic situation of poor Black people and its roots in White racism and institutional racism,[12] even

11. This Article's focus is on D.C. neighborhoods whose residents were more than 90% Black in the 1960s. Poor Black neighborhoods, characterized by a combination of racial segregation and concentrated poverty, have not disappeared since. For a study of the intertwined relationship between racial economic inequality and poor Black neighborhoods, see generally PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2013). Sharkey argues that neighborhood, like income, occupation, or education, should be viewed as an "independent dimension of stratification," because "African Americans do not live apart from whites purely because they have lower income or fewer assets—even after considering these factors, blacks continue to live in the most economically depressed, violent neighborhoods of any American racial or ethnic group." *Id.* at 15. In addition, Blacks have been "stuck" in these neighborhoods over generations: "over 70 percent of African Americans who live in today's poorest, most racially segregated neighborhoods are from the same families that lived in the ghettos of the 1970s." *Id.* at 9. See also Paul A. Jargowsky, *The Persistence of Segregation in the 21st Century*, 36 MINN. J.L. & INEQ. 207 (2018), for the interaction between economic and racial segregation. On poor White neighborhoods distinguished from poor Black neighborhoods, see generally Reba L. Chaisson, *The Forgotten Many: A Study of Poor Urban Whites*, J. SOCIO. & SOC. WELFARE, June 1998, at 42.

12. Some classic works are: DANIEL R. FUSFELD & TIMOTHY BATES, THE POLITICAL ECONOMY OF THE URBAN GHETTO (1984); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987); DOUGLAS S. MASSEY & NANCY A. DENTON,

Electronic copy available at: https://ssrn.com/abstract=4371842

a greatly expanded unconscionability doctrine could play no more than a palliative role in the struggle for race/class equity.[13] Nonetheless, according to a better, still strictly neoclassical analysis, it is overwhelmingly likely that banning the clause helped consumers in poor Black neighborhoods. Yet the case is continuously referenced for the opposite proposition: that "hurting the people" is the inevitable outcome of consumer protection through control of abusive terms. Although Skelly Wright's opinion is closely tied to the factual situation of Williams as a single mother living on welfare, the law and economics literature uses it to critique pro-consumer compulsory contract terms in general—regardless of the circumstances—editing out the race/class dimension altogether.

The law and economics critique has had an impact far beyond the scholarly law review literature because of its role in legal education. Virtually all first-year Contracts casebooks include *Williams* as a leading case.[14] Its easy-to-remember facts and outcome, I've discovered, will come readily

AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016); DON LASH, "WHEN THE WELFARE PEOPLE COME": RACE AND CLASS IN THE US CHILD PROTECTION SYSTEM (2017).

13. *See infra* note 181 and accompanying text.

14. Of eleven contracts casebooks which either have been used at Harvard Law School in the last decade or are currently available from major casebook publishers, all but one used *Williams* as a main case. *See* IAN AYRES & GREGORY KLASS, STUDIES IN CONTRACT LAW 23–29, 562–67 (9th ed. 2017); DAVID G. EPSTEIN ET AL., CASES AND MATERIAL ON CONTRACTS: MAKING AND DOING DEALS 403–10 (3rd ed. 2011); RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 1008–16 (5th ed. 2012); JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENTS 918–24 (11th ed. 2019); E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 497–503 (7th ed. 2008); LON L. FULLER ET AL., BASIC CONTRACT LAW 90–96 (10th ed. 2018); DANIEL MARKOVITS, CONTRACT LAW AND LEGAL METHODS 1685–89 (2012); STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW 224–28, 233–34 (4th ed. 2012); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 622–33 (8th ed. 2016); ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 53–65 (5th ed.

Electronic copy available at: https://ssrn.com/abstract=4371842

to mind to many lawyers, anywhere in the United States, even many years out of law school. It doesn't seem an exaggeration to say it does important work in the construction of the race/class ideology of the legal profession.

In order for the case to serve its pedagogic purpose, the teacher explicitly or implicitly turns it into a hypothetical. Assume, for the sake of argument, that: (1) in spite of the tentativeness of the holding, Skelly Wright categorically condemned the clause;[15] (2) the outcome in *Williams* helped Williams and other defaulting borrowers at the point of repossession; and (3) the case became a precedent and retailers changed their practices in response.[16]

Most casebooks take up the "hurt the people" argument against the outcome restated in this way, with some endors-

2013). For the enduring significance of *Williams* for legal academics, see Fleming, *supra* note 2, at 1387; Russell Korobkin, *A "Traditional" and "Behavioral" Law-and-Economics Analysis of* Williams v. Walker-Thomas Furniture Company, 26 U. HAW. L. REV. 441, 442 n.12 (2004) (finding that only two out of twenty contracts casebooks published by Aspen Law & Business, West, Foundation, and LexisNexis did not include *Williams* as of 2004).

15. He remanded to the lower court to decide the unconscionability question on the facts since the issue had not been argued below. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965).

16. Williams settled her claim for $200, so there was no ruling in the case that cross-collateralization clauses were unconscionable, either in general or in the circumstances of the case. *See* Fleming, *supra* note 2, at 1432. But the case was the leading precedent for the definition of unconscionability when courts all over the country had to interpret section 2-302 of the Uniform Commercial Code, which was first adopted by Pennsylvania in 1952 and then by every other state over the next two decades. *See id.* at 1422 & n.249. *See generally* UNIF. L. COMM'N, *Uniform Commercial Code*, https://www.uniformlaws.org/acts/ucc (last visited Dec. 30, 2022). The Code was enacted in D.C. in December 1963 but was not effective at the time of Williams' transactions, which was why Skelly Wright relied on the common law doctrine. *See* Act of Dec. 30, 1963, Pub. L. No. 88-243, 77 Stat. 630.

Electronic copy available at: https://ssrn.com/abstract=4371842

ing it while others merely put it on the table along with arguments from fairness on the other side.[17] So there are hints for the attentive student, but there is nonetheless likely to be a surprised pause when the teacher asks whether on those facts the banning of the clause would be good for poor buyer/borrowers. Very few students other than those with some training in conservative economic thinking will have anticipated that the correct classroom answer is "no."[18] It is a kind of "GOTCHA!" typical of first-year law school induction into tough mindedness.[19]

The simplest form of the argument goes as follows. The

---

17. Six out of the ten casebooks included *supra* note 14 used *Williams* to introduce the "hurt the people" critique of unconscionability, or of compulsory terms in general. One of the six casebooks presented the critique as clearly correct. *See* SCOTT & KRAUS, *supra* note 14, at 59–61. Four of the six followed the conventional practice of law school casebook writing, which is to maintain a certain level of objectivity by not taking an explicit position in a debate that it introduces and frames. *See* ARYES & KLASS, *supra* note 14, at 26–29, 564–67; EPSTEIN ET AL., *supra* note 14, at 408–10; FARNSWORTH ET AL., *supra* note 14, at 496–97; KNAPP ET AL., *supra* note 14, at 631–32. All four of these introduced Richard Epstein's 1975 article, Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975) [hereinafter Epstein, *Unconscionability*], as representing the economic critique of *Williams* and of substantive unconscionability in general (one of them also introduced Richard Posner's opinion in Amoco Oil Co. v. Ashcraft, 791 F.2d 519 (7th Cir. 1986)). *See infra* note 33. The last of the six was an outlier in that it provided a sophisticated economic analysis of mandatory terms. *See* MARKOVITS, *supra* note 14, at 1695–1705. A seventh casebook, while not discussing the "hurt-the-people" argument in law and economics terms, approvingly introduced an anti-paternalist critique of *Williams*. *See* DAWSON ET AL., *supra* note 14, at 923–24.

18. My knowledge of the case in the curriculum and classroom is based on teaching Contracts six times in the 1970s and 1980s and three iterations of a first-year course on "The Politics of Private Law in Historical and Comparative Perspective" in the 2010s. In that course I regularly asked students how their different teachers in the seven first-year sections taught the case.

19. *See* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 17–29 (2004).

Electronic copy available at: https://ssrn.com/abstract=4371842

clause favors the seller by increasing what he gets if the buyer defaults. The case took that away from him, making the default rule into a compulsory term. This increases the seller's costs of operation. He will have to raise the interest rate he charges or the sale price to compensate. Some buyers will be forced out of the market. Others will have to pay a higher price for a protection they didn't want enough to be willing to pay the market price. If they had been willing to pay, the seller would have provided it without legal coercion.[20]

That Williams was poor supposedly makes this outcome especially unfortunate. Poor borrowers end up with less credit for necessaries at a higher price. In the case of this clause, the price hike will be larger because going back to the default rule, that absent agreement to the contrary a good is a collateral only for the loan for its purchase, thereby eliminating the forfeiture for a missed payment, will reduce the incentive to keep up. It is the quintessential case for the idea that well-meaning humanitarian policy initiatives are chronically counterproductive as well as grossly paternalist.

The "hurt the people" argument is typically paired with an institutional competence argument to the effect that Skelly Wright's definition, now commonly used to flesh out the Uniform Commercial Code's one-sentence § 2-302(1), is hopelessly vague. It supposedly creates a license for unelected judges to run riot across the settled rules of consumer

---

20. Bowers, *supra* note 4, makes a much more complex but ultimately unconvincing argument that poor buyers are better off with the term than without, seeming to posit, as best I could understand him, that striking down the clause meant eliminating the seller's security interests altogether rather than defaulting to the rule of applying payments to the oldest purchase first. That is the solution adopted by the jurisdictions that ban the clause by statute, as described *infra* note 23 and accompanying text. A common law court could adopt it using its remedial discretion under U.C.C. § 2-302(2) and Comment 2.

Electronic copy available at: https://ssrn.com/abstract=4371842

credit.[21] Its purpose would supposedly be better served by legislation or regulation on the model of the European Unfair Contract Terms Directive than by judge made law.[22] This Article doesn't take up this interesting controversy because it is about the "hurt the people" argument as it supposedly applies to a categorical ban on the clause whether from case law, a statute, or a regulation. As a matter of fact, a few years after *Williams*, Congress passed a "Credit Code" just for the District of Columbia that banned its use in installment sales contracts.[23] The Federal Trade Commission (FTC) has since

---

21. *See* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

22. For an interesting survey and proposal for the regulatory solution, see Yehuda Adar & Shmuel I. Becher, *Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 B.C. L. REV. 2405 (2021). For a critique of the kind of apolitical institutional competence argument Adar and Becher offer, see Duncan Kennedy, Utopian Rationalism in American Legal Thought: A Critique of the Hart & Sacks Legal Process Materials (Sept. 29, 2022) (unpublished manuscript), https://ssrn.com/abstract=4233370. On the substance of Adar and Becher's proposal, see *infra* notes 46 and 54.

23. After the Report of the National Advisory Commission on Civil Disorders ("the Kerner Commission Report") in 1968, as well as the D.C. riots protesting the assassination of Martin Luther King, Congress passed a federal Truth in Lending Act in 1968 (Title I of the Consumer Credit Protection Act), which provided for disclosure of loan terms but did not prohibit cross-collateralization clauses. Truth in Lending Act, Pub. L. 90–321, 82 Stat. 146 (1968) (codified as amended in scattered sections of 15 U.S.C.). In 1971, Congress passed the D.C. Consumer Credit Protection Act just for the District of Columbia. Section 28-3805 requires the lender to apply payments to the oldest debts first. District of Columbia Consumer Credit Protection Act of 1971, Pub. L. No. 92-200, § 28-3805, 85 Stat. 665, 670 (codified as amended at D.C. CODE § 28-3805). *See* Fleming, *supra* note 2, at 1426–29. The ban applies to cross-collateralization of purchase money securities in general rather than just to household goods. For history of the regulation of the clause in the Federal Trade Commission's subsequent consumer credit regulations and in state consumer protection, see *infra* note 131 and accompanying text.

Electronic copy available at: https://ssrn.com/abstract=4371842

repeatedly refused proposals to make the ban part of national consumer protection law and the states are split.[24] Our question is how the outcome of *Williams*, translated into general consumer protection statutory law, was good or bad for poor Black neighborhoods.

A diligent student might brief the case this way:

> *Facts of the case*: Plaintiff Williams, a single mother of seven living on welfare in Washington, D.C., bought a variety of household goods on credit from a local merchant. The contract said that the series of purchases were all backed by one loan, and that missing any monthly payment on the current balance was default, and that in the event of default the seller could take back all the purchased items. When Williams defaulted, Walker-Thomas repossessed most of the goods. Williams challenged the repossession and lost at trial. The U.S. Court of Appeals for the District of Columbia, per Judge J. Skelly Wright's opinion, defines unconscionability.
>
> *Issue*: Was the "cross-collateralization clause" unconscionable?
>
> *Holding*: Remanded to the lower court to decide whether it was unconscionable because of unequal bargaining power, the one-sidedness of the term, and its possible unreasonableness as commercial practice.
>
> *Arguments against the ruling*: banning the clause hurts borrowers by raising cost of credit; paternalism; the test is too uncertain.
>
> *Arguments in favor of the ruling*: unfairness of the term to plaintiff.

There is yet another level of irony here. Unless the teacher has decided to supplement the casebook with other race cases,[25] *Williams* is one of the very few, and in many

---

24. Douglas Baird asserts that "the particular practice at issue in [*Williams*]—the cross-collateralization clause—is a dead letter. It was banned outright a quarter of a century ago in an uncontroversial regulation issued during the Reagan Administration." Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 951 (2006). This is wrong. The FTC regulation he cites, 16 C.F.R. § 444.2(a)(4), does not apply to the clause in contracts for household goods when the debtor has agreed to a "consolidation" of earlier contracts with a purchase money security interest with the most recent one. *See infra* notes 129–133.

25. In recent years, there have been numerous efforts by first-year

Electronic copy available at: https://ssrn.com/abstract=4371842

Contracts casebooks the only case, that students will understand as involving a Black litigant, let alone a resident of a poor Black neighborhood,[26] in spite of the fact that neither fact is in the opinion.[27] Race will be salient in the way students, whether or not of color, experience the case as a story about racial reality. Conservative politicians have since the time that *Williams* was decided worked to identify Black people in general with the welfare system. Black unwed mothers with many children living on welfare, supposedly prone to cheat—Ronald Reagan's "welfare queens"—were and still are central to this racist narrative.[28] It isn't surprising that

---

teachers to incorporate insights from critical race theory into the classroom. *See, e.g.*, Zalesne, *supra* note 6.

26. According to an amazing feat of legal and sociological research by Dylan C. Penningroth, "Today, the only time that most first-year Contracts students read a case knowing that one of the parties was Black is in the roughly twenty minutes spent discussing *Williams v. Walker-Thomas Furniture Co.*" Penningroth, *supra* note 6, at 1276. He shows that a large sample of all the cases in the casebooks, like those in Contracts treatises, involved Black litigants. He describes the complicated historical process by which "law schools' explicit engagement with race [in contract law] shrank to one case," that is, *Williams*. *Id.* at 1210. Students therefore cannot "see the other Black litigants 'passing' in their casebooks or the marks those litigants left on the rules they are learning.*" Id.* at 1276. On race in the other first-year required courses, including multiple efforts to widen the range, see *id.* at 1201 n.1. I would argue that the inclusion of a slavery case or two and *Johnson v. M'Intosh*, 21 U.S. 543 (1823), at the beginning of a Property casebook and *Shelley v. Kramer*, 334 U.S. 1 (1948), later on only make the ideological skew worse by suggesting that the Emancipation Proclamation levelled the private law playing field except for attempts at de jure segregation struck down by the 14th Amendment.

27. For a criticism of Skelly Wright's decision not to expressly discuss institutional racism, see Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 306–07 (1994). For a defense of Skelly Wright's decision not to recognize Williams' race, see Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 446–50 (2012).

28. *See generally* Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 247 (2014); Julilly Kohler-

Electronic copy available at: https://ssrn.com/abstract=4371842

students reflexively identify the case as about race even in the absence of its overt mention.[29]

The opinion notes that Williams' last purchase, with new monthly payments that pushed her into default, was for a "stereo set" that cost $514 (in 1962). Every time I've taught the class, one or two White students have commented on the "extreme irresponsibility" of this purchase given her $218 per month welfare check. More on this later.[30] A second alleged "fact" that is part of the narrative for teachers oriented to the law and economics critique of the decision is that we would expect merchants selling household goods on credit to charge high prices with bad terms because of, and only because of, the high default rates of the Black poor. The capper, so to speak, is the claim that empirical evidence shows that merchants in poor neighborhoods make only modest profits. Much more on all of this later as well.[31]

Again, unless the teacher supplements the casebook, *Williams* will be one of a tiny number of cases in the first-year Contracts course that involve identifiable Black people, let alone poor Black neighborhoods. The upshot of all these factors combined is that in the case where they do appear, the opinion tries, in apparent good faith, to help out the Black poor. But it fails miserably because of some combination of their own racially stereotyped faults and the general counter-productivity of well-meaning paternalist interventions.[32] Given their several vulnerabilities in the classroom

---

Hausmann, *Welfare Crises, Penal Solutions, and the Origins of the "Welfare Queen,"* 41 J. URB. HISTORY 756 (2015).

29. *See* Penningroth, *supra* note 6, at 1259.

30. *See infra* text accompanying notes 118–120.

31. *See infra* text accompanying notes 139–153.

32. On the stereotyping effect, see Muriel Morisey Spence, *Teaching* Williams v. Walker-Thomas Furniture Co., 3 TEMP. POL. & C.R. L. REV. 89, 102–03 (1994) (discussing how *Williams*, while well worth teaching, also raises concerns about reinforcing particular stereotypes associated with African American women); Kastely, *supra* note 27, at 306 ("Judge

Electronic copy available at: https://ssrn.com/abstract=4371842

situation, only the occasional very bold student of color is likely to protest.

The twist, the bitter twist, is that this is all wrong.

II. LIBERAL RESPONSES AVOID CONFRONTATION WITH THE ECONOMIC ARGUMENT

It is not surprising that "hurt the people you're trying to help" passes unchallenged as just conventional wisdom among conservatives and law and economics-oriented professors more generally.[33] But it is striking that liberal defenders

Wright's opinion allows—even invites—the reader to use raced tropes linking poverty, lack of education, single parenthood, and lack of capacity with black women and to disregard the connection between white racism and exploitative pricing and collection practices."); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 38–39 (1995) (arguing that while the doctrine of unconscionability is an important tool to remedy oppressive or unfair situations, "the inclusion of African-Americans in legal textbooks only in [unconscionability] cases [like *Williams*] reinforces stereotypes and impedes the inclusion of all races as equal participants in contract law."); Crenshaw, *Race-Conscious Pedagogy*, *supra* note 6, at 6–9 (while not discussing *Williams* specifically, arguing that "unless the instructor clearly establishes antiracism as a norm, occasional uses of racial hypotheticals may anger and deeply offend most minority students."); Zalesne, *supra* note 6; Penningroth, *supra* note 6, at 1300 ("By making *Williams v. Walker-Thomas Furniture* the only '"colored" case' first-year law students read, contracts teachers have inadvertently reinforced racial stereotypes and relegated racial minorities to the marginal, seldom-used doctrine of unconscionability.") (citing Spence, *supra*, at 103) (footnote omitted). I don't agree with Penningroth that the doctrine and the case are marginal. Both were crucial to the creation of the modern statutory law of consumer protection and, as just described, law teachers and law and economics academics use them to introduce the "hurt the people" trope that will play a role throughout the curriculum.

33. Richard Epstein's 1975 article is one of the earliest and worst examples that offers an economic analysis of this kind, where he argues that cross-collateralization clauses serve the interests of both parties and striking down such a clause under substantive unconscionability would "do more social harm than good." Epstein, *Unconscionability*, *supra* note 17, at 315. According to HeinOnline, Epstein's article was cited by 376 law and law-related periodicals (searched for (("18 J.L. & Econ. 293" OR

Electronic copy available at: https://ssrn.com/abstract=4371842

of the use of unconscionability doctrine to police contract terms, and of the outcome in *Williams* in particular, only

---

"18 JL & Econ 293" OR "18:2 JL & Econ 293" OR "18 J. Law & Econ. 293") AND NOT id:hein.journals/jlecono18.17) in Law Journal Library) (last accessed Mar. 16, 2023). Half of the casebooks that I have reviewed dedicated a lengthy note or comment to the article and its argument, three of them including excerpts of the article. *See* AYRES & KLASS, *supra* note 14, at 27; EPSTEIN ET AL., *supra* note 14, at 409; FARNSWORTH ET AL., *supra* note 14, at 496–97; KNAPP ET AL., *supra* note 14, at 631; SCOTT & KRAUS, *supra* note 14, at 60 n.41. Sometimes, the note or comment barely does any work of showing students why exactly a cross-collateralization clause or substantive unconscionability is economically bad. One casebook, for instance, simply quotes the following paragraphs from the article:

> One of the major conceptual tools used by courts in their assault upon private agreements has been the doctrine of unconscionability. That doctrine has a place in contract law, but it is not the one usually assigned it by its advocates. The doctrine should not, in my view, allow courts to act as roving commissions to set aside those agreements whose substantive terms they find objectionable. Instead, it should be used only to allow courts to police the process whereby private agreements are formed, and in that connection, only to facilitate the setting aside of agreements that are as a matter of probabilities likely to be vitiated by the classical defenses of duress, fraud, or incompetence.
>
> When the doctrine of unconscionability is used in its substantive dimension, be it in a commercial or consumer context, it serves only to undercut the private right of contract in a manner that is apt to do more social harm than good. The result of the analysis is the same even if we view the question of unconscionability from the lofty perspective of public policy. "[I]f there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."

EPSTEIN ET AL., *supra* note 14, at 409; *see also* FARNSWORTH ET AL., *supra* note 14, at 496–97. For refutation of Richard Epstein's position on legal regulation of consumer contracts, see Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008).

Electronic copy available at: https://ssrn.com/abstract=4371842

rarely, as far as I've been able to determine, challenge it directly. Thoughtful supporters of the doctrine and of the outcome in *Williams* reduced to the hypothetical above, rely on a variety of non-utilitarian reasons for outlawing the clause. These reasons include protecting autonomy and meaningful consent (Williams obviously didn't understand what she was signing),[34] sanctioning the fault of the seller in offering unfair terms,[35] or in some combination of the above, sometimes with overt appeal to one form or another of paternalism.[36] A few take up "hurt the people" but marginalize it in one of a number of ways: this is a case of efficiency against equity,[37] or pass-along-the-cost arguments, are somehow irrelevant because perfectly competitive markets are exceptional.[38] The Contracts casebooks that are crucial to the broad dissemination of the "hurt the people" trope,[39] provide, with one or two

34. *See, e.g.*, Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131, 1146–47 (2016).

35. *See, e.g.*, Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1418 (2009).

36. *See, e.g.*, David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1679–80 (2009); Baird, *supra* note 24, at 944–45.

37. *See, e.g.*, Richard R.W. Brooks, *Credit Past Due*, 106 COLUM. L. REV. 994, 1018 (2006) ("At this point, it is important to stress that I firmly believe that the unconscionability doctrine serves an important and useful practical purpose, particularly in the fringe market. That purpose is largely justice, not efficiency."); Brian Bix, *Epstein, Craswell, Economics, Unconscionability, and Morality*, 19 QUINNIPIAC L. REV. 715, 722–25 (2000); *see also infra* note 39.

38. *See, e.g.*, Eisenberg, *supra* note 35, at 1416–17.

39. Some liberal casebook authors frame the debate about unconscionability as objection based on economic efficiency *vs.* defense based on fairness or justice. *See*, *e.g.*, KNAPP ET AL., *supra* note 14, at 631–32 (after introducing Richard Epstein's claim that cross-collateralization clauses benefit both parties, introducing Hazel Beh's defense that, despite all its weaknesses, the "doctrine of unconscionability serves a fundamental role in promoting fairness in contractual relationships"); *see also* EPSTEIN ET

Electronic copy available at: https://ssrn.com/abstract=4371842

notable exceptions, neither intelligent economic analysis[40] nor the factual context that would permit students to critique it.[41]

There is, however, literature taking up the question of how much, if any, of a seller's increased cost of compliance with a new duty will be passed along, how much he will reduce sales, and how his response to the new duty will affect consumer welfare. This literature begins with Bruce Ackerman's famous article about the enforcement of housing codes, a concrete application of the critique of "hurting the people."[42] The basic message of this approach is that the welfare consequences for consumers and the wealth consequences for sellers or lenders[43] depend on the particular configuration of

AL., *supra* note 14, at 409–10 (including an excerpt from Justice William J. Brennan's article that highlights Skelly Wright's judicial activism and his commitment to "justice" and "righteousness," following an excerpt from Richard Epstein's 1975 article). *Cf.* FARNSWORTH ET AL., *supra* note 14, at 496–97 (pitting Richard Epstein against Melvin Eisenberg, who defends unconscionability in certain circumstances on fairness grounds, including when "the relevant market deviates from a perfectly competitive market.").

40. *But see* MARKOVITS, *supra* note 14, at 1695–1705.

41. *But see* FARNSWORTH ET AL., *supra* note 14, at 502. The key factual context for the case, to be discussed *infra* notes 65–81 and accompanying text, was included for the first time in the sixth edition of the casebook. *See* E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 407–08 (6th ed. 2001). Muriel Spence's discussion of the case might have informed this change. *See* Spence, *supra* note 32, at 102 n.61 (discussing a workshop where Farnsworth invited participants to offer suggestions for his casebook).

42. Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971).

43. On the wealth consequences of compulsory terms for sellers, there was an initial vigorous debate provoked by Ackerman's denial of any ethical basis for landlord complaint in the low-income housing context. Charles Fried's CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) provides an important statement of the position that

Electronic copy available at: https://ssrn.com/abstract=4371842

firms in each particular market as well as on the shapes of supply and demand curves.[44] As we will see in what follows, Russell Korobkin has greatly, even dramatically, advanced the discussion by the incorporation of realistic assumptions about consumer behavior faced with complex contract terms.[45] But as far as I can tell, the only relatively recent piece that attempts to apply the abstract discussion of the distribution of harms and benefits is by Jean Sternlight and Elizabeth Jensen on whether compulsory arbitration clauses in contracts (by now) of all kinds should be banned as unconscionable.[46]

---

striking down an exploitive contract as the one in *Williams* as unconscionable is not only counterproductive but also unfair: even if it helps poor consumers, it is unjust because it deprives sellers, even monopolists, of their profits based on legally permitted actions that are therefore "blameless." *See infra* note 84. It is difficult to find this argument in the subsequent debate. The "hurt the people" trope obviates the need, replacing it with earnest concern for the welfare of the victims.

44. *See* Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815. 1818–27 (1976); Kennedy, *Distributive and Paternalist Motives*, *supra* note 8, at 615–20; Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485, 497–98 (1987) [hereinafter Kennedy, *Effect of the Warranty of Habitability*]; Duncan Kennedy, *Cost-Benefit Analysis of Debtor Protection Rules in Subprime Market Default Situations*, *in* BUILDING ASSETS, BUILDING CREDIT: CREATING WEALTH IN LOW-INCOME COMMUNITIES 266, 270 (Nicolas P. Retsinas & Eric Belsky eds., 2005); Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 377–80 (1991).

45. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

46. *See* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004). Adar and Becher provide a valuable catalogue of the many ways in which boilerplate terms can injure consumers. *See* Adar & Becher, *supra* note 22. Unfortunately, their normative proposal is both ambiguous and vague on how to treat the "hurt the people" argument. They propose to ban any term that

Electronic copy available at: https://ssrn.com/abstract=4371842

This passage from Louis Michael Seidman, a deservedly highly respected liberal public law scholar writing in a law review issue devoted to Skelly Wright's legacy, represents progress because it recognizes the problem without claiming to be able to solve it.

> On conventional, neo-classical economic premises, Wright's regulatory interventions in these markets were bound to backfire. Because he could not and did not completely control private markets, ordinary market transactions would undo the effect of the regulation. Thus, raising landlords' costs produces less investment in low-income housing and constraining "predatory" credit terms reduces the availability of credit.
>
> The economics behind these assertions is contested and complicated, and I make no claim to the expertise necessary to adjudicate the dispute. One thing is certain, though. Nothing Wright did or had the power to do could *increase* the supply of credit and housing for poor people.[47]

"might result in serious harm or loss to consumers that cannot easily be avoided and that is not outweighed by any benefit the average consumer may obtain from the transaction." *Id.* at 2420. The benefit in question being price reduction on the underlying commodity. This treats avoiding serious harm to the "average" consumer as a hard limit on banning the clause regardless of the benefits that may accrue to particular classes within the group, defined for example by race, gender, or wealth. But in elaborating their test, they restrict it even further by adding benefits to the seller to the calculus: the decision maker has "to engage in market analysis, consult big data, and compare aggregate harms to consumers and aggregate benefits for firms. [Administrative] agencies are better equipped to analyze data pertaining to levels of competition, market structure, prevalent industry customs, the relationship between terms and prices, and the potential impact of agencies' intervention on third parties (suppliers, investors, lenders, servicers, other industries, etc.). . . . Without reliable information on these matters, one cannot expect courts to decide whether a particular standard term is harmful or inefficient." *Id.* at 2444. This Article proposes just this type of detailed market analysis but to pose simply the question of whether banning the term benefitted poor black neighborhood residents. On the role of efficiency in this type of analysis, see *infra* text accompanying notes 133–137.

47. Louis Michael Seidman, *J. Skelly Wright and the Limits of Legal Liberalism*, 61 LOY. L. REV. 69, 87 (2015).

Electronic copy available at: https://ssrn.com/abstract=4371842

Seidman's honest avowal signals a disastrous state of affairs for progressive advocacy for the poor. If judges cannot affect outcomes favorably to the poor without the ability to control prices and quantities in private markets, then not just judge-made but also all legislative consumer protection,[48] for example Truth in Lending and mortgagor protection, has been, is, and will be counter-productive. Consumer protection has to start from an immovable political consensus that includes most liberals forbidding price and quantity control of consumer transactions. Control of the market is never more than partial. Conservative law and economics scholars draw the conclusion that, in the words of Alan Schwartz and Louis Wilde, "[g]eneral bans [of contract terms] are seldom an appropriate response to imperfect information about market opportunities."[49]

My goal here is to persuade readers who share Seidman's take that what Skelly Wright and his liberal judicial allies did in this and similar cases circa 1965–80 and what consumer advocates and ghetto rioters persuaded Congress and many state legislatures that adopted the Uniform Consumer Credit Code to do in the ensuing period, in all likelihood improved the welfare of borrowers in poor Black neighborhoods. And did it without raising the price of credit or reducing the supply at all, or by a very little. That they improved the credit supply without increasing it does not detract from the beauty of what they did.

III. BUYER/BORROWERS IGNORE NON-PRICE CONTRACT TERMS; SELLER/LENDERS ARE OLIGOPOLISTS

Teachers generally teach the *Williams* case to make an argument about compulsory contract terms in general, just

48. *See generally* NAT'L CONSUMER L. CENTER DIGIT. LIBR., https://library.nclc.org (last visited Mar. 22, 2023).

49. Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1457 (1983).

Electronic copy available at: https://ssrn.com/abstract=4371842

as Seidman observes.[50] We are trying to decide, using conventional neo-classical economic analysis, the much narrower question: whether it is likely or even very likely that a jurisdiction that banned cross-collateralization clauses, in the contracts of poor buyers in typical poor Black neighborhoods made them better off. Many complex and interesting questions about the very general argument are irrelevant when we bring the analysis down to this level. In this Part and throughout, I critique the conventional argument on the assumption that, for purposes of economic analysis, poor Black consumers are like other poor consumers. Race is not relevant to consumption decisions except in so far as it differentially impacts economic circumstances.

The first problem with the conventional analysis is that it implicitly assumes that consumers in general, White or Black, rich or poor, understand the term and that all or most of them will pay the seller something more for the goods if he is forced to abandon the term, eliminating the danger of blanket repossession. The second is that it assumes that the market in question is competitive.[51] The economic analysis of the distributional effect on these consumers of banning the term changes dramatically when we relax these assumptions.

A. *Consumers Don't Read Contract Terms in Small Print*

According to a seminal article by Alan Schwartz and Louis L. Wilde,[52] information asymmetry between buyers

---

50. *See*, *e.g.*, MARKOVITS, *supra* note 14, at 1698 ("As regards the substantive component of unconscionability, do rules that require certain pro-consumer contract terms (or prohibit certain anti-consumer terms) in the end benefit consumers?").

51. *See, e.g.*, SCOTT & KRAUS, *supra* note 14, at 60 ("[W]ould Walker-Thomas force a cross-collateral clause on their customers? Yes, if they had monopoly power and if the owners preferred forcing these clauses on buyers more than the owners preferred greater profits. Neither of these assumptions seems very plausible.").

52. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U.

Electronic copy available at: https://ssrn.com/abstract=4371842

and sellers of consumer goods means that most consumers will pay, without protest, prices that are far above the sellers' cost plus their normal profit. For credit terms, the asymmetry is even greater: the borrower is "at the mercy" of the lender. However, for Schwartz and Wilde, there is a silver lining in this dark cloud.[53]

In a competitive market, as Schwartz and Wilde model it, there are some buyers who "shop." They are willing to hold off buying while they explore alternatives to the price that the uninformed willingly pay. A seller who reduces his price in a way that is accessible to these marginal buyers can increase his market share at the expense of competitors. They in turn have to fight back with their own reductions until price equals cost. For credit terms, sellers will offer the terms that shopping buyers want because if they are worth more to the buyer than they cost the seller, then the seller who offers them will take customers from his competitors. The seller's higher price is worth it for a better package.[54]

According to the behavioral economics literature pioneered by Russell Korobkin,[55] rational buyers, educated or not and whether or not they shop for price, ignore fine print credit terms because it would take a lot of time even to begin

PA. L. REV. 630 (1979).

53. *See id.* at 643–51.

54. Adar and Becher provide a valuable catalogue of research showing that there will be few shoppers for terms in consumer contracts. *See* Adar & Becher, *supra* note 22, at 2426–27. Where this is the case, as I argued in *Distributive and Paternalist Motives*, sellers will have a perverse incentive to include terms that reduce their costs but cost consumers far more than sellers gain, then reduce their prices to take customers from rivals with better terms. *See infra* text accompanying notes 60–62. Adar and Becher oddly misconstrue as about shoppers my argument about the contrary case where sellers have an incentive to improve terms and increase prices to increase profit and take market share from rivals who stay put. *See* Adar & Becher, *supra* note 22, at 2426 n.108 and accompanying text.

55. Korobkin, *supra* note 45.

Electronic copy available at: https://ssrn.com/abstract=4371842

to understand them and probably would turn out to be impossible given their technical phrasing. They cover events that are unlikely to occur,[56] and it would be naïve to believe that the legal system will offer practical redress for consumer grievance regardless of the contents of the contract. Rational buyer decisions to ignore fine print terms are reinforced by standard cognitive deficits overestimating present risks while underestimating long-run risks when deciding to put time and effort into understanding terms.[57] Low educational levels and poverty are not necessary for these effects to exist, but it seems likely that they exacerbate them.

Here is the cross-collateralization clause buried in the middle of the fine print in the Walker-Thomas form contract Williams signed:

> If I am now indebted to the Company on any prior leases, bills or accounts, it is agreed that the amount of each periodical installment payment to be made by me to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by me under such prior leases, bills or accounts; and all payments now and hereafter made by me shall be credited pro rata on all outstanding leases, bills and accounts due the Company by me at the time each such payment is made.[58]

In my experience, only a small minority of first-year students manage to figure this out on their first read without some help.[59]

If there are shoppers for price but not for terms, there is no incentive for sellers to figure out which terms borrowers

---

56. *See id.* at 1232–33.

57. *See* Markovits, *supra* note 44, at 1822–23; Kennedy, *Distributive and Paternalist Motives*, *supra* note 8, at 600; Craswell, *supra* note 44, at 391; Korobkin, *supra* note 45, at 1232–33.

58. Fleming, *supra* note 2, app. at 1440.

59. For a similar teaching experience, see Spence, *supra* note 32, at 97. Spence would assign the contract clause in a class session before she taught *Williams*. Students were given a full two minutes to read the text but generally had difficulty understanding what it meant.

Electronic copy available at: https://ssrn.com/abstract=4371842

want or to compete in offering them. Sellers have the opposite incentive: namely, to adopt cost reducing terms even when they benefit by less than the harm to consumers. Demand will not fall no matter how buyer-unfriendly the terms. Moreover, assuming a competitive market, a seller who voluntarily increases his price to cover terms that customers would willingly pay for, if they knew about them, will lose price-shopping customers to rivals who face no buyer pressure to follow suit.[60]

B. *Effects of Consumer Ignorance in a Competitive Market*

According to the standard analysis,[61] responding to consumer ignorance by outlawing a term like the clause, making the pro-consumer default rule compulsory (that is, that goods are only collateral for the loan to purchase them), will have complicated distributional consequences. Still assuming a competitive market, firms have zero or break-even profits. In that case, the full increased cost of banning the clause has to be passed along whether or not consumers are aware of it because sellers have no profit margin to absorb it. When all sellers raise the price, some buyers leave the market, priced out, but that drives the price back down some. Those who stay in pay a higher price but one that is still below the full cost of the term to sellers.[62] The compulsory term has different pros and cons for different classes of buyers according to

60. *See* Korobkin, *supra* note 45, at 1214; Kennedy, *Distributive and Paternalist Motives*, *supra* note 8.

61. *See* Markovits, *supra* note 44; Kennedy, *Distributive and Paternalist Motives*, *supra* note 8; Korobkin, *supra* note 45; Craswell, *supra* note 44.

62. *See* Markovits, *supra* note 44. An important qualification is that in the unusual but theoretically interesting case in which all the competing firms operate at the bottom of identical upward shaping cost curves and the industry supply curve is horizontal, any compulsory term—no matter how small—will push all firms into bankruptcy. *See* Korobkin, *supra* note 45, at 1209–10. In the real world, competitors differ in various

Electronic copy available at: https://ssrn.com/abstract=4371842

their preferences and to how expensive the term is for sellers.[63] For our purposes, however, we can ignore these interesting questions[64] because the D.C. neighborhood market for household goods on credit was not competitive in 1965 any more than it is today.

C. *The Merchants in Poor Black Neighborhoods in D.C. in 1965 Were Oligopolists Serving a Quasi-Captive Neighborhood Market*

A complex set of market conditions, each of limited importance in isolation, combined to make poor Black neighborhoods in the 1960s unique for the purposes of standard neoclassical analysis. In the prototype case,[65] the neighborhoods had: concentrated poverty in a racially segregated regional housing market; oligopolistic retail product and financial markets (a small number of sellers and lenders); and what I will call "low road" commercial practices in retailing, housing and credit.

We know a good deal about how the *Williams* case fits into this picture from an excellent contextualizing article by

---

ways so that the supply curve is upward sloping. The cost of the compulsory term reduces supply at any given price but does not wipe it out.

63. Which buyers get the benefit of the default rule below its cost to the lender depends on who happens to stay in the market when the price goes up. But those who stay may or may not be among those who value the term more than it costs. And likewise, some who leave in response to the price increase might have stayed in if they had understood. Then there is the question of how many defaulters get the "after the fact" benefit of losing only not-yet-paid-off purchases rather than the whole bundle.

64. Craswell seems to be the last author to take the analysis this far but without considering the case where consumers are ignorant of what terms they are getting. *See* Craswell, *supra* note 44, at 373–80; *see also* Kennedy, *Distributive and Paternalist Motives*, *supra* note 8; Markovits, *supra* note 44.

65. *See generally* NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 91–140 (1968).

Electronic copy available at: https://ssrn.com/abstract=4371842

the late Anne Fleming called *The Rise and Fall of Unconscionability as the "Law of the Poor,"*[66] and from a 1968 post-riot FTC *Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers.*[67] Fleming does not take a position in the debate about the economics of cross-collateralization clauses. She does collect previous research on the case and provide new facts and a picture of how the low road worked for sales on credit in D.C. at the time. According to her:

> Walker-Thomas Furniture sits on the border of two census tracts. In 1940, the tracts were 69% and 96.7% African-American; 83.7% and 98.2% in 1950; 94.4% and 99.5% in 1960; and 92.4% and 99.8% in 1970. Families earning less than $3,000 per year made up 40.7% of one tract and 45.9% of the adjacent tract.[68]

---

66. Fleming, *supra* note 2. For an earlier and less comprehensive article that contextualizes *Williams* against the racially and economically segregated neighborhoods, see also Kastely, *supra* note 27, at 305–10. Kastely criticized Skelly Wright for leaving to readers the job of "translat[ing] the text to mean that Williams is black, living in highly segregated, racially exploitative Washington, D.C.," even though he "did consider this case to involve the exploitation of low-income people of color by merchants who charge high prices and engage in harsh collection techniques, enabled in part by racist barriers, which prevent many people of color from shopping at less expensive stores, and in part by burdens of transportation, child-care, and ill-health, which are aggravated by racially unfair systems of public transportation, child-care, and medical service." *Id.* at 306–07. Writing three decades after the decision, Kastely then added that such "racist barriers and burdens continue to effect the lives and commercial choices of black people in the District of Columbia." *Id.* at 307.

67. FED. TRADE COMM'N, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS (1968), *reprinted in Consumer Protection Legislation for the District of Columbia: Hearing on S. 316, S. 2589, S. 2590, and S. 2592 Before the Subcomm. on Bus. & Com. of the S. Comm. on the Dist. of Columbia*, 90th Cong. 251 (1968).

68. Fleming, *supra* note 2, at 1393 n.49. Williams also lived in a poor Black neighborhood. "In 1960, Williams's census tract was 99.8% African-American and 25% of families earned less than $3,000 per year. In

Electronic copy available at: https://ssrn.com/abstract=4371842

In the entire District of Columbia in 1965 there were, according to the FTC study, eighteen stores specializing in selling household goods on installment credit to a low-income clientele and having estimated sales of at least $100,000.[69] They were clustered in poor Black neighborhoods.[70] The customers of the stores were racially excluded from housing outside their neighborhoods, had limited education, and worked at low paying jobs or were dependent on welfare or social security.[71] In particular, about half of unmarried women customers—single, divorced, separated, or widowed—were receiving social security, pension, welfare, alimony, or income from relatives.[72] Most customers had virtually no access to credit outside the low-income retail market.[73] There was no internet. Outside the poor neighborhoods, downtown department stores had high qualifying requirements for a loan (and

this period, before the release of official federal poverty guidelines, President Johnson's Council of Economic Advisors set the poverty line at $3,000 in 1962 dollars for all families, regardless of size." *Id.* at 1392 n.42 (citation omitted).

69. FED. TRADE COMM'N, *supra* note 67, at 256–57.

70. *Id.* at 257 ("Low-income market retailers were, for the most part, located in what could be described as neighborhood shopping areas in or adjacent to low-income areas. A characteristic of low-income market stores is that they are unlikely to draw any substantial volume of business from the more affluent sections of the city or from the suburbs.").

71. *See id.* at 279–84; *see also* Kastely, *supra* note 27, at 306–07. A decade after *Williams*, David Greenberg found, based on 1975 field research, that "[the] business [of Walker-Thomas] [was] derived almost completely from a very narrow clientele: welfare, Social Security, and Supplemental Security Income recipients; unemployed people; and segments of the working poor. All [had] one characteristic in common: an inability to obtain credit for major purchases in normal retail stores." David I. Greenberg, *Easy Terms, Hard Times: Complaint Handling in the Ghetto*, *in* NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 379, 381 (Laura Nader ed., 1980).

72. *See* FED. TRADE COMM'N, *supra* note 67, at 283.

73. *See id.* at 284–85.

Electronic copy available at: https://ssrn.com/abstract=4371842

were none too friendly to poor Black visitors).[74]

The information we have about the market indicates that some sellers, including Walker-Thomas with $4 million dollars of sales, were long established businesses operating as the lead firms in a local oligopoly. Here is Fleming's description:

> Merchants serving low-income consumers clustered in a row on Seventh Street, known as an "easy credit" corridor. The Walker-Thomas Furniture store had occupied the same three-story retail space on Seventh Street since 1938, when it moved from its prior location down the block. The storefront was easily recognizable from a distance. A two-story-tall neon sign placed in the center of the yellow brick building advertised the store's name in vertically arranged characters spelling out "Walker-Thomas."[75]

According to the FTC study, low-income market retailers' markups were wildly variable,[76] but were generally two or three times higher than markups for general market retailers.[77] Most of them charged for the credit dimension of the transaction by large "add-ons" on top of the already high selling price.[78] The FTC study pointed out that there was no "effective price competition" among them and that they competed instead by taking "greater credit risks."[79] It also acknowledged that "the opportunity for high pressure or deceptive selling [was] great" given door-to-door sales, which were common in the low-income market.[80]

In short, the facts in *Williams* were typical of the poor

---

74. *See id.*

75. Fleming, *supra* note 2, at 1393 (footnotes omitted).

76. FED. TRADE COMM'N, *supra* note 67, at 256.

77. *Id.* 253, 263–66.

78. An exceptional low-income market retailer that did not impose separate finance charges had even higher markup than the other low-income market retailers; its price was on average three times the cost. *Id.* at 271.

79. *Id.* at 254.

80. *Id.*

Electronic copy available at: https://ssrn.com/abstract=4371842

Black neighborhoods of the time, and not very different from the poor Black neighborhoods of today, a half century or so later. National chains of "rent to own" stores have displaced the poor neighborhood household goods stores, but the business model seems to be the same.[81]

IV. Redistributing Sellers' Oligopoly Profits Through Compulsory Terms

As a general matter, those oligopolists (oligopoly equals a market with small number of sellers) who have the ability to raise their individual firm prices without losing all their customers to rivals are engaged in what economists call "monopolistic competition."[82] They typically compete not on price but on factors like location, branding, advertising, discounts, and sales. They use their high prices along with these devices to raise their revenue above cost up to the point where the additional revenue for each unit sold to loyal customers is less than the reduction of revenue from lost customers.[83]

When costs increase because of a new compulsory term, the seller will raise his price to compensate. The goal is to give up as little profit as possible. He increases price only until the increased revenue per unit is less than the revenue lost from defectors. How much of his profits will have to go to

---

81. *See infra* notes 177–178 and accompanying text.

82. "[I]f firms have differentiated products with varying attributes, brand image, or location of sale, then each firm can have some local market power to charge above marginal cost to customers who are close to it in location or quality or brand preferences. Economists call both sorts of situations cases of 'monopolistic competition,' to distinguish them from our ideal case of perfect competition, but since fixed costs or product differentiation are a reality in most markets, this is the type of competition the law typically means and can at most aspire to have." EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST 278 (2nd ed. 2011).

83. Assuming constant cost, so that $AC=MC$, the oligopolist picks the price at which $MC(AC)=MR$ meaning the increment of revenue from raising the price given that the price rise means fewer units sold.

Electronic copy available at: https://ssrn.com/abstract=4371842

paying the cost of the term depends on how much price increase the loyals who stick with him will stand, given how much they were paying for the product before the clause was banned.[84] A quasi-captive market like the one in *Williams* allows larger increases above cost because it is difficult for customers to desert to stores outside the neighborhood.

In the next Section, I argue that what we know about the "low road" operations of low-income sellers on installment credit in poor Black neighborhoods strongly suggests that, above and beyond these anticipated oligopoly profits, sellers extracted so much of buyer willingness to pay through their marketing techniques that there was little or no margin for price hikes without sharp curtailment of demand. This means that the seller probably had to eat most or all of the cost rather than passing it along. Because of the ample profit cushion to absorb increased costs, there would have been minimal or no motive to curtail sales.

A. *Seller Surplus on the "Low Road": No Shopping for Either Price or Terms*

In this Section, we relax the assumption that the presence of shoppers meant that Walker-Thomas set a price for each item it sold based on the anticipated reaction of price-

84. Charles Fried may be the only commentator to discuss the possibility that the market power of the low-income market retailers permits them to reap monopoly profits. He opposes responding with a compulsory term, in a critique of the position taken here, with the argument that monopoly positions obtained without engaging in "restraint of trade" are "blameless." If the problem is the poverty of consumers, the only appropriate solution is to eliminate poverty through general public law rather than targeted redistribution from their contractual partners. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 107–08 (2nd ed. 2015). See *supra* note 43 and accompanying text. This is the argument that Justice Sutherland made against a minimum wage law for women workers in *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923). The minimum wage, he argued, expropriated that profit the employer made from the perfectly legal exercise of his superior bargaining power. *But see* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

Electronic copy available at: https://ssrn.com/abstract=4371842

shoppers.

Again, Fleming's contextualizing article provides details of Williams' transactions with Walker-Thomas that don't appear in either the majority or the dissenting opinion. The goods Williams bought (or "hired"[85] according to the seller's characterization) in her first purchase in 1957 were: "a wallet, two pairs of solid-colored drapes, an apron set, a potholder set, a set of throw rugs."[86] Over the course of the next five years, she bought "another pair of drapes, a folding bed and mattress, a chest of drawers, a rug, four pairs of curtains, four sheets, a portable fan, a portable typewriter, two (presumably toy) guns and holster sets, a metal bed, an inner spring mattress, four kitchen chairs, a bath mat set, shower curtains, a washing machine, and a stereo."[87] The last purchase of a stereophonic record player for $514 increased her total balance due from $164 to $678.[88] After just four months of paying the increased monthly charge of $36, Williams was not able to pay regularly but still paid a total of $102 for three more months.[89] Walker-Thomas, however, refused to accept partial payment, filed its complaint, and received its order for repossession. Under D.C. law at the time, there was no

85. Fleming, *supra* note 2, at 1396.

86. *Id.* at 1395.

87. *Id.* at 1396 n.60.

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

89. Fleming, *supra* note 2, at 1397. Fleming suggests, based on payment receipts in evidence, that Williams' payments were irregular even before the purchase of the stereo. *Id.* at 1397 n.64. If that was the case, we can speculate that Walker-Thomas let Williams cure her defaults until it (suddenly) didn't, which aligns with Greenberg's description of Walker-Thomas salespersons' practice in the 1970s. According to Greenberg, Walker-Thomas' door-to-door salespersons led customers to perceive their relationships with them as "a fluid, bargaining relationship rather than a strict, legal one" by allowing flexibility towards missed payments until they (suddenly) did not, usually after the costs were covered. Greenberg, *supra* note 71, at 385.

Electronic copy available at: https://ssrn.com/abstract=4371842

requirement of an appearance by Williams though presumably Walker-Thomas had her served with notice of the complaint.[90]

The bailiff Walker-Thomas paid to execute the writ took the recently purchased stereo and the washing machine, along with the bed and the chest purchased in 1958, sparing the rest for whatever reason.[91] At the time, Williams had paid Walker-Thomas approximately $1,056 out of $1,500 charged, an amount that presumably included interest, late fees, and other charges. To get an idea of how much the finance charges might have been, the FTC study notes that effective annual rates of finance charges, usually charged on an "add-on" basis, were on average 25% for low-income market retailers.[92] The bailiff attached an estimated used market value to each item (thereby establishing what part of Williams debt had been paid off by the seizure): the stereo was worth $75, the bed $7.50, the chest $9, and the washing machine $0.[93]

To figure out whether reducing, to just the stereo, what Walker-Thomas could repossess on default would be good or bad for poor Black neighborhood residents as a class, we need to put these facts in the context of the specific market where they occurred. One key to the "low road" is that all seller/lenders are specialists selling only or almost only on

---

90. Fleming, *supra* note 2, at 1397 n.67. Baird seems to have been unaware that the District had not yet reformed its traditional law to require an appearance before a judge. Baird, *supra* note 24, at 944 n.39.

91. Fleming, *supra* note 2, at 1397. Fleming, based on the court records, suggests that the Marshals either couldn't find the rest or refused to seize them. However, Pierre E. Dostert, who represented Williams, wrote in 1969 that the Marshal seized other, more trivial items as well. Pierre E. Dostert, *Case Studies in Consumer Fraud*, 25 BUS. LAW. 153, 153–54 (1969).

92. FED. TRADE COMM'N, *supra* note 67, at 271.

93. Fleming, *supra* note 2, at 1398 n.70.

Electronic copy available at: https://ssrn.com/abstract=4371842

credit only to buyer/borrowers in poor Black neighborhoods.[94] According to the FTC study, 92.7% of low-income market retailers' sales were on the installment plan, compared to 26.7% of the general market retailers'.[95] The buyers from these retailers in general had no other credit references.[96] One court judgement was obtained for every $2,599 of the low-income market retailers' sales, compared to every $232,299 of the general market retailers.[97]

The second key is that Walker-Thomas and presumably other low-income market retailers sold both new and used (including repossessed) goods.[98] In other words, repossession

94. *See* Greenberg, *supra* note 71, at 381 ("In fact, credit is not merely available at Walker-Thomas; it is required. The company often tells customers that, for purchases above $100, credit is the only acceptable method of payment . . . .").

95. FED. TRADE COMM'N, *supra* note 67, at 258.

96. *Id.* at 284–85.

97. Eleven low-income market retailers reported a total of 2,690 judgments in 1966, resulting in 1,568 garnishments and 306 repossessions which would seem to indicate that low-income merchants realize substantial success in minimizing bad debts. In contrast, twelve general market retailers reported only ninety-nine judgements, resulting in thirty-five garnishments and sixteen repossessions. *Id.* at 278.

98. A technical issue, which has no bearing on this or the usual poor Black neighborhood but has confused commentators and some casebook writers regardless, is whether Walker-Thomas could have kept and resold the goods keeping the proceeds even if they exceeded her debt. The answer to this question is that under the law that existed at the time of Williams' transactions, Walker-Thomas could have, because the conditional sales at that time in the District were treated distinctly from other secured transactions. *See* Fleming, *supra* note 2, at 1431 n.317. *See also* Robert H. Skilton and Orrin L. Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1477–78 (1967) ("The transactions in *Williams* and *Thorne* were in fact conditional sales. At common law the conditional seller could, upon default by the buyer, repossess and keep the goods plus all payments made."). After Williams' transactions with Walker-Thomas, however, the District adopted the Uniform Commercial Code, which does not distinguish conditional sales from other secured transactions. Douglas Baird

Electronic copy available at: https://ssrn.com/abstract=4371842

was an integral, even a central element in the low-income market business plan.[99] In sharp contrast with the general market retailers, the low road revenue maximizing strategy for a given product was to make credit widely available, understanding that profit would be based on a stream of monthly payments (generally without a down payment) based on a non-competitive item price, including finance and late charges, and plus the in-store resale value of substantial quantities of repossessed goods.

In this model, the cross-collateralization clause performs two functions. On the one hand, it increases what proportion of the borrower's goods the seller will be able to repossess and sell (or resell) in case of default. It thereby reduces lender's net bad debt losses. In the *Williams* case, it is striking that the bailiff's on site estimated "market value" of the seized goods was a small fraction of the purchase price, and some of the goods the bailiff spared had no resale value at all.[100] Williams settled with Walker-Thomas for the disputed repossession for only $200 total. But we don't know even approximately the resale value of the goods, to Walker-Thomas, a specialist in used goods sales, as opposed to what they would bring if sold by an individual owner on the general market.[101]

---

appears to be wrong when he asserts to the contrary. *See* Baird, *supra* note 24, at 944 n.39. The issue has no bearing on the distributive question discussed in this piece because in Williams' case, and typically, the resale value (of the used consumer goods) was a fraction of the unpaid balance (of the grossly inflated price). The cross-collateralization clause is penal not because it allows the seller to repossess and then sell for more than the outstanding debt but because it threatens extreme disruption by taking away essential household items which the poor debtor will be unable to replace. *See infra* text accompanying note 105. There is a different debate about whether contemporary rent-to-own contracts should be regulated as credit sales or true lease. The rent-to-own industry is strongly against regulations that make them look like credit sales. *See* Jim Hawkins, *Renting the Good Life*, 49 WM. & MARY L. REV. 2041, 2105 (2008).

99. FED. TRADE COMM'N, *supra* note 67, at 279.

100. *See supra* text accompanying note 93.

101. *See infra* note 121 and accompanying text.

Electronic copy available at: https://ssrn.com/abstract=4371842

The second function of the clause is to make default less likely by creating a classic forfeiture.[102] Although the resale value of the goods might be only a fraction of their sale price, their value to Williams as measured, say, by the price she would have asked to give them up, was likely a large multiple of the amount of her default—probably at least what it would have cost to replace them. The goods were household necessities, the basic furnishings for her home.[103] She had no source of income beyond her welfare check of $218.[104] The idea of the forfeiture is that gaining this deterrent to breach is costless to the seller. He just has to add a clause to the contract.

Remember that we are assuming that buyers do not shop for terms so it might appear that the forfeiture could have no deterrent effect. But as pointed out by Eben Colby, the practice of blanket repossession by low-income poor Black neighborhood merchants may have been well known in the community of borrowers since it was, as we just saw, a common occurrence.[105] In this situation, it was likely that the clause

102. *See* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 392–93, 393 n.62 (1990) (describing self-help repossession as an example of "nonlegal sanction for breach of a commitment," or a "bond" posted by the promisor/debtor ex ante that will be forfeited upon breach); *see also* Brooks, *supra* note 37, at 1003–05 (distinguishing the "collateral and coercion functions" of security interests and highlighting the salience of the latter for "fringe creditors" targeting low-income market).

103. Korobkin, *supra* note 14, at 467.

104. Fleming, *supra* note 2, at 1392 n.42.

105. Eben Colby, *Comment, What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625, 652 (arguing that it is more likely that the Walker-Thomas' practice was well known in the community); *see also* Spence, *supra* note 32, at 96 (pointing out that Williams might have been "street wise" about how low-income market retailers work given her long experiences with such stores); LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 180 (2011) ("Repossessions were public affairs that everyone in the

Electronic copy available at: https://ssrn.com/abstract=4371842

as deterrent was significant and banning it in favor of the default rule would increase seller/lender costs.[106] The question in deciding the net outcome for buyer/borrowers as a class is whether seller/lenders' price increase or supply restriction when they lost the clause would offset the benefit to the class as a whole of escaping the fear and fact of blanket repossession for a small default. Below, I argue that the practices of one-on-one in store bargaining and door-to-door sales made compensating price hikes highly unlikely and that the ex post benefit of safety from blanket repossession was likely large.

---

neighborhood could witness. Repo men would come and remove the family television, publicly shaming the family."). In the long FTC rulemaking process summarized *infra* note 131, the industry argued that blanket security interest over household goods was essential to "enhance a debtor's sense of moral obligation and to encourage prompt payment" and was "evidence of a debtor's good faith effort to repay." See the following response from an industry witness, quoted in the Regulatory Analysis on the final 1984 rule:

Q. What is there about security interests in household goods that seems to qualify an otherwise marginal debtor for credit?

A. Well, there are several things. First of all, I do believe and have experience that household goods do provide some monetary security. . .

Number two, there is a psychological disadvantage to the consumer, in a sense (I hate to use the word "disadvantage"), in fact that we eventually back that truck up, tote his stuff out. His neighbors see it; his friends see it. It is embarrassing. It shows up on his credit record as a repossession. Man, next to a charge-off, that about as bad as you can do."

Security Interests in Household Goods, 49 Fed. Reg. 7765 (March 1, 1984).

106. My supposition is that these buyers did not associate blanket repossession with the terms of the contracts they were signing—even though they knew that it was "the practice" and that there was nothing they could do to stop it once the bailiff suddenly appeared at the door. I imagine that the deterrent effect lasted a long time after the D.C. Consumer Credit Code banned the clause until gradually people realized it wasn't happening anymore, not attributing the change to the code or the working of the "contract."

Electronic copy available at: https://ssrn.com/abstract=4371842

B. *In-Store One-on-One Bargaining*

Prices for consumer durables in the low-income market are based on one-on-one bargaining rather than on take-it-or-leave-it sticker prices as in department stores or conventional merchants. A familiar contemporary analogy is bargaining for a new or used car in a dealership.[107] True, sellers advertise prices in various ways, including displays in windows. These are often loss-leader items that the seller uses to lure customers into the store. At that point a salesman working on a commission based on sales works to switch the customer to higher priced items. This means that reported information on markups tells little about what is really going on.

As Korobkin explains, the situation once the customer has entered the bargaining process resembles bilateral monopoly.[108] The goal of the seller and of the salesman working on commission is to get as close as possible to the buyer's reservation price, meaning the price at which he will leave the store. The buyer has no information about the seller's reservation price—that is about how low he will go to get the sale. The sticker represents the seller's first offer and bears only a very limited relationship to his cost. If the buyer is hesitant, the salesman makes adjustments on all aspects of the deal, including price but also bonus items, free delivery, etc. It will be well-nigh impossible if a deal is struck for the customer to put a single price on it, and to comparison shop would require ending the negotiation and beginning again—perhaps down

---

107. *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818 (1991).

108. Korobkin, *supra* note 45, at 1214–15 ("Assume now that shopping is an extremely costly activity for buyers, such that no buyers shop among multiple sellers. Instead, each buyer interested in a widget visits a single seller, learns about the product attributes (including contract terms) offered by that seller, and then decides whether to purchase the widget or do without. In this situation, each seller is effectively a monopolist relative to each buyer that considers that seller's widgets and should determine contract terms and price as would any other monopolist.").

Electronic copy available at: https://ssrn.com/abstract=4371842

the street but under a whole new set of seller maneuvers. Twelve percent of all ghetto merchants (not just furniture and appliances) in a 1968 Kerner Commission Supplemental Study endorsed this practice of "bargaining with each customer and taking whatever breaks you can get," a figure regarded by the researcher as likely much lower than the number who actually engaged in the practice.[109]

The Kerner Commission Report of everything wrong with race relations in America presents retailing practices as a major grievance of residents of poor Black neighborhoods.[110] "High-pressure salesmanship" along with high pressure debt collection and defective products with no recourse to the seller are high on the list.[111] For our purposes, what counts is that the bargaining process means prices that approach the buyer's reservation price rather than the seller's bottom offer. The buyer comes close to leaving the store but is reeled back in by a last adjustment from the seller and the deal is done.

---

109. Richard Berk, *Doing Business in the Ghetto: Retail Merchants*, *in* SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 125, 129 (1968) ("Twelve percent of the merchants endorsed the most ethically questionable policy of 'bargaining with each customer and taking whatever breaks you can get.' Although this proportion is not very high, it still means that at least one store in eight is likely to take advantage of naive customers."). The survey did not ask what the merchant himself did but whether he "agreed to statements made by 'other merchants.'" It is therefore "probable that many merchants who do engage in this practice will not admit to endorsing this practice publicly. Hence twelve percent is probably an underestimate." *Id.*

110. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, KERNER COMMISSION REPORT ON THE CAUSES, EVENTS, AND AFTERMATHS OF THE CIVIL DISORDERS OF 1967, 139–40 (1967).

111. *Id*. at 140 ("[M]any merchants in ghetto neighborhoods take advantage of their superior knowledge of credit buying by engaging in various exploitative tactics—high-pressure salesmanship, 'bait advertising,' misrepresentation of prices, substitution of used goods for promised new ones, failure to notify consumers of legal actions against them, refusal to repair or replace substandard goods, exorbitant prices or credit charges, and use of shoddy merchandise.").

Electronic copy available at: https://ssrn.com/abstract=4371842

C. *Door-to-Door Sales*

Although we don't know it from the opinion, Williams visited the store only once and made the rest of her purchases from a door-to-door salesman.[112] Door-to-door sales were an essential part of Walker-Thomas's business,[113] and they were common among low-income market retailers in the FTC study.[114] Oftentimes, the salesman had Williams sign the contract without filling in the price or monthly payments lines in the form and with the page for signature folded so the terms, in very small print, were out of sight.[115] He assured her that the "exact price" as well as "[s]ales [t]ax, and such as that" would be filled in "later at the store."[116]

In 1962, the "stereo set"—presumably including a turntable, tuner, and speakers—selling for $514 must have been

112. Fleming, *supra* note 2, at 1392–93, 1395.

113. *See* Greenberg, *supra* note 71, at 381, 384–85 (describing Walker-Thomas' "fleet of approximately 30 door-to-door sales representatives-collection agents who comb the neighborhoods in search of sales and payments" and their relationship with customers).

114. FED. TRADE COMM'N, *supra* note 67, at 254 (acknowledging that low-income market retailers often utilized door-to-door sales techniques, which not only provided "an opportunity for deceptive and high-pressure sales techniques" but also cost more). For another case which involves another low-income market in another time but a similarly outrageous sales tactic, see *In re* Stewart, 93 B.R. 878 (Bankr. E.D. Pa. 1988). In this 1988 case, the seller had the elderly and disabled wife of the debtor fill out a blank installment sales contract at her home in a low-income neighborhood of Philadelphia. He then drove the debtor to a third-party store with which he had an arrangement and had him pick out the items (TV and VCR) without quoting the price. After that, the seller filled out the contract and had the debtor sign it. While the items were normally sold at $867 at the store, the seller's price was about $2,000 plus finance charges. *Id.* at 882–83.

115. Fleming, *supra* note 2, at 1395–96.

116. *Id.* at 1395; *see also* Greenberg, *supra* note 71, at 384 ("A Federal Trade Commission investigation of Walker-Thomas reveals that many customers learn of the total cost and financing charge of their purchases long after the sales are consummated.").

Electronic copy available at: https://ssrn.com/abstract=4371842

a very fancy item.[117] But it is highly likely that Williams hadn't seen it[118] and didn't know the price when she signed the form contract. As with the other items, the door-to-door salesman she had been dealing with presumably proposed the stereo set and filled in the price "later at the store."[119] We don't know what exactly she thought she was buying or what she thought it would cost. It seems likely that the salesman abused her trust built up over prior years of dealing.[120] The real mystery is why the store initiated the transaction given the virtual certainty that it would lead her to default.

One possibility is that it was a mistake. On the other hand, Skelly Wright's first draft opinion demonstrates that he suspected that Walker-Thomas induced its customers to default by selling high-priced items that they could not afford, repossessing all of the items purchased when they did default, and reselling such repossessed items at a price

117. For a different take on the famous "stereo set," see Spence, *supra* note 32, at 93–94 (providing a fictionalized account of a welfare mother of seven's purchase of stereo set using essential facts of *Williams*).

118. *See* Greenberg, *supra* note 71, at 384–85 (describing door-to-door sales practice of Walker-Thomas as of 1975); FED. TRADE COMM'N, *supra* note 67, at 254 ("To the extent that door-to-door sales techniques are utilized, such families frequently make crucial purchases without leaving the home and without seeing the products they commit themselves to buy.").

119. Fleming, *supra* note 2, at 1395.

120. *See* Greenberg, *supra* note 71, at 381–84 (describing various tactics that Walker-Thomas and its salesmen employ so that their customers experience their relationship with the salespeople as "highly personal, highly informal, [and] mutually beneficial."). A striking example of an "aid" that Walker-Thomas provided its customers was its collection practice. The same door-to-door salesmen would visit their customers on the days when their monthly benefits check arrive and cash the check, taking out the monthly due. Customers were saved from the trouble of travelling to and from the bank under the threats of robberies in the neighborhood; Walker-Thomas, of course, was guaranteed a steady payment. *Id.* at 382.

Electronic copy available at: https://ssrn.com/abstract=4371842

greater than the evaluation at the time of repossession.[121] Even putting aside the temptation to resell it as new, the expectation of reselling the stereo used after repossession makes the business model much more complex than a model in which list or sticker prices anchor the profit calculation.

If Walker-Thomas planned to resell the stereo used (or as "new"), it was important to repossess before deterioration in the hands of the buyer reduced its resale value to less than the discounted value of future monthly payments. Repossessing before that point and reselling to start a new stream of monthly payments would yield the best return on the asset. It is striking that the FTC Report says that unlike general market retailers, who "would suffer a substantial loss" if a customer defaulted after paying only half of the payments, "[l]ow-income market retailers often [could] recover the wholesale costs of merchandise when less than half the payments have been made."[122] Charges that would induce

121. Fleming, *supra* note 2, at 1418. In his first draft opinion, Skelly Wright also instructed the lower court to admit evidence on whether the stereo set was new or repossessed. *Id.* at 1417. Upon learning Judge Danaher's plan to dissent and communicating with Judge Bazelon, however, he revised the opinion, deleting much of his suspicion about the business model as well as his instruction to the lower court. *Id.* at 1418–19; *see also* Greenberg, *supra* note 71, at 385 (describing how Walker-Thomas was able to sell used, repossessed, and repaired goods as new ones); Berk, *supra* note 109, at 129. Thirty-six percent of the ghetto merchant in the 1968 Kerner Commission Supplemental Study endorsed the practice of buying "bargain" goods, which were "likely to be 'seconds' or slightly spoiled." Again, the researcher cautioned that the figure was likely an underestimate. Kerner Commission Report, *supra* note 23, at 129.

122. FED. TRADE COMM'N, *supra* note 67, at 266. There is an interesting analogy to the business model that "debt-based" credit card companies have evolved for chronically distressed card holders (who may be of any income level). The issuer/lender's profitability comes from the cardholder/borrowers in the "sweat box," who carry balances, make minimum payments, or even miss payments without failing altogether. So, the issuer makes money by charging them high interest and as their distress deepens late charges and other fees. Even without security of any kind

Electronic copy available at: https://ssrn.com/abstract=4371842

default, which might or might not be forgiven, would then give the seller the choice between repossession and resale or continuing to collect on the debt while the asset lost value.

In effect, the company's door-to-door salesmen took it to the limit by eliminating any semblance of a negotiated deal. By establishing trust, the store got to choose the price and the associated monthly payments that would, in their opinion, fit with the final pieces of the strategy, repossession while the goods retained value for resale in the store. But why didn't she just go to the store? Consider: the store was six miles away from her apartment,[123] she had no car, seven kids, and there was serious street crime in the neighborhood.[124]

D. *Are Buyer/Borrowers Made Better off by Banning Cross-Collateralization?*

The one-on-one bargaining scenario allowed the seller to price discriminate, splitting the demand curve into its component individual parts. Price discrimination means extracting the available surplus from each individual customer, rather than selling for a single take-it-or-leave-it price as in normal modern retail marketing. There, the price reflects the willingness to pay of the least interested buyer (the shopper), with everyone else getting the product for less than they would have paid in an individualized transaction such as those we have been discussing. Price discrimination means invading consumer surplus by the largest possible amount

or much hope of a judgment in a suit for the defaulted debts, if the combination of monthly payments is a large enough sum and goes on for a long enough time, the issuer/lender makes far more than the cost of working capital. *See* Ronald J. Mann, *Bankruptcy Reform and the Sweat Box of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 384–92 (2007).

123. Fleming, *supra* note 2, at 1393.

124. *See* Greenberg, *supra* note 71, at 382 (discussing how customers, even though they were unhappy with Walker-Thomas, felt that it was the only option and how trips in the neighborhood were dangerous and emotionally stressful).

Electronic copy available at: https://ssrn.com/abstract=4371842

leaving only enough so that the customer stays in to purchase.

When it is successful, there is literally nothing left for the seller to appropriate in order to pass along the cost of the lost term. The buyer is unaware that his bargain has improved so would not pay more than the maximum already extracted even if he had the means. In the case of door-to-door sales, the situation is more complicated with the same result. The commission salesman returns to the store with a signed contract with no price or payments term. The store presumably calculates what combination of price, monthly payments, length of term, and expected resale will produce the largest profit assuming that she has already accepted whatever that turns out to be.

Unlike the in-store bargain, the limit is not what she will accept rather than walking away, but what she can be made to pay without too early default. If the monthly payment is too high, she will default not because of unwillingness to pay the higher price but because she has reached the limit of her resources as calculated by the seller. The limit is the same after the banning of the clause as it was before. As with the bargained price, the buyer pays nothing for the gain of protection against blanket repossession.[125]

One-on-one bargaining up to the buyer's reservation price, and door-to-door sales for the maximum the buyer can pay without premature default, allowed, according to conventional neo-classical reasoning, profits far above the oligopolistic norm. They should have been so high that it is implausible that sellers could raise prices much, if at all, in

125. A second indirect effect of extracting maximum surplus from the buyer is that the buyer's disposable income is reduced. Selling at individualized exorbitant prices to buyers with fixed low incomes (Williams' monthly welfare check was for $218 and her monthly payments went to $36) means they have less money for everything, including price hikes on the seller's goods.

Electronic copy available at: https://ssrn.com/abstract=4371842

response to the banning of the clause. Sellers almost certainly had to "eat the cost," or the vast majority of it, because they had already exhausted buyer willingness to pay for the underlying good in bargaining and/or ability to pay for door-to-door sales.

Because of extreme overcharging, there was plenty to redistribute to the class of poor neighborhood buyers without putting any seller out of business. (Contrast the perfectly competitive situation of no profits.)

Repossession presumably remained a basic element in the business plan, but the subclass of defaulting buyer/borrowers no longer experienced it in the blanket form. Sellers who wished to recover for the unpaid balance of the loan for purchase over the repossession value of the commodity would have to make the improbable move of going to court against a judgment-proof defendant whose household goods were exempt from seizure in bankruptcy.[126] *Williams* was cheap compulsory insurance against blanket repossession.[127] And it reduced pressure to pay by reducing that danger. In other words, when confronted with a choice whether or not to default in order to divert the payment to some other urgent matter, the default option became significantly less costly.

Of course, there is no way of knowing for sure whether

---

126. Baird, *supra* note 24, at 944 (Baird stresses that "[t]he cross-collateralization clause served this purpose [of taking security interest in otherwise exempt household goods] and no other."). This, however, ignores the advantage to seller/lenders of being able, without a court order, to get a low-level state official to authorize them to just go and take all the stuff. Otherwise, the seller/lender would have to get a court order for repossession after the buyer/borrower's non-compliance with a final judgment in a proceeding in the regular (very dilatory) court system. *See also* DAWSON ET AL., *supra* note 14, at 922; AYRES AND KLASS, *supra* note 14, at 567.

127. For more on reconceptualizing mortgage protection laws as compulsory insurance, see generally Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489 (1991).

Electronic copy available at: https://ssrn.com/abstract=4371842

sellers ate, then or now, the full cost of this or any other compulsory term. There is, however, a bit of interesting evidence that it cost the consumer credit industry enough to make it worthwhile to fight the extension of the ban from the post-riot, post-King-assassination District of Columbia of 1971 to the national market. In 1968, Congress established a National Commission on Consumer Finance (NCCF) which commissioned a study of consumer credit practices.[128] In 1972, the NCCF found "no significant need for or use of the cross-collateralization" and recommended that the *Williams* type clause be banned.[129] It never happened.

In 1975, the FTC, based on the NCCF study and its own separate investigation, published the initial notice of rulemaking on consumer credit practices which listed eleven unfair consumer credit practices, including *Williams*-type cross-collateralization.[130] The FTC didn't actually promulgate the rule until 1984, adopting only six of the eleven originally proposed practices, including for example a ban on blanket non-purchase money security on household goods, but not the prohibition of cross-collateralization.[131] In 1995,

128. For a brief summary of what happened between 1968 and 1985 in terms of the Commission's credit practices rulemaking, see Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957 (D.C. Cir. 1985).

129. NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES: REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE 27 (1972). The NCCF stated that "[c]ross-collateralization agreements in which the seller applies payments on a pro-rata basis to all secured items and retains an interest in all goods until the entire debt is paid is an unconscionable practice" and recommended the mandatory first-in, first-out accounting.

130. Credit Practices: Proposed Trade Regulation Rule, 40 Fed. Reg. 16,347 (proposed Apr. 11, 1975).

131. Credit Practices Rule, 49 Fed. Reg. 7740, 7789–90 (Mar. 1, 1984) (codified at 16 C.F.R. pt. 444). The ban on security interests in household goods does *not* apply to Williams type cross-collateralization: creditors may retain purchase money security interests in household goods after refinancing or consolidating the original agreements. It does ban contracts clauses such as the following:

Electronic copy available at: https://ssrn.com/abstract=4371842

a periodic FTC review of credit regulations heard and rejected an appeal by a law firm representing consumer debtors to restore the ban.[132] In rejecting the proposal, the Commission explained its earlier decision:

> The Commission did not adopt the provision initially because it

---

This not [sic] is secured by a security interest in consumer goods consisting of all household goods, furniture, appliances, and bric-a-brac, now owned and hereinafter acquired, including replacements, and located in or about the premises at the Debtor's residence (unless otherwise stated) or at any other location to which the goods may be moved. In addition, all other goods and chattels of like nature hereafter acquired by the Debtor and kept or used in or about said premises and substituted for any property mentioned. Proceeds and products of the collateral are also covered.

Complying with the Credit Practices Rule, FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/resources/complying-credit-practices-rule#SecurityInterestsinHouseholdGoods (Edited Feb. 2023). Even the scope of this ban on blanket security on household goods was significantly narrowed in the 1984 final rule compared to the 1975 proposed rule and was a product of compromise between the initial drive for consumer protection and the industry's opposition. On the one hand, as explained *supra* note 100, the industry argued that blanket security on household goods was crucial to discipline the borrowers. On the other hand, the FTC acknowledged that resale value of used household goods was marginal compared to their value to the borrowers, citing cases where creditors simply "junk" or "burn" the repossessed goods. Credit Practices Rule, 49 Fed. Reg. at 7763. Balancing monetary and psychological cost to the borrowers against the industry's alleged need to "enhance a debtor's sense of moral obligation" and to maintain credibility, the 1984 rule significantly modified the 1975 proposal and was much less consumer friendly. *Id.* at 7765–68; *see also id.*, Statement of Basis and Purpose and Regulatory Analysis, at 7761–68. On the other hand, the Uniform Consumer Credit Code (UCCC), adopted by 11 states, does require first-in, first-out accounting in the *Williams* type cross-collateralization. UNIF. CONSUMER CREDIT CODE § 3.303 (NAT'L CONF. ON COMM'RS ON UNIF. STATE L. 1974); *Consumer Credit Code*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=0f 8dc75f-b418-4378-9641-486bb12813ff (last visited Dec. 31, 2022).

132. Regulatory Flexibility Act Review of Trade Regulation Rule Concerning Credit Practices, 60 Fed. Reg. 24,805, 24,806 (May 10, 1995).

Electronic copy available at: https://ssrn.com/abstract=4371842

> found insufficient evidence in the record that the use of cross-collateral clauses was prevalent or that cross-collateral, when used, caused any notable degree of consumer injury. It, therefore, concluded that the benefits of the provision would not outweigh its costs.[133]

Forcing borrowers to protect themselves saves some number of them from the devastating material and psychological consequences of blanket repossession, for a very small price. If, as the FTC noted, presumably in response to merchant advocacy, the costs to seller/lenders would have exceeded the benefits to buyer/borrowers, the clause would have been inefficient. It would have been inefficient precisely because the merchants would have had to eat at least part of the cost. That would have made it distributively desirable from the point of view of the poor Black neighborhood and that is all that matters for us here.[134]

Those who would have preferred a lower price without protection reduce their installment plan purchases because they have become slightly more expensive. It is important that there be enough of them to rein in the seller's desire to pass along his new cost. They play the role of the lukewarm tenants in Ackerman's enforced housing code scenario.[135] In this case, they signal that any further attempt to get blood from a stone will likely involve a serious loss of customers. They will spend what they would have spent in the store on

133. *Id.*

134. At the end of his important but sadly unrecognized article, Korobkin proposes, or at least suggests, an economic test for the legal definition of unconscionability that looks solely to the benefits to consumers from compulsory terms: "[i]t *is* unconscionable . . . for Walker-Thomas to include a cross-collateralization clause in its standard form contract if the resulting market-driven price/term combination makes buyers as a class worse off than they otherwise would be." This test disregards the effect on sellers and thereby rejects what he calls the "law and economics approach," which, according to him, rejects imposition if costs to sellers are greater than the benefit to consumers, making the change inefficient. Korobkin, *supra* note 14, at 468.

135. Ackerman, *supra* note 42, 1104–10.

Electronic copy available at: https://ssrn.com/abstract=4371842

the next affordable item on their list. The loss to them is a genuine cost of the strategy. To put it bluntly, their small losses from diverting their spending seem well worth the large benefits to poor Black neighborhood residents as a group.[136]

Who pays? The owners of the store, but also employees, salesmen on commission, the repo men who collect the goods on default, the owner of the land under the store if it isn't the seller's, and on and on. The benefit spreads as well, to sellers of the goods bought by slightly enriched buyers, and so on. But this way of looking at the benefits has the major drawback of accepting the conventional welfare economics insistence on measuring welfare from transactions on the basis of offers ex ante rather than asking prices ex post. If we ask what low-income borrowers would ask, at the moment of repossession, to give up the protection of previously acquired goods, the efficiency calculation looks completely different, as Russell Korobkin noted two decades ago.[137] If we look at

136. For the equivalent case in a competitive market, see Craswell, *supra* note 44, at 380 ("The important point is that such a warranty might be regarded as good, from the standpoint of some pro-consumer policy, for consumers as a class *even if it were inefficient under an overall Kaldor-Hicks standard*. As long as the marginal consumers place a sufficiently low value on the warranty, this will limit the accompanying price increase even if the warranty is tremendously costly to the sellers. The sellers' costs might increase enough to make the warranty inefficient from an overall standpoint, especially if the benefits the warranty conferred on the infra-marginal consumers are not all that large. However, for the infra-marginal consumers to gain, the benefits they receive from the warranty need only be large enough to exceed the accompanying price increase, not large enough to exceed the sellers' costs. When those who place the lowest value on the product also place a low value on the warranty, thereby limiting the accompanying price increase (without limiting the value placed on the warranty by other consumers), it may be possible for a pro-consumer or distributional analysis to endorse a warranty that an efficiency analysis would condemn.").

137. Korobkin, *supra* note 14, at 467 ("Identifying the appropriate question, given the normative assumption that the law of unconscionability should be used by courts either to improve social efficiency or protect the

Electronic copy available at: https://ssrn.com/abstract=4371842

the welfare of poor Black neighborhood residents as a group, the consequences of reducing the rate of blanket repossession, with its obvious material and psychological cost to the family affected, is I would say obviously worth the tiny price increase and the lost monopoly profits on the seller's side of the bargain.[138]

V. ANOTHER GOTCHA! LOW-INCOME RETAIL IS (SUPPOSEDLY) UNPROFITABLE

It was for many years the conventional wisdom that the poor live in poor housing because they can't afford better housing. The only remedy for bad conditions, in this analysis, is to increase their incomes or reduce the real resource cost of amenity. The dissenting position developed by Bruce Ackerman, Richard Markovits, and myself was that under plausible assumptions about low income housing markets there should be, at least in theory, landlord surpluses that could be expropriated and redirected to housing code enforcement.[139] William Apgar presented empirical evidence that

---

interests of buyers, is not to suggest that it is an easy question for judges to answer. On one hand, it is likely that if Williams defaults and Walker-Thomas is permitted to repossess all of her furniture as the cross-collateralization clause allows, the cost of the repossession to Williams will exceed the benefit to Walker-Thomas. Although the now-used furniture is important to Williams because it is part of her living space, it probably has less value to others who might purchase it used from Walker-Thomas and, logically, the price that it might bring at resale less the costs of repossession is the maximum that the right of repossession is worth to Walker-Thomas-at least after the default. On the other hand, the presence of the clause in the purchase contract might make Williams less likely to default than she otherwise would be. If the clause substantially deters defaults, which are costly to Walker-Thomas, this incentive effect might make the total expected benefits of the clause to Walker-Thomas exceed the expected costs to Williams.").

138. *See generally* Kennedy, *Distributive and Paternalist Motives*, *supra* note 8; Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 Stan. L. Rev. 387 (1981); Korobkin, *supra* note 14.

139. *See generally* Ackerman, *supra* note 42; Markovits, *supra* note 44; Kennedy, *Effect of the Warranty of Habitability*, *supra* note 44.

Electronic copy available at: https://ssrn.com/abstract=4371842

rising rent levels after the low income housing rental crash of the late 1960s and early 1970s indicated the existence of significant landlord surpluses of exactly that kind.[140] The strong analogy in the *Williams* situation is the claim that the reason for sky-high markups and pro-lender terms is that the poor are poor credit risks. They get the terms they can afford, period, given their inferior creditworthiness. If this is true, there is no surplus from which to eat the cost.

The FTC study showed:

> Obviously, the higher the gross margin on a particular product, the higher will be its retail price. On the average, goods purchased for $100 at wholesale sold for $255 In low-income market stores, whereas the retail price was $159 in general market stores (see figure II-1). Thus, low-income market retailers marked up their cost two and a half times to determine their selling price. This was the average for the 18 low-income market retailers in the sample. The retailer with the largest volume of sales in this group had a gross margin of 67.9 percent of selling price, which means that he marked up his merchandise on the average to more than three times its cost.[141]

The FTC study purported to show that the rate of return on capital for low-income market retailers was 10.1%, substantially less than the 13% earned by department stores.[142] The returns for general market appliance and furniture stores were even higher.[143] Louis Hyman draws what seems to me a bizarre conclusion from this data: "[t]he poor paid more, but the merchant did not profit. The credit system of the ghetto hurt both sellers and buyers."[144] The clear implication is that it would be wrong and ineffective to go after the ghetto retailers as way to help their customers. This assertion became the conventional wisdom for critics of proposals

---

140. William C. Apgar Jr., *Which Housing Policy is Best?*, 1 HOUS. POL'Y DEBATE 1, 7 (1990).

141. FED. TRADE COMM'N, *supra* note 67, at 261.

142. *Id.* at 268.

143. *Id.*

144. HYMAN, *supra* note 105, at 180.

Electronic copy available at: https://ssrn.com/abstract=4371842

to regulate the low-income market.[145]

As pointed out by a student writer as early as 1971,[146] a closer look at the study shows that its findings were perfectly consistent with substantial surpluses available for redistribution from sellers to buyers. First of all, the 10% return to capital was almost certainly seriously underestimated, as we will see in a minute. But even if it wasn't, 10% return after taxes is hardly operating at a loss and might seem surprisingly close to what the three massive department stores earned.

The FTC study itself notes that only "half the retailers surveyed submitted profit and loss statements and balance sheets" adequate for analysis and that "[t]here was a considerable amount of variation in the accounting methods used and in individual firm returns."[147] A 10.1% v. 13% return to capital was "some overall comparison" drawn from this limited data.[148]

Meanwhile, only ten out of the eighteen low-income mar-

---

145. Mehrsa Baradaran repeats this as though it were an obvious truth. Reformers "picked the wrong target" by going after the ghetto merchants. MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 145–46 (Harv. Univ. Press 2017). Burton's casebook also cites this data to refute "[p]opular images" which "sometimes cast merchants like the Walker-Thomas Furniture Co. as unscrupulous capitalists getting rich by exploiting low-income buyers." BURTON, *supra* note 14, at 233–34. Jonathan J. Bean's 2000 article repeats the claim, completely misstating the significance of Berk's data in the process. *See* Jonathan J. Bean, *"Burn, Baby, Burn": Small Business in the Urban Riots of the 1960s*, 5 INDEP. REV. 165, at 169–71 (2000); Berk, *supra* note 109.

146. Richard S. Brooks, *Is the High Mark-up in Low Income Areas Unconscionable?*, 16 HOW. L.J. 406, 424 (1971) (pointing out that the implications of the finding are limited given limited sample size and accounting practices).

147. FED. TRADE COMM'N, *supra* note 67, at 268.

148. *Id.*

Electronic copy available at: https://ssrn.com/abstract=4371842

ket retailers submitted "statements permitting *some* analysis of specific expense items (emphasis added)."[149] When these ten low-income market retailers were paired with ten general market retailers whose size and merchandises were comparable to the ten low-income market retailers, a different picture emerged. "[T]he gross margin to cover expenses and net profit was 26.7 percentage points higher for the [ten] low-income market retailers" (62.2% versus 35.5%), and the "net profit return on sales" was 3.9% for the ten low-income market retailers, compared to 2.3% for the ten general market retailers.[150] The FTC study stressed how small the "difference of 1.6 percentage points" in net profits was compared

149. *Id.* at 266.

150. The following table from the FTC report compares the revenue components of general and low-income market retailers:

Table II-5. Comparison of Expenses and Profits as Percent of Sales for 10 Low-Income Market Retailers and 10 General Market Retailers of Furniture and appliances in the District of Columbia, 1966

Revenue Component	10 Low-Income Market Retailers	10 General Market Retailers	Difference in Margins and Ratios	
			Percentage Points	Percent of Total
1966 Net Sales	$5,146,395	$5,405,221		
Operating Ratios as Percent of Sales	100.0	100.0		
Cost of Goods Sold	37.8	64.5		
Gross Profit Margin	62.2	35.5	+26.7	100.0
Salary and Commission Expense[1]	28.2	17.8	+10.4	38.9
Advertising Expense	2.1	3.9	-1.8	-6.7

Electronic copy available at: https://ssrn.com/abstract=4371842

to the difference of 26.7 percentage points in gross margin, but the net profit for ten low-income market retailers was still 70% higher than their counterparts.

When we look at the expense breakdown, the biggest difference between mainstream and low-income market retailers was in the salaries they paid, including to "officers," and commissions. Commissions were much higher on the low road, for obvious reasons given the in-store and door-to-door bargaining responsibilities of the salesmen.[151] The salaries, even apart from "officers," almost certainly included family members of the owners. Nonetheless, without even including these elements in profit, the rate of return on capital was 12.7% for the ten low-income market retailers, compared to 8.1% for their general market counterparts.[152]

The information we have about the market indicates that there were sellers, among them Walker-Thomas, that were long established large businesses operating as the lead firms in a local oligopoly. According to Greenberg, as of 1975, "Walker-Thomas maintain[ed] from 15,000 to 20,000 working accounts and an average yearly sales volume of $4 million."[153] The rate of return on capital even in the unlikely

Bad Debt Losses[2]	6.7	0.3	+6.4	24.0
Other Expenses[3]	21.3	11.2	+10.1	37.8
Total Expenses	58.3	33.2	+25.1	94.0
Net Profit Return on Sales	3.9	2.3	+1.6	6.0

Id. at 267.

151. *Id.* (pointing out the fact that low-income market retailers pay higher rates of compensation compared to small-volume general market retailers as one reason for their higher personnel costs).

152. *Id.* at 268.

153. Greenberg, *supra* note 71, at 381.

Electronic copy available at: https://ssrn.com/abstract=4371842

case that it was accurate was an average including the firms that were barely meeting the $100,000 a year standard plus much bigger firms like Walker-Thomas. The tail of smaller less successful firms might be struggling to survive while the large ones, as shown by their figures, were highly profitable. The average tells nothing about the distribution of returns across firms. But the big firms almost certainly had to eat the cost of ending cross-collateralization even if some small ones couldn't afford to do so and had to go out of business. Their customers would switch to the big guys. This famous study simply doesn't show what the conventional *Williams* narrative says it does.

CONCLUSION

The *Williams* court held that the cross-collateralization clause was at least arguably unconscionable and so unenforceable (depending on the facts on remand) because of her status as a poor welfare mother with limited education and because the clause was arguably "one-sided," unfair, and failed a reasonableness test. To return to my initial thought, it seems overwhelmingly likely that rational, self-interested, commercially amoral sellers in the *Williams* fact situation were making far more than the bare competitive profits necessary to keep them in business in the poor black neighborhoods of D.C. It seems overwhelmingly likely that invalidating the cross-collateralization clause helped the people it was supposed to help, at the expense of some of the sellers' surplus.

But it is also clear that the clause was just one element in the larger, exploitative seller/lender to buyer/borrower transaction.[154] Its function was to set up the forfeiture as an incentive to debtor performance and to feed the supply of used goods for resale in the captive market conditions of the

154. *See* HYMAN, *supra* note 105, at 173–90; BARADARAN, *supra* note 145, at 141–47; DAVID CAPLOVITZ, THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES (1967) (the classic first text).

Electronic copy available at: https://ssrn.com/abstract=4371842

poor Black neighborhoods. According to the Kerner Commission Report and contemporaneous testimony at the congressional hearings on the low-income credit market in the District, the low road business plan was multi-faceted. The clause was of a piece with clauses permitting the lender to accelerate the debt schedule for a missed payment, balloon payment clauses and assignment of the debtor's wages as security for the debt.[155] Repossession with threats of violence and a whole litany of abusive debt collection tactics were well known practices.[156] A bank that financed the sale of a refrigerator or other household goods could continue to exact payment of the monthly charge even if the appliance broke down the day it was delivered (recourse only against the seller).[157]

As Fleming demonstrates, Williams' decision to sue and keep at it, and Skelly Wright's advocacy using the case, were partially responsible for the D.C. legislation that banned not just the clause but all the practices just mentioned and more, for example advertisement of loss leaders the seller doesn't

155. For more discussion on wage garnishment, see KERNER COMMISSION REPORT ON THE CAUSES, EVENTS, AND AFTERMATHS OF THE CIVIL DISORDERS OF 1967, *supra* note 110, at 140. For more discussion on balloon payment and acceleration, see generally *Consumer Protection Legislation for the District of Columbia: Hearing on S. 316, S. 2589, S. 2590, and S. 2592 Before the Subcomm. on Bus. & Commerce of the S. Comm. on the Dist. of Columbia*, 90th Cong. 54–60 (1968) [hereinafter *Consumer Protection Legislation Hearings*] (statement of Egon Guttman, Professor of Law, Howard University). For the provisions in the D.C. Credit Code that concern these issues, see the District of Columbia Consumer Credit Protection Act of 1971, Pub. L. No. 92-200, sec. 4, §§ 28-3803, 28-3812(b), sec. 5, § 16-571, 85 Stat. 665, 669, 673, 678–79 (1971) (codified as amended at D.C. CODE §§ 28-3803, 28-3812(b), 16-571 (2023)).

156. *See* KERNER COMMISSION REPORT ON THE CAUSES, EVENTS, AND AFTERMATHS OF THE CIVIL DISORDERS OF 1967, *supra* note 110, at 139–40.

157. *Consumer Protection Legislation Hearings*, *supra* note 155, at 45–46 (1968) (statement of Theresa Clark, United Planning Organization).

Electronic copy available at: https://ssrn.com/abstract=4371842

stock and doesn't intend ever to sell.[158] All were of course open to the "hurt the people" charge in the generalized form it took after *Williams*. It is impossible to know for sure whether the cost of the whole set of prohibitions was in fact fully absorbed from the oligopoly profits of the seller/lenders or was large enough to increase prices and drive some of them out of business. But it is pretty implausible to my mind that the masses of residents of poor Black neighborhoods of the District would be better off today if only they could still contract on these abusive terms in return for a slightly discounted price.

The history of the clause beyond the facts of *Williams* is complicated and uncertain for a lack of data. Oddly, we know more about it in that particular moment in one part of one city sixty years ago than we know about it for the rest of the country for the whole period to the present. This raises a list of interesting questions, each eminently suitable for interesting research results.

To begin with, in 1971 when the D.C. Consumer Credit Code banned the clause outright, it did so without regard to the status of the borrower.[159] It thereby rejected the Skelly Wright approach in which unconscionability depended on the poverty and lack of education of the borrower as well as on the arguable substantive unfairness of the clause all by itself. It turns out, however, that by that time, according to Hyman, mainstream retailers in urban areas had long since given up repossession as a significant economic tool.[160] They sold goods on "revolving credit" (charge accounts), or buyers used credit cards. Neither method allowed repossession as a remedy for non-payment. Again, according to Hyman, the resale value of seized consumer goods had come to be no more

158. District of Columbia Consumer Protection Procedures Act of 1976, D.C. Law 1-76 (codified as amended at D.C. CODE §§ 28-3901 to 28-3913 (2012)). § 28–3904 lists unfair or deceptive trade practices.

159. *Supra* note 23.

160. HYMAN, *supra* note 105, at 166–67, 178.

Electronic copy available at: https://ssrn.com/abstract=4371842

than a fraction of initial purchase prices, downgrading their value as collateral.[161]

We have seen already that the attempt to ban the clause nationally through the FTC abusive credit regulations failed. According to the National Consumer Law Coalition database, some states banned it when they adopted the Uniform Consumer Credit Code,[162] others through distinct statutory provisions, making twenty-two jurisdictions in all.[163] It's striking that according to the same source, there are fourteen states that actually mandate the pro rata clause unless the parties agree otherwise and the rest of the states have no prohibition.[164]

Was the clause important in poor Black neighborhoods in other parts of the country beyond the District? What about White neighborhoods in the District and beyond? Is it important in poor White neighborhoods today? And what about Black and Latinx neighborhoods? I suspect that while *Williams* is part of the specific credit history of poor Black neighborhoods in D.C., the clause more generally is part of the credit history of poor neighborhoods nationwide—Black, Latinx, and White. And I suspect that it is still true that, for purpose of welfare economic analysis, racial segregation and economic isolation make the results for poor Black and Latinx neighborhoods significantly different from what they are for poor White neighborhoods.

The poor Black neighborhoods of the District of Columbia were one of the striking consequences of the post-World War II mass movement of six million Black people from the

161. *Id.*

162. UNIF. CONSUMER CREDIT CODE § 2.409(1) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1968); UNIF. CONSUMER CREDIT CODE § 3.303(1) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1974).

163. NCLC, *Pro Rata Allocation of Payments for Multiple Purchases*, § 3.7.4 n.526, REPOSSESSIONS, https://library.nclc.org/ (last visited Apr. 4, 2023).

164. *Id.* at n.528.

Electronic copy available at: https://ssrn.com/abstract=4371842

Deep South to large northern cities. As chronicled by Isabel Wilkerson in *The Warmth of Other Suns*,[165] there was both push (for example, by planters mechanizing agriculture and throwing their tenants off the land without any kind of welfare provision) and pull (the promise of a far better life). Practically the only thing we know about Ora Williams is that she had an eighth-grade education in a southern school[166] and found herself in the District by the mid 1950s. Her limited education was typical of the majority of the internal immigrants to the North, products of southern Jim Crow at its most destructive.

The situation of poor Black people, now joined by the Latinx poor, in poor neighborhoods today is different from, but historically derived from, and in many ways still similar to what existed in that formative period of the American "law of the poor."[167] The number of people involved is large: nationwide, 20.9% of Black people (roughly 9.2 million people) and 17% of Hispanic people (roughly 10.6 million people) lived in high poverty neighborhoods between 2015 and 2019, defined as census tracts with a poverty rate of 30% or higher.[168] The rest of the residents in these neighborhoods

---

165. ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2010).

166. Fleming, *supra* note 2, at 1392 n.41. *But see* Dostert, *supra* note 91, at 153 (where Williams' lawyer suggests a sixth-grade education).

167. See generally WILSON, *supra* note 12, on the consequences of the end of the migration after about 1970 leaving the black population of these neighborhoods stranded without access to the now suburbanizing industrial jobs that had been a major allure of the migration. *See generally* NICHOLAS DAWIDOFF, THE OTHER SIDE OF PROSPECT: A STORY OF VIOLENCE, INJUSTICE, AND THE AMERICAN CITY (2022) (for the way this played out in New Haven, Connecticut).

168. PolicyLink & USC Equity Rsch. Inst., *Neighborhood Poverty: All Neighborhoods Should Be Communities of Opportunity*, NAT'L EQUITY ATLAS, https://nationalequityatlas.org/indicators/Neighborhood_poverty#/ (last visited Dec. 27, 2022). In contrast, only 4.3% of Whites lived in poor neighborhoods. The rough estimates were drawn from the 2020 census data (for the Black and Hispanic population as a whole). 41% of

Electronic copy available at: https://ssrn.com/abstract=4371842

who are not officially poor[169] are still worse off than those who reside outside such areas: "[t]he average median household income for a high-poverty neighborhood is less than half [the median for] the nation as a whole . . . ."[170]

While poverty tracts dominated by Black people are a smaller percentage compared to decades ago,[171] it is not because the economic situation of the Black poor has improved[172] but because the combination of long-term growth in the poor Hispanic population and the worsening inequality among White people has increased the number of non-Black poor neighborhoods.[173] Nationwide, the number of

---

the Black poor and 31% of the Hispanic poor lived in such neighborhoods in 2018.

169. In a 2020 report which analyzed neighborhood poverty trends between 1990 and 2018 in metro area census tracts (consisting around 80% of U.S. census tracts), the median poverty rate of a high-poverty neighborhood (poverty rate of 30% or higher) was 37%. AUGUST BENZOW & KENAN FIKRI, THE EXPANDED GEOGRAPHY OF HIGH-POVERTY NEIGHBORHOODS 6 (2020).

170. *Id.* at 8–9. As of 2018, median household income in high-poverty neighborhoods was $29,000 whereas it was $61,900 for the nation as a whole and $78,700 for low-poverty neighborhoods (poverty rate below 20%). The median household income in high-poverty neighborhoods is also much lower than the median income for Black households. *Id.* at 9. In the same year, the latter was at $41,000. Jessica Semega et al., *Income and Poverty in the United States: 2018*, U.S. CENSUS BUREAU (Sept. 10, 2019), https://www.census.gov/library/publi cations/2019/demo/p60-266.html.

171. PAUL A. JARGOWSKY, CONCENTRATION OF POVERTY IN THE NEW MILLENNIUM: CHANGES IN THE PREVALENCE, COMPOSITION, AND LOCATION OF HIGH-POVERTY NEIGHBORHOODS 4–5 (2013). Between 2007 and 2011, roughly one third of high-poverty tracts were still dominated by Blacks (75% or more of the tract's population).

172. *See* SHARKEY, *supra* note 11, at 27–30, 38–40.

173. JARGOWSKY, *supra* note 171, at 4. For more recent numbers, see BENZOW AND FIKRI, *supra* note 169, at 3. According to Benzow and Fikri, the number of neighborhoods with a poverty rate of 30% or higher doubled from 1980 to 2010 and remains high. *Id.* Between 2000 and 2018,

Electronic copy available at: https://ssrn.com/abstract=4371842

middle-income Black neighborhoods has been declining for a decade,[174] partly as a result of displacement by White gentrifiers[175] and partly as a result of Black flight to the suburbs from those neighborhoods.[176]

It is striking that advocates on behalf of poor neighborhoods no longer list contract terms as a major issue. The focus is on the new low road credit market including a nationally organized and highly concentrated low-income rent-to-

---

the number of non-Hispanic White poor living in poor neighborhoods doubled, whereas the number of Blacks saw a 20% increase. *Id.*

174. Alan Greenblatt, *Why Black Neighborhoods Continue to Struggle*, GOVERNING (April 29, 2021), https://www.governing.com/community/why-Black-neighborhoods-continue-to-struggle; Alan Mallach, *Making the Comeback: Reversing the Downward Trajectory of African American Middle Neighborhoods in Legacy Cities* 2, 4–5 (Lincoln Inst. Of Land Pol'y & Ctr. For Cmty. Progress, Working Paper No. WP21AM1, 2021), https://www.lincolninst.edu/publications/working-papers/making-comeback.

175. *See* Emily Badger et al., *The Neighborhood Is Mostly Black. The Home Buyers Are Mostly White*, N.Y. TIMES (Apr. 27, 2019), https://www.nytimes.com/interactive/2019/04/27/upshot/diversity-housing-maps-raleigh-gentrification.html. *But see* Mallach, supra note 174, at 4; Jerusalem Demsas, What's Causing Black Flight?, ATLANTIC (Sept. 6, 2022), https://www.theatlantic.com/ideas/archive/2022/09/Black-families-leaving-cities-suburbs/671331/ ("In reality, gentrification of majority-Black urban neighborhoods is rare.").

176. *Supra* note 175; *see also* William H. Frey, *Black Flight to the Suburbs on the Rise*, BROOKINGS: THE AVENUE (July 31, 2015), https://www.brookings.edu/blog/the-avenue/2015/07/31/Black-flight-to-the-suburbs-on-the-rise/.

Electronic copy available at: https://ssrn.com/abstract=4371842

own industry that looks as though it exercises even more monopoly power[177] than the owner-owned local stores it has displaced.[178] There are still astronomical interest rates multiplied by deceptive up front "fees" for over-collateralized cash borrowing through payday loans, bank overdrafts, and title

---

177. A major difference in their business model is that unlike the low-income market retailers of the 1960s, they have access to the national banking sector to finance their lending rather than relying on their own working capital. Jim Hawkins asserts that "[t]he case for severely regulating the rent-to-own industry is harder to make than past commentary has admitted," based on, among other things, interviews with industry operators. Hawkins, *supra* note 98, at 2044. He also stresses that rent-to-own businesses face enough competition among themselves and from other fringe market creditors. *Id.* at 2070–74. By his own account, however, rent-to-own businesses do not compete on price or terms. Instead, "[b]oth big and smaller rent-to-own operators emphasized the importance of personal relationships in building business." *Id.* at 2073.

178. An extensive survey conducted by the FTC two decades ago revealed that rent-to-own customers were "significantly more likely to be African American, younger, and less educated; have a lower income; have children in the household; rent their residence; live in the South; and live in nonsuburban areas." James M. Lacko et al., *Customer Experience with Rent-to-Own Transactions*, 21 J. PUB. POL'Y & MRTG. 126, 130 (2002). Another major finding of the survey was that 87% of the customers who intended to purchase the item eventually did so. *Id.* at 131. While the latter finding seems to provide a case against an intervention to protect consumers from equity stripping, it seems likely that customers who rent longer are precisely those who bring money to the stores. In addition, a further analysis of the same data found that the customers who intended to purchase, compared to those who intended to rent temporarily, were much more likely to be African American, less educated, have a lower income, and rent their residence. Signe-Mary McKernan et al., *Empirical Evidence on the Determinants of Rent-to-Own Use and Purchase Behavior,* 17 ECON. DEV. Q. 33, 43, 47 (2003). While stressing that more data is needed to justify regulation on this ground, Hawkins concedes that it "appears to be" the case that "poorer customers who actually purchase merchandise" are subsidizing "relatively richer customers who only rent short-term," again, based on his interview with rent-to-own operators. Hawkins, *supra* note 98, at 2084–87.

Electronic copy available at: https://ssrn.com/abstract=4371842

loans.[179] There is still a poor neighborhood credit economy that includes housing as well as household goods. It includes predatory subprime mortgage lending to poor home buyers, equity stripping on foreclosure, and fraudulent second mortgage scams when poor homeowners run into emergencies (to name a few).[180]

Williams stands for the plausibility of marginal doctrinal change initiated by activists, consumer advocates, and lawyers addressed to judges, regulators, and legislatures rather than for anything structural or transformative.[181] It seems to me a bitter irony that *Williams* is instead the posterchild for the "hurt the people you are trying to help" scenario: the

---

179. For a brief introduction of the contemporary fringe lending including payday loans and title loans, see Mehrsa Baradaran, *Credit, Morality, and the Small-Dollar Loan*, 55 Harv. C.R.-C.L. L. Rev. 63, 87–97 (2020). For more discussion on bank overdrafts, see Joe Valenti, *Overdraft Fees Can Price People Out of Banking*, CONSUMER FIN. PROT. BUREAU (Mar. 30, 2022), https://www.consumerfinance.gov/about-us/blog/overdraft-fees-can-price-people-out-of-banking/; Aluma Zernik, *Overdrafts: When Markets, Consumers, and Regulators Collide*, GEO. J. ON POVERTY L. & POL'Y 1, 27–29 (2018) (explaining the cross-subsidization between unsophisticated and often low-income consumers and sophisticated consumers of bank services).

180. For a recent reportage on the practice known as "deed theft," see Stefanos Chen, *He Runs a New York Real Estate Empire. Did He Steal It?*, N.Y. TIMES (July 24, 2022), https://www.nytimes.com/2022/07/24/us/deed-theft-ny.html; Stefanos Chen, *He Admitted Stealing People's Homes. He's Charged With Doing It Again*, N.Y. TIMES (Jan. 18, 2023), https://www.nytimes.com/2023/01/18/nyregion/solny-deed-theft-charges-ny.html.

181. Familiar transformative approaches are the detailed control of the substantive fairness of bargains, as seemed to be suggested by Skelly Wright in his draft opinion, later abandoned, in *Williams*, and highly regulated or publicly supplied subsidized credit for the poor. *See* Fleming, *supra* note 2, at 1418. Korobkin, as noted *supra* in note 134, suggests a redefinition of unconscionability that would be transformative if put into effect: "[i]t *is* unconscionable . . . for Walker-Thomas to include a cross-collateralization clause in its standard form contract if the resulting market-driven price/term combination makes buyers as a class worse off than they otherwise would be." *See supra* text accompanying note 134.

Electronic copy available at: https://ssrn.com/abstract=4371842

poor would have been better off with blanket repossession than they are without it, and they pay astronomical prices with terrible terms because they are bad credit risks, period.[182] The critique of this reading has involved digging quite deep into the context. The technique of hunting the context for transaction surplus where it might seem there couldn't be any would show, I believe, that dramatic regulation of the current mixed bag of abusive credit practices would likewise unequivocally help the people it was supposed to help, at the expense of the various stakeholders in the industry. *Williams* should stand for working in that direction, with the support of conventional neo-classical economic analysis, rather than in the opposite direction entrenching race/class inequity in the name of neoliberal pseudoscience.

182. The conventional neo-liberal idea was that this will be cured either by the seller advertising its better terms or by truth in lending legislation. Measures to require disclosure were popular in the 1980s but long since fell victim to evidence that it just is not possible to package the mass of terms relevant to the simplest sale of goods on credit in a way that will actually draw consumer attention and then comprehension. Even Truth in Lending, the barest minimal measure in this direction requires daunting detail and invites ingenious evasion. Paradoxically in this situation Truth in Lending legislation would, if it worked, which it never does, make consumers worse off by making them willing to pay the oligopolist when he raises the price on efficient terms. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 665–79 (2011).

Electronic copy available at: https://ssrn.com/abstract=4371842