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Racially Restrictive Covenants—Were They Dignity Takings?

Carol M. Rose

Racially restrictive covenants—subdivision rules or neighborhood agreements that "run with the land" to bar sales of rentals by minority members—were common and legally enforceable in the United States in the first half of the twentieth century. In spite of their demeaning character, these racial covenants took away opportunities *from excluded minorities, rather than* things*, and thus they amounted to something less than the dramatic "dignity takings" that Bernadette Atuahene (2014) describes in her new book on dignity takings in South Africa. In this article, I explore some significant ways in which racially restrictive covenants differed from dignity takings as Atuahene defines them, as well as the shadowy similarities between racial covenants and Atuahene's dignity takings; I focus here on the dimensions of dehumanization, state involvement, and property takings. I conclude with a discussion of remedies, particularly considering measures that restore dignity through both public policies and private actions.*

During the first half of the twentieth century, nonwhite or non-"Caucasian" persons were legally barred from owning homes or residing in many white neighborhoods in US urban areas. The chief targets of these restrictions were African Americans and, to a lesser extent, persons of Asian descent, the latter largely in cities in the western states. This article explores whether these racially restrictive covenants can be considered "dignity takings," in the sense that Bernadette Atuahene describes in her new book on this subject: a governmental taking of property that purposely affronts the humanity of the claimant so seriously that ordinary remedies (particularly monetary compensation) are an insufficient recompense (Atuahene 2014). In this article, I will first sketch a brief background of the history and practices involved in racially restrictive covenants. I will then take up some questions about whether or not these covenants should be classed as dignity takings. I will conclude that racially restrictive covenants did not match Atuahene's definition of dignity takings in a strict sense, but that they nevertheless bore a shadowy resemblance to dignity takings in a way that affects the question of remedy.

I. BACKGROUND

In some ways, racial residential restrictions resembled the flurry of laws that sprang up around the beginning of the twentieth century in the southern states, all requiring segregation in ordinary aspects of life: public transportation, schools, parks, theaters, other amusement facilities, and so on. The first such law to reach

Carol M. Rose is G. B. Tweedy Professor of Law, emerita, and Professorial Lecturer, Yale Law School (carol.rose@yale.edu), and Ashby Lohse Professor of Water and Natural Resource Law, emerita, University of Arizona Rogers College of Law (crose@email.arizona.edu).

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the US Supreme Court was Louisiana's statute requiring segregated railway cars for white and black patrons. When the Court upheld "equal but separate" racial segregation in the notorious *Plessy v. Ferguson* case in 1896, southern state legislatures followed with a whole array of segregation measures commonly known as "Jim Crow" laws (Myrdal 1944, 578–82, 628–30).[1]

There were some differences, however, between the Jim Crow laws and the racially restrictive covenants that soon became the chief mandates for segregated housing. One major difference was that the Jim Crow segregation laws were largely confined to the southern states, whereas residential racial restrictions occurred all over the country, north as well as south, west as well as east, becoming prevalent as waves of African Americans abandoned the rural South for urban areas all over the nation. The other major difference was that racially restrictive covenants in housing were not mandated by legislatures or public administrative actions, but were instituted by private actors who deployed the private law tools of contract and property.[2]

Residential segregation requirements thus ultimately took the form of private property arrangements, but it would be entirely misleading to attribute this fact to self-restraint on the part of legislative bodies. Quite the contrary, a number of cities actually passed racial zoning ordinances during the first years of the twentieth century (Bernstein 1998, 834–39). Respect for African Americans' property was all too often and sometimes tragically absent in the Jim Crow era (Litwak 1998, 153, 486–87; Godsil 2006, 512–13; Brophy 2016). Nevertheless, given the stern rhetoric about private property and freedom of contract in early-twentieth-century courts, public officials may have been hesitant to restrict by law the ways that people could buy, sell, or rent property. It is notable that the first racial zoning ordinance was passed in Baltimore in 1910, something of a latecomer in the history of Jim Crow laws. Indeed, the Baltimore ordinance itself ran into trouble with the Maryland Supreme Court as an undue "restraint on alienation" (Brooks and Rose 2013, 39–41).

Other cities passed zoning ordinances similar to Baltimore's, but all ultimately ran afoul of the US Supreme Court's 1917 decision in the case *Buchanan v. Warley*, which ruled that racial zoning was an undue intrusion on property owners' ability to buy and sell property as they wished and that, as such, racial zoning violated the Fourteenth Amendment's prohibition on state action denying due process of law and equal protection of the laws (Bernstein 1998; Brooks and Rose 2013, 38–46).

Meanwhile, a few property owners tried to use the legal category of nuisance to keep their neighborhoods all white, but nuisance law was an almost complete nonstarter for this purpose. Even southern courts ruled that no person could be a nuisance simply because of his or her race (Godsil 2006, 516–19). Even aside from that legal obstacle, nuisance cases faced others. Nuisance cases are notoriously

1. Myrdal's (1944) classic book described "Jim Crow" laws while they were still in force. For just a few of the other major historical works, see Woodward (1951), Kirby (1972), and Litwak (1998); for the view that segregation laws were an improvement over total exclusion, see Rabinowitz (1976).

2. For a comprehensive study of the legal history and functioning of racially restrictive covenants, see Brooks and Rose (2013), on which this article draws extensively. Readers of the book will find many more sources for points made in this article.

factitious, and each claim is decided on its particular circumstances. This meant that meant that race nuisance would be an extremely time-consuming and expensive route for anyone who wanted to keep a neighborhood white. In addition, such a person would be offering a "free ride" to other white neighbors who did not want to take on the effort and expense; as is well known among game theorists, the free-rider problem often undermines any action at all (Brooks and Rose 2013, 31–34, 97).

All this left only one practical tool for the formal legal enforcement of neighborhood segregation after 1917: racially restrictive covenants. These devices had originated with the high-end subdividers who began to create fashionable new neighborhoods around the turn of the twentieth century. Residential developers like J. C. Nichols, famous for Kansas City's Country Club District, pioneered a new kind of homebuilding style in which the developers purchased large areas, installed streets and infrastructure, landscaped the properties and divided them into individual lots, and then sold the lots to owners who would arrange for the construction of their own houses. This development pattern could work according to plan only if developers like Nichols could keep some control over the styles, sizes, and uses that owners made of their individual lots, at least until the development was built out. Thus these new "community builders" innovated with elaborate patterns of residential restrictions "running with the land" to bind future as well as current buyers in order to assure that their well-to-do subdivisions retained what the developers called the "high-class" character of their development plans (Weiss 1987; Fogelson 2005; Brooks and Rose 2013, 99–105).

Given the racial attitudes of the time, it was perhaps predictable that these developers would deem covenants restricting race to be a part of the gracious living that they thought their purchasers would want in their luxurious communities. All the same, the legality of racial restrictions was not entirely certain, even when adopted by private developers. In the later nineteenth century, a federal judge in California had declared that anti-Chinese covenants were "state action" in violation of the Fourteenth Amendment, even though instituted by private parties—a ruling that for some time undermined the confidence of developers about the validity or racial covenants (*Gandolfo v. Hartman* 1892).

However, two years after the Supreme Court's 1917 decision in *Buchanan v. Warley* invalidated racial zoning, a major race riot broke out in Chicago. This was not the first race riot of the twentieth century by any means, and not even the only race riot in the violent summer of 1919, but certainly one that was spotlighted in the news, and one that may have convinced many that the races could not live together in peace. After that terrible event, several important state supreme courts upheld residential racial covenants. These cases distinguished *zoning* from *covenants*, viewing zoning as a type of public restriction—unlike covenants, which they regarded as private arrangements. In 1926, the state courts were joined by the US Supreme Court in *Corrigan v. Buckley*, in which the Court found no constitutional jurisdictional basis to hear a challenge to racial covenants in a case from Washington, DC—a city, incidentally, that had suffered its own race riot in the summer of 1919.

In *Corrigan*, the Supreme Court echoed the state courts in distinguishing racial covenants from racial zoning; the Court treated zoning as public action, undertaken by governmental actors, by comparison to the ostensibly private action entailed in

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covenants. Racial covenants thus supposedly lacked the "state action" predicate to civil rights safeguards that required public bodies to accord equal treatment to all persons. After *Corrigan*, real estate professionals assumed that residential racial covenants would raise no constitutional issues (Brooks and Rose 2013, 51—56, 81, 121).

Meanwhile, racial covenants had spread beyond the high-end new communities like Kansas City's Country Club District or Los Angeles' Palos Verdes Estates, moving first to upper-middle-class and middle-class new developments, and finally to older urban neighborhoods. In those latter areas, residences were already built out, so that it was too late for race to be added into packages of subdivision restrictions instituted *ex ante* by developers. In the older urban areas, racial restrictions were rather single-purpose documents initiated by local residents, who knocked on neighboring owners' doors, gathered signatures for racial covenants against sale or rental to minorities, and then recorded the signed documents with the local Recorder of Deeds (Brooks and Rose 2013, 78–87, 121–24).

There was a sense in which all these racially restrictive covenants acted as substitutes for much more direct and brutal methods of keeping neighborhoods white, particularly in working-class neighborhoods where the white residents shared long-term residence, ethnicity, family, jobs, or membership in the same churches and clubs (Bell 2013, 18–23, 43–46). Their methods sometimes went so far as bombings, arson, and cross-burnings, and more routinely included rocks through windows, insults painted on siding, and personal molestation of African Americans who had the temerity or naïveté to move into some kinds of white neighborhoods.[3]

As Richard Brooks and I have argued, racially restrictive covenants were supposed to act as an alternative, usually in rather different types of neighborhoods. Racially restrictive covenants had their particular provenance in more loosely knit upper-class developments or middle-class urban areas, where the residents were less likely to know one another well, and where more respectable aspirations usually made the white neighbors shy away from violence—especially of the more extreme type to be found in the rougher ethnic neighborhoods. However odious to a modern sensibility, racially restrictive covenants had the aura of propriety, in no little part because they were enforceable by law rather than by forcible self-help (Brooks and Rose 2013, 12, 18, 95–96, 102, 112, 121, 125).

But racially restrictive covenants also had other feedback effects on the loose-knit neighborhoods in which they emerged. For one thing, they became nodes around which these communities organized. Many of the so-called neighborhood improvement associations came to have no purpose other than the enforcement of racial covenants. The ostensible reason was that racial restrictions upheld property values. However, in another very important feedback effect, the spread of racially restrictive covenants cemented the view that property values in white

3. Bell (2013) gives a comprehensive treatment of move-in violence, which persisted long beyond the era of racially restrictive covenants and well into the present day. Her second chapter (pp. 53–85) particularly recounts more recent incidents. Among others, Williams (1987) describes forty-five cases of arson and cross-burning accompanying minority moves to predominately white neighborhoods in the mid-1980s. Many all-white small towns have been equally threatening, in the past posting signs warning African American visitors not to let the sun go down on them (Loewen 2005).

neighborhoods depended on maintaining residential segregation (Long and Johnson 1947, 39–55; Sugrue 1998).

More subtly, the very legality of racial covenants may have played an important symbolic role, undermining opponents' arguments that the restrictions were unjust, while bolstering the self-confidence of those who instituted them. The National Association for the Advancement of Colored People (NAACP), founded in 1909, fought a running battle against racially restrictive covenants from roughly 1915 through the next several decades, generally arguing that these devices constituted state action in violation of the Fourteenth Amendment's requirement that the states accord the equal protection of the laws to all their residents. This was not a winning argument at the time; the NAACP lost all the major challenges to covenants (except one that detoured onto a civil procedure matter) (*Hansberry v. Lee* 1940; Brooks and Rose 2013, 51–54).

But Nazi atrocities, together with African American service during World War II, much heightened the sense of the injustice of racism at home. Meanwhile, the federal government, spurred by Cold War politics and Soviet propaganda, grew increasingly uncomfortable about the legality of racial restrictions in US housing. In 1948, with the support of the Justice Department and a multitude of civic, religious, and labor organizations, the NAACP finally won an important, albeit ambiguous, victory over racially restrictive covenants in the US Supreme Court (Dudziak 1988, 100–01; Brooks and Rose 2013, 136–39). In *Shelley v. Kraemer* (1948), the Court ruled that judicial enforcement of racially restrictive covenants was state action after all under the Fourteenth Amendment, a decision that prohibited all courts in the United States from enforcing them.

Shelley's ambiguity arose because it did not identify the reasons why seemingly private legal arrangements would become state action simply because courts enforced them. Taken literally, the case seemed to turn judicial enforcement of ordinary contracts or trespass actions into "state action"—a reading with such a vast impact on private arrangements that few lawyers thought that *Shelley* could be taken literally. The problem was that no one knew exactly how the case *should* be taken—with the result that *Shelley* turned out to be something of a jurisprudential dead end. Moreover, *Shelley* ruled only that *judicial enforcement* of racially restrictive covenants was state action—not the racial covenants themselves. As a result, developers and real estate professionals continued to insert racial restrictions into deeds for at least a few years after the *Shelley* case, on the view that *Shelley* might be overturned or limited, or that even unenforceable racial covenants might at least count for something as signals of neighborhood attitudes (Brooks and Rose 2013, 171–75, 188–89).

With the passage of the Fair Housing Act in 1968 (Civil Rights Act of 1968, Public Law 90-284; 82 Stat. 73), newly created racially restrictive covenants, or references to older ones, were rendered illegal in the United States in almost all real estate transactions. Almost simultaneously with the passage of the Fair Housing Act, the Supreme Court issued another opinion that eliminated even the small-scale exceptions to the prohibition on racial discrimination in property transactions, ruling that these were violations of a century-old federal civil rights statute (*Jones v. Alfred H. Mayer Co.* 1968). Preexisting racial residential restrictions did have a

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kind of zombie afterlife, however, especially showing up in title searches. Nevertheless, over time, racial covenants in deeds gradually receded into the past and disappeared as reminders of once-viable legal claims against any given property.

More importantly, however, racial covenants reappeared—and continue to reappear now—in the ongoing documents listing "covenants, restrictions and rules" (CC&Rs) of many older planned communities. The CC&Rs govern these communities with respect to homeowner rights and obligations—community dues, use of common spaces, permissible and impermissible exterior improvements, and the like—and new residents are generally furnished with copies. CC&Rs have their own rules for amendment, often rather onerous and hence rarely invoked. The result is that racial restrictions continue to pop up in the CC&Rs of older communities, where they are very likely to offend modern homebuyers of all races. However, since these covenants no longer have any legal effect, even offended parties seldom bother to try to have them changed (Brooks and Rose 2013, 218–29).

So much for the background story of racially restrictive covenants. Turning to the question posed by this symposium issue: Were these covenants dignity takings?

II. RACIALLY RESTRICTIVE COVENANTS AS "DIGNITY TAKINGS": SOME QUESTIONS

However repellant racially restrictive covenants may now seem, there are several issues about whether they can be classed as dignity takings. Let me preface these issues by setting up a kind of "ideal type" example of a dignity taking, if one can use that phrase for an instance of wanton injustice. That example would be *Kristallnacht* in Germany in 1938, an early and very public step in the march that led to the Holocaust. *Kristallnacht* seems to meet all the criteria that Atuahene's definition sets out for dignity takings. On that night, state-sponsored paramilitary thugs smashed the storefronts and other property of Jewish citizens and looted or destroyed the contents, with the object of humiliating and terrorizing the victims and demonstrating their impotence against a regime that regarded them as enemies.

The most common racially restrictive covenants had at least one characteristic that overlaps with this dreadful example: they singled out specific racial groups as unwanted, notably African Americans and, to some degree, persons of Asian origin, but other elements of the example seem to be missing or at least much attenuated by comparison, raising several questions as to whether racially restrictive covenants ought to be considered dignity takings. The first question is probably the easiest to answer, although not unproblematic: Did these racial covenants constitute a dignitary affront? Next, and somewhat more difficult, is the question of whether the state was involved in what were formally private arrangements. Considerably more difficult is a third question: whether anything was actually taken—that is, whether there was a "takings" predicate to the dignitary question. The answer to that question influences a final question: What (if anything) might be an appropriate remedy? The following sections take up these questions in order.

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The First Question: Did Racially Restrictive Covenants Constitute a *Dignitary* Affront?

In *Kristallnacht*, the destruction and looting of Jewish property was part of a conscious and purposeful campaign of humiliation and intimidation that targeted a specific group. What about racially restrictive covenants? In the early-twentieth-century United States, these covenants certainly did not appear to rise to anything like a *Kristallnacht* level of viciousness and purposeful dehumanization. If anything, racial covenants were supposed to prevent violently destructive behavior. In the 1917 case of *Buchanan v. Warley* (1917), the most prominent arguments put forth by proponents of racial zoning were that residential separation would maintain property values and also reduce violent confrontations between the races—confrontations that had already occurred in several US cities, and that would soon again rock more of them, notably Chicago in 1919. By 1944, the influential American Law Institute's *Restatement of Property* gave the same justifications—maintaining property values and reducing violence—for racially restrictive covenants (Brooks and Rose 2013, 44, 112, 161–62).

In *Buchanan*, of course, the Supreme Court rejected racial zoning as an overly intrusive state incursion on private property rights. However, the Court did not necessarily reject the argument that racial segregation might keep the peace. After *Buchanan*, real estate professionals could argue that racially restrictive covenants were a necessary substitute for racial zoning and, in particular, that they were a legal means to prevent the kind of violence through which some communities enforced segregation—communities that did not bother with restrictive covenants (Brooks and Rose 2013, 81–82, 95–96, 111–22).

On the other hand, targeted violence is not the only way to inflict indignity. In other contexts, property takings raise dignitary issues even where the taker is simply indifferent to the wishes and interests of the owners—that is, even when the taker is not aiming specifically at humiliation or dehumanization, yet does in fact humiliate and dehumanize the victim. Irving Goffman's *Asylums* (1961, 18–21) gave a most striking example of this phenomenon, describing the dismay of entrants to asylums at the point when institutional rules required that the new inmates give up their individual clothing and articles of personal grooming. More generally, to take away someone's property against his or her will, particularly without generally applicable reasons or compensation, is to signal that this person is not someone whose wishes and projects really matter. It is to treat the owner as an "other" who does not deserve respect (Rose 2000, 33–37).

It was that kind of indifference through which racially restrictive covenants inflicted dignitary harm. The real estate developers who initiated racially restrictive covenants obviously thought that their white customers shared the racist distaste for having "non-Caucasians" in the neighborhood—unless, of course, they were live-in servants, for whom an exception was commonly made in racially restrictive covenants. Until the middle of the twentieth century, real estate brokers eagerly promoted racially restrictive covenants, piously referring to their national professional association's "Code of Ethics," which admonished them to avoid introducing into their white clients' neighborhoods "members of any race … whose presence

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will be detrimental to property values" (Helper 1969, 201, quoting National Board of Real Estate Brokers' Code of Ethics). From the brokers' and developers' perspective, this was indeed largely a matter of protecting property values for their (white) clients, but as one African American defendant complained, racially restrictive covenants treated him as if he were a nuisance (*Parmalee v. Morris* 1922, 332).

Real estate professionals would have denied this assertion, claiming that there was no inequality in racial covenants. White people simply wanted to be with other white people, and if racially restrictive covenants helped them to maintain all-white communities, the same types of covenants could help black or brown people to maintain their own communities if they so desired.[4] Decades before racially restrictive covenants spread through housing developments and neighborhoods, the majority in *Plessy v. Ferguson*'s (1896, 551) had taken the position that no one can deprive a person of dignity simply by not wishing to associate with him or her, and if there was any insult, it was in the mind of the observer. But it would have taken a blind observer indeed not to notice that, in fact, racially restrictive covenants were designed to exclude nonwhite minorities, not white people.

In the wake of the economic collapse of the early 1930s, New Deal legislation created new agencies that, among other things, attempted to revive the housing market. Real estate professionals were important staffers in these agencies, and they brought with them their attitudes about race and residential segregation. The new Federal Housing Administration (FHA) was tasked with reviving the housing market by insuring home loans, thus reducing the risk for private lenders. In a striking example of institutional racism, the FHA explicitly promoted racially restrictive covenants in its underwriting policies, and generally favored loans in white neighborhoods while disfavoring those in mixed or minority neighborhoods, where loans were considered riskier (Weaver 1948, 70–73; Jackson 1985, 195–203; Gordon 2005).

The FHA, of course, was attempting to guard its own funds, insuring loans that it deemed likely to be repaid and thus permitting the agency to continue to extend mortgage insurance on more home loans. Nevertheless, by taking the position that residential segregation safeguarded property values, the FHA effectively baked that nostrum into housing market calculations. The value of keeping neighborhoods white came to be what was later called a "self-fulfilling prophecy": racial mixing undermined property values because everyone believed it to be so (Abrams 1955, 75).

Racially restrictive covenants helped to cement that belief—a belief that not only fueled the fears of white neighborhoods but that also carried a pervasive dignitary affront to the minority groups who were the targets of exclusion. In promoting racial restrictions, real estate brokers warned residents of white neighborhoods against the entry of even the most respectable African American purchasers, on the theory that these would become an entering wedge for more minority entrants, dragging down property values with them (Helper 1969, 360). Those kinds of warnings easily acknowledged the worthiness of at least some members of the targeted

4. Cities adopting racial zoning had also used the pretext that the treatment of the races was equal (Brooks and Rose 2013, 40).

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minorities, but individual merit did not matter. Members of those groups were indeed envisioned as a kind of nuisance, simply by virtue of their race.

Thus, in racially restrictive covenants, what purported to be a more or less neutral motivation about property values veiled a pervasive insult to minorities. This was not normally an intentional infliction of humiliation, at least in public explanations, but a set of acts that still targeted the excluded groups and demonstrated a studied indifference to the interests and sensibilities of those groups. It is in that sense that one can find a dignitary affront—perhaps attenuated by comparison to the worst kinds of dignity takings, but very real all the same.

The Second Question: Was the State Involved?

Insofar as one can use *Kristallnacht* as a kind of extreme example of dignity takings, one can see that the Nazi state was clearly a motivator and perpetrator of these terrible events. State involvement is also a part of ordinary takings cases in more normal governmental actions, however. Takings cases in the United States are brought against governments or governmental agencies, or against others carrying out governmentally supported projects. The charge is often simply that the government should have compensated but failed to do so; in the case of compensated takings, the charge is more likely to be that the taking lacked a sufficient public purpose. But whatever the cause of action, the defendant is a government or a governmentally sponsored entity.

Were racially restrictive covenants actions of governmental authorities in this way? These covenants, after all, originated in measures taken by private developers and homeowners. They did not purport to govern any larger area than the properties whose owners had signed on originally. The *Shelley* case famously held that judicial enforcement of racially restrictive covenants did constitute state action, in spite of the private origin and scope of these covenants; but there are several caveats about *Shelley*. One was mentioned earlier: the case held only that *judicial enforcement* constituted state action in violation of the Fourteenth Amendment's requirement of equal protection. For the time being, the covenants themselves remained "private" and legal although simply voluntary. As also noted above, some developers initiated racial covenants for several years after *Shelley*, using them as a kind of signaling device about neighborhood norms even though they were not legally enforceable.

The other caveat about *Shelley* is that the ostensible holding of the case—that judicial enforcement of these covenants constituted state action—was potentially so broad that it threatened the entire realm of private law, in which individuals rely on the courts to settle disputes about their private relationships. Even committed civil rights proponents have noted that the sweep of the case would have undone any meaningful distinction between public and private action—something that would matter greatly for contracts, wills, and torts (Tushnet 1994, 86). All this has left an ongoing question about the actual meaning of the *Shelley* case.

Richard Brooks and I have argued that racially restrictive covenants might be distinguished from ordinary contracts for several reasons—reasons that implicate state or public action in a distinctive way. One reason is that covenants "running with the land" require a level of judicial interpretative action that is not needed in

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ordinary contracts. Another reason, and perhaps more important, is that by the time of the *Shelley* case, racially restrictive covenants had become so widespread as to be considered customary practice, and enforcement of custom can count as state action in US constitutional law (Brooks and Rose 2013, 140–67). Indeed, the very fact that racial covenants were legally enforceable gave them a kind of moral authority that helped them to congeal into customary practice (Sugrue 1998, 564).

As a practical matter, public bodies were heavily involved in turning racial covenants into standard practice in real estate development. As described above, and as also described by other authors, the FHA in particular played an important role in supporting these covenants for homeowners' mortgage insurance. Although no individual was obligated to buy a house and apply for an FHA-insured mortgage, by the early 1940s, the FHA had become a sufficiently important player in new housing development that subdividers explicitly incorporated FHA standards into new developments, including the FHA's standards for racial covenants. Moreover, by insuring home loans in restricted white neighborhoods, while denying mortgage insurance in neighborhoods that were mixed or potentially mixed, the FHA's policies effectively steered home finance away from minority areas. Although the FHA dropped its explicit endorsement of racial covenants shortly before the *Shelley* case, for two years after the case it continued to insure mortgages in new developments with racial covenants, taking the position that racial covenants were legal even if not enforceable (Brooks and Rose 2013, 108–11, 170–71, 213).

Whether all these factors add up to state action for purposes of the US Constitution's Fourteenth Amendment is not really the issue for dignitary takings. However one answers that question, and whatever one thinks of the *Shelley* formulation, it seems clear that public bodies—both courts and agencies—were participants in making racially restrictive covenants a pervasive part of US real estate practice by the middle of the twentieth century. Their individual motivations were not necessarily consciously invidious or discriminatory, but by the 1940s, their indifference to the cumulative damage to minority citizens had come to worry some judges—and with good reason (*Fairchild v. Raines* 1944, 267—69 [Traynor, concurring]; *Mays v. Burgess* 1945, 873—78 [Edgerton, dissenting]). And so, as to the question of state involvement, racially restrictive covenants seem to fill the bill.

The Third Question: Was Anything Taken?

Kristallnacht involved the conscious destruction and theft of real estate and personal property, obviously without compensation. In US takings law, compensation is generally a key element, but the most common arguably "taken" object is some identifiable property, often all or some portion of real estate or sometimes personal property. Some takings cases involve matters that are less concrete, like trade secrets, interest in an escrow fund, liability for health benefits, or the ability to engage in a business (*Ruckelshaus v. Monsanto* 1984; *Eastern Enterprises v. Apfel* 1988; *Phillips v. Washington Legal Foundation* 1988; *City of San Antonio v El Dorado Amusement Co.* 2006). But in all these cases, there is some "there there," some tangible thing or at least some identifiable right or interest.

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Racially restrictive covenants generally did not involve this kind of identifiable object or entitlement, except in the relatively small percentage that were defied and then litigated. Instead, the covenants acted as blanket restrictions on the transfer of real estate from white owners to unwanted minority buyers or renters, and their main function was to prevent any interest from ever ripening at all. To be sure, the litigated cases often revolved around actual sales of residential properties by white owners to minority purchasers—sales to which white neighbors objected—and in these cases an identifiable claim of entitlement was at stake. But those cases were relatively few by comparison to the transactions that simply never took place—or were even initiated—because of racial covenants.

What racially restrictive covenants did was to discourage white owners from even thinking about selling or renting their property to African Americans or Asian minorities, and to discourage those minorities from even inquiring about rentals or purchases in covenanted areas. As one discouraged African American observed, breaking covenants meant that a person had to be a "lawbreaker," and only a few were willing to take that role (Drake and Cayton 1945, 199).[5] Even Ethel Shelley, one of the named defendants in the famous *Shelley v. Kraemer* case, testified that she only bought the house because she saw other African Americans on the block, and evidently would not have tried to buy the house if she had thought she faced legal action (Gonda 2015, 36–37). For the vast majority of the persons affected by racially restrictive covenants—and there were many, as racial covenants became commonplace in the 1920s, 1930s, and 1940s—no identifiable interest ever really came into being to be "taken."

What was taken, however, was the opportunity to deal. Taking away that opportunity was the whole point of racially restrictive covenants: the subdividers and neighborhood groups who initiated racial covenants intended to preclude deals that would permit minorities to buy or rent in white subdivisions or neighborhoods. The opportunity at stake was usually not specific, since racial covenants acted as deterrents to potential dealings rather than a disruption of dealings already initiated.

In that sense, racial covenants were quite different from the move-in violence perpetrated against minority members who attempted to move into white neighborhoods, and who sometimes suffered severe property losses from hostile neighbors' extreme vandalism (Bell 2013). This is not to say that racial covenants did not contribute: by giving white residents the impression that they were entitled to live in segregated neighborhoods, racial covenants may well have augmented white outrage and the white turn to violence when covenants failed to deter minority entrance. Moreover, the covenants' nonspecific denial of the opportunity to deal had other less speculative real-world consequences. Racial covenants acted to pen up African Americans in urban ghettos, surrounded by what St. Louis civil rights lawyer Scovel Richardson called the "ring of steel" of racial covenants (Gordon 2008, 80). By restricting opportunities, racial covenants contributed to the "dual

5. One of the few systematic "lawbreakers" who was not a minority purchaser or renter, but a white real estate broker in Washington, DC, was Rafael Urciolo, who regularly defied racial covenants and was a defendant in *Hurd v. Hodge* (1948), the Washington, DC case accompanying *Shelley v. Kraemer* (1948) (Brooks and Rose 2013, 135–36).

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housing market" that overcharged minorities for housing and may have also contributed to a racialized economic lag that lasts to this day.

Because of the nonspecific character of these harms, however, racially restrictive covenants cannot be considered takings in the sense of what Frank Michelman and many US takings cases have called the "investment-backed expectations" of particular owners (Michelman 1967, 1213; *Penn Central Transportation Co. v. City of New York* 1978, 123). But racial covenants did take away a generalized opportunity for minority persons to buy or rent in ever-expanding restricted swaths of the urban landscape, and thus these covenants substantially diminished the opportunity to break out of overcrowded and overpriced ghetto areas.

Racially restrictive covenants did not so much take a "thing" as they took an *opportunity* to acquire a thing, a kind of a foreshadowing of a taking. With this shadow version of a taking, then, let us move on to another important question: What remedies might be sought?

The Fourth Question: What Remedies Might Be Appropriate?

In any general program of reparation for racial discrimination, racially restrictive covenants would clearly be listed among the grievances. They set the stage for much modern urban and suburban segregation; they raised the prices that many African American families had to pay for housing; and they erected substantial barriers to those families' ability to make that most common form of capital investment: home purchase.

But remedies under the specific aegis of dignity takings are more fraught, precisely because racial covenants generally removed *opportunities* rather than *things*. An important consequence of the shadowy character the "thing" taken by racial covenants is that racial covenants did not create easily identifiable and specific victims for whom a remedy might be fashioned. Litigants are a special case: before the *Shelley* case made racially restrictive covenants unenforceable, some minority persons were adjudged to be barred from living in a specific house after they had successfully bid for it, but a restitutionary remedy even for the litigants would raise some problems. One is the simple problem of locating these persons or their heirs at this late date. A second is that even if they or claimants under their estates can be found, an award of the denied home might no longer be something that they want, particularly since restitution would presumably require them to match the present value of the original bid that was denied years ago. A third problem is that the persons who bid after minority residents' ouster, and who actually did take the residences in question, would appear to be more or less innocent third parties, from whom a long-delayed divestiture now seems at least questionable.[6] The same is even truer of other subsequent owners in the chain of title.

6. To the best of my knowledge, none of these later purchasers were involved in the lawsuits that enforced racial covenants against minority buyers or bidders. In the reported cases, the chief enforcers were neighbors, often supported by "neighborhood improvement associations," which in turn were often assisted by real estate professionals. See, e.g., Gordon (2008, 83–88), describing the role of the major St. Louis real estate brokers' organization in orchestrating covenant enforcement.

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But as was pointed out above, litigants were by no means the chief class of persons affected adversely by racially restrictive covenants. For the most part, racial covenants acted as invisible deterrents to any bids at all from the excluded minorities. Once again, however, this means that covenants did not create identifiable victims for whom a personal remedy might be fashioned.

Let me pause here to make a parenthetical but important point. Would-be white sellers were also victims of racially restrictive covenants insofar as they were willing to break the covenants on their properties but were prohibited from doing so. Many did in fact have a motive to break the covenants: they could get a better price from minority purchasers, especially in locations that appeared to be in the process of racial transition. Potential white bidders were few and far between in such locations, whereas minority members were eager to leave overcrowded and overpriced ghetto housing.[7]

Here is the significant point, however: there was a substantial difference between the harm suffered by white would-be sellers and minority would-be buyers, and a major part of that difference was dignitary. No one assumed that a white owner would cause property values to fall—the classic evidence of nuisance—whereas this was widely expected to be the case with any minority entrant, no matter how personally respectable. It was precisely in that attitude that the dehumanizing element in racially restrictive covenants is most visible. Racial covenants sprang from and reinforced an attitude that all minority members were somehow like nuisances, and thus less than worthy human beings, whatever their individual characteristics.

Even acknowledging this dignitary affront, however, does not yield an easy cure; its diffuse character still creates the question whether any fully satisfactory remedy can be found. One answer is that at least a partial remedy already has been found, through public policy measures to de-fang racially restrictive covenants. However one may read *Shelley* as a constitutional case, it made an important statement in announcing that these discriminatory restrictions would not be enforced in US courts, no matter how "private" they might seem to be. Even more powerful were some state fair housing laws of the 1960s forbidding discrimination in the sale or rental of housing. These laws were then followed by the Federal Fair Housing Act, first enacted in 1968 and still in force today. The federal law forbids almost all references to discriminatory preferences in housing sales, rentals, and finance, and, as described above, it was soon bolstered by another Supreme Court decision that swept in even minor acts of discrimination in housing sales and rentals (*Jones v. Alfred H. Mayer Co.*,1968; Brooks and Rose 2013, 206–208).

These various measures together met a blanket harm with a blanket remedy, and—most important for the issue of dignitary restoration—one that publicly announced a rejection of the attitudes behind racially restrictive covenants. No one can plausibly believe that US law now stands behind a guarantee that white

7. Brooks and Rose (2013, 134–35) describe the phenomenon of "strange bedfellows" of white sellers and African American buyers at times when it became advantageous to both sides to break racial covenants.

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neighborhoods should be able to use legal means to make themselves all white and to keep things that way.

Nevertheless, given white flight from cities, the separation of the races in housing continues to be an entirely recognizable feature of US real estate. In an attempt to change this pattern, some localities have attempted to go beyond nondiscrimination law in order to promote positive integration. Until the 1980s, some housing developments experimented with "benevolent quotas," that is, numerical percentage limits that attempt to replicate within any particular development the racial demographics of the surrounding area. However, a 1988 decision of the prestigious US Court of Appeals for the Second Circuit (*United States v. Starrett City Associates*) invalidated these benevolent quotas as violations of the Fair Housing Act, and they are now widely regarded as illegal because of their discrimination based on race.[8] Although one might dispute the court's verdict, benevolent quotas are now widely regarded as forbidden.

Meanwhile, a different desegregation initiative emerged from the Chicago suburb of Oak Park, Illinois, which established a homeowner insurance program to guard against sudden drops in housing values. The theory was a kind of a reverse twist on the "self-fulfilling prophecy" about property value loss in the wake of racial transition. The idea was that if white owners could be assured that their housing investments were secure, they would not panic and leave at the prospect that minority buyers or renters might move into their neighborhoods; hence the insurance fund would remain intact. Oak Park's initiative has had some success as a model for Illinois legislation, and for the larger metropolitan area of Chicago (Brooks and Rose 2013, 217–18).

Programs like benevolent quotas and value-loss insurance may have merit for promoting integration, and insofar as they succeed, they may act as an important long-term remedy for the dignitary affronts of the old racially restrictive covenants, simply by acting as examples of the possibility of enjoying stable integrated communities. On the other hand, in a shorter run, such programs run dignitary risks of their own: they implicitly recognize white fears about the adverse effect of minority neighbors on housing values, or, as one African American opponent of the Illinois insurance program complained, white people seemed to need "black insurance" (Johnson 1988).

In some states, a different and rather more personal set of remedies has emerged, not as an alternative to integration efforts, but as a measure to promote actions that are largely small scale and voluntary but that still carry considerable symbolic freight. These remedies give property owners an opportunity publicly to renounce the belittling message implicit in racial covenants.

For reasons having to do with some of the technicalities of property law, it is difficult to negate any covenant running with the land without the consent of those who are supposed to be its beneficiaries, or to alter planned communities' CC&Rs without complex amendment procedures. For free-standing single-family residences, racial covenants in old deeds are steadily less likely to be seen by or even known by homeowners, since recording statutes often effectively limit the time back that a

8. Some years earlier, the eminent constitutional scholar Alexander Bickel (1962, 64–65, 71) had used benevolent quotas as an example of a subject on which legislators needed room to experiment, and hence as one on which the Supreme Court should avoid constitutional decisions.

title search must go, but, as mentioned early in this article, the situation is different for the CC&Rs of older planned communities. There, the racial provisions incorporated in the old CC&Rs are much more likely to come to the attention of current owners; the racial restrictions are no longer legal, but it is still difficult to amend the CC&Rs to renounce them.

While many minority purchasers may not take these now-unenforceable provisions very seriously, the provisions themselves remain as an uneasy and not entirely resolved reminder of an earlier set of legally enforceable attitudes. White homeowners may not be the targets of these reminders, but many are offended that their minority neighbors are.

A number of states have enacted legislation permitting individual homeowners and homeowners' associations to renounce racial restrictions in any recorded documents, including CC&Rs, without going through the usual complicated procedures that would be required for renunciation or amendment.[9] These kinds of statutes offer an interestingly apt remedy to the insult accompanying supposedly private racial restrictions: they allow individual homeowners and homeowners associations to announce their personal rejection of racial insult, and to place that rejection in the title records of their properties so that all future purchasers can see it.

Taken alone, state laws encouraging these personal statements may do little to alter the continuing patterns of housing segregation that dog the United States, but they very strongly suggest the significance that some property owners personally attach to the effort to try. The author has seen one such renunciation in the record books, accomplished in the old-fashioned manner of collecting the requisite signatures, an effort that reportedly took over a year in the now diverse San Marcos neighborhood of Tucson, Arizona. It is a modest but powerful statement, simply repudiating the offending paragraph in the community's CC&Rs, and accompanying the repudiation by the signatures of the neighborhood property owners (Pima County, Arizona, Recorder of Deeds 2013).

CONCLUSION

Racially restrictive covenants can be considered a dignitary taking only in an attenuated and shadowy manner, at least by comparison to the direct and purposefully humiliating property takings inflicted in other dignity takings. The motivation of racially restrictive covenants was less a conscious effort to dehumanize than a stony indifference to the insult and injury that they caused; the primary initiators of racial covenants were not state officials but private real estate developers and neighborhood groups; they did not so much divest people of property as discourage them from attempting to acquire or use it in the first place.

Racially restrictive covenants were thus but shadows of dignity takings, albeit uncannily recreating and reinforcing the racial contempt from which these covenants emerged. Given their shadowy character, it is perhaps fitting that remedies, too, might best be structured as measures restorative of dignity, with some real-world bite but

9. California has been a leader in these legislative changes. See Brooks and Rose (2013, 228).

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even more with symbolic character. The Fair Housing Act fills the bill with its public denunciation and outlawry of housing discrimination, but so do the small-scale, private, and personal denunciations by individuals and homeowners associations when they memorialize their rejections of racial covenants. Their acts recognize the past infliction of racial insult, and they announce that they want no part of it.

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