

Stumbling Stones at Levittown: What to Do About Racial Covenants in the United States

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Racially restrictive covenants blanketed much of the housing in the United States beginning in the late nineteenth century.¹ Although these covenants are most noted for forbidding the ownership or occupancy of land by Black people (except when they were domestic servants), covenants also forbade ownership or occupancy by, among others, “Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, and Filipinos . . .”²

In 1948, such covenants were held by the U.S. Supreme Court to be judicially unenforceable, and, in 1968, covenants expressing a preference based on race, color, religion, or national origin were made unlawful by the federal Fair Housing Act.³ Despite the covenants’ judicial unenforceability and

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I dedicate this article to the memory of David Madway, long time Executive Director of the National Housing Law Project and a brilliant fighter for housing justice and leader in the battle to keep the legal services back-up centers effective sources of powerful advocacy.

1. JAY TIDMARSH, *THE STORY OF HANSBERRY: THE RISE OF THE MODERN CLASS ACTION, IN CIVIL PROCEDURE STORIES* 233, 235-7 (Kevin M. Clermont, ed) (2d ed. 2004); RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 3 (2013) (stating that “[d]evelopers of high-end urban residential areas began to use them regularly in the early years of the twentieth century”); *Racial Covenants, a Relic of the Past, Are Still on the Books Across the Country*, NPR MORNING ED. (Nov. 17, 2021), <https://www.npr.org/programs/morning-edition/2021/11/17/1056388624/morning-edition-for-november-17-2021>.

2. *Shelley v. Kraemer*, 334 U.S. 1, 21 (1948).

3. *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Hurd v. Hodge*, 334 U.S. 24 (1948), made the covenants judicially unenforceable; the covenants were made unlawful by Title VIII of the Civil Rights Act of 1968, Section 3604(c) (prohibiting statements of preference based on race, color, religion or national origin). *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1969) (en banc). That Act was amended in 1974 to prohibit discrimination based on sex and in 1988 to prohibit discrimination based on familial status or disability (called “handicap” in the statute). Housing and Community Development Act of 1974, Pub. L. No. 93-383 (Section 808(b)), 88 Stat. 633, 729 (1974); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619-39 (1188); see Robert G. Schwemm, *Housing Discrimination:*

illegality, such covenants continue to exist and be referenced in subsequent transactions involving the properties that they purport to bind, and in some situations have continued to be written into new deeds.⁴ Although the covenants are judicially unenforceable and unlawful, they continue to perform their powerful function of signaling that properties are “exclusive” and that certain groups of people are not welcome in particular places.⁵

Property scholars and others have discussed what the twenty-first century should do with these restrictive covenants. Some communities are mapping them, identifying properties subject to such covenants.⁶ Some jurisdictions have enacted legislation to make it easier and less expensive to eliminate such covenants from deeds.⁷ An opinion in the 1969 case holding such covenants unlawful reported that “the major title companies . . . responsible for 95% of the deeds presented for recordation . . . have agreed with the Justice Department not to report racially restrictive covenants in their title policies.”⁸ Since the covenants plainly are unlawful under the federal Fair Housing Act, and have been held to be illegal under that statute, another possibility would be for the covenants to be crossed out on the deeds, with notations that the covenants are illegal and unenforceable. A law professor reported that when he bought a house in Los Angeles, prior transactions that had been superseded were “carefully lined out in blue ink

Law and Litigation Sections 11C:1 and 5:3 (2017). Thus, covenants restricting ownership or occupancy on the bases of sex, disability, or familial status are unlawful under the Fair Housing Act. See, e.g., *Simovits v. The Chanticleer Condominium Assn.*, 933 F.Supp. 1394 (N.D. Ill. 1996) (familial status).

4. See, e.g., *May v. Spokane County*, 481 P.3d 1098 (Wash. Ct. App. 2021), *rev. granted*, 197 Wash. 2d 1016, 489 P.3d 258 (Table) (Wash. 2021) (regarding racial covenant created in 1953); see also, Brooks & Rose, *supra* note 1, at 88 (explaining that property law, particularly with regard to covenants, differs from contract law in that “property relations are durable, affecting not only people who might originally want a set of arrangements, but successive owners as well, who are increasingly remote from firsthand knowledge of the earlier transactions”).

5. Brooks & Rose, *supra* note 1, at 86 (referencing covenants’ “assigned function of signaling and intimidation”).

6. See, e.g., City Roots Community Land Tr. & Yale Env'tl. Prot. Clinic, *Confronting Racial Covenants: How They Segregated Monroe County and What to Do About Them* (hereinafter “City Roots/Yale”) (2020) (identifying cities where restrictive covenants are being mapped); <https://www.mappingsegregationdec.org> (D.C.). The cities include Seattle, Minneapolis, South Bend, and Washington, D.C.

7. See, e.g., Justin Wm. Moyer, *Racist Housing Covenants Haunt Property Records Across the Country. New Laws Make Them Easier to Remove*, WASH. POST (Oct. 22, 2020) (discussing new laws in Maryland and Virginia); City Roots/Yale, *supra* note 6 (listing jurisdictions that have done this); *May v. Spokane County*, 481 P.3d 1098 (Wash. Ct. App. 2021), *rev. granted*, 197 Wash. 2d 1016, 489 P.3d 258 (Table) (Wash. 2021). Several other states have enacted legislation to facilitate formal legal rejection of covenants. See, e.g., Or. Rev. Stat. § 93.272; 2021 Cal. Stat. Ch. 359 (A.B. 1466), to be codified at GOV'T CODE § 12956; IND. CODE § 32-31-15-1.

8. *Mayers v. Ridley*, 465 F.2d 630, 646 (D.C. Cir. 1972) (Wilkey, J., concurring).

and initialed by a title company employee to highlight that they were no longer effective,” though the racial covenant in his deed “was untouched.”⁹

Courts across the country have wrestled with the issue of discriminatory covenants. In 1972, the full U.S. Court of Appeals for the District of Columbia Circuit held it was unlawful for the D.C. Recorder of Deeds to accept and file or provide copies of deeds with such covenants without providing a notice that the covenants are “null and void.”¹⁰ In another case, the U.S. Department of Justice secured from a federal trial court an order requiring a county clerk to “post in her office and affix to all documents pertaining to real property furnished by her office a notice stating that racially restrictive covenants are void under federal law.”¹¹

Yet another response is to use the covenants as educational or exorcistic tools. Richard Rothstein, for example, suggests adding to a deed with a racial covenant a provision that says the covenant is “unenforceable, unlawful, and morally repugnant” and that the owners “repudiate this clause, are ashamed for our country that many once considered it acceptable, and state that we welcome with enthusiasm and without reservation neighbors of all races and ethnicities.”¹² Connecticut has authorized such action by allowing a property owner to record an affidavit disavowing racial covenants.¹³

Rothstein’s proposal is an improvement on elimination of the covenants because it recognizes and addresses the evil of the racial exclusion. But these additions to the deeds would be seen by relatively few persons—those who search and record the deeds, and the parties to the transactions that involve the deeds. Drawing on work by Michael Gorra and Susan Nieman, I propose an additional response, that each house that is the subject of such a covenant bear a plaque reporting the covenant’s creation, purpose, and repudiation. This would be similar to the *Stolpersteine*—stumbling stones—in Europe that are hammered into sidewalks before the last homes in which victims of the Nazis lived in freedom.¹⁴ Michael Gorra praises the *Stolpersteine*:

[T]he best vehicle I know for the process of what in German is called *Vergangenheitsbewältigung*, the process of working through or overcoming through the past . . . a fusion of the noun for ‘pasts’ . . . with the word that denotes

9. August 6, 2020 email from Professor David Glazier of Loyola Law School, Los Angeles, to AALS Property Professors listserve (email on file with author).

10. *Mayers*, 465 F.2d at 630 (en banc).

11. *United States v. Univ. Oaks Civic Club*, 653 F. Supp. 1469, 1476 (S.D. Texas 1987).

12. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 221-2 (2017).

13. CT Pub. Act No. 21-173 Section 1; see <https://today.uconn.edu/2021/07/revelation-of-a-racist-property-restriction-leads-to-new-state-law-in-connecticut>.

14. See MICHAEL GORRA, *THE SADDEST WORDS: WILLIAM FAULKNER’S CIVIL WAR* 324 (2020); SUSAN NIEMAN, *LEARNING FROM THE GERMANS: RACE AND THE MEMORY OF EVIL* 30 (2019).

the idea of coping or mastering, and always with a sense of struggle. It is what one does, must do, with a difficult and recalcitrant history, a history for which one's people bear responsibility: a struggle that may last for generations and that extends even to those individuals who carry no personal share of the burden.¹⁵

The stumbling stones were created in 1995 by the German artist Gunter Demnig; each four-inch square brass plaque bears a name and dates of birth and deportation.¹⁶ As of 2018, there were almost 70,000 "across Europe, from Poland to Spain"; more than 61,000 are in Berlin.¹⁷

Susan Nieman teaches that the undertaking is important

to explore how the past should, and should not, be used in thinking about our moral and political futures. This kind of moral training helps us to recognize complex forms of evil as well as simple ones and prepares us to begin to prevent them. It's training that should not be confined to historians but must become a matter of shared public memory—history no thinking man or woman can honorably ignore.¹⁸

She adds:

We all benefit from inheritances we did not choose and cannot change. Growing up involves sifting through all the things you couldn't help inheriting and figuring out what you want to claim as your own—and what you have to do to dispose of the rest of it.¹⁹

Bryan Stevenson, founder of the Equal Justice Institute and National Lynching Memorial (formally, the National Memorial for Peace and Justice) in Montgomery, Alabama, was interviewed by Nieman for her recent book. He said that a critical absence in the United States is shame. (Another is leadership.)²⁰ "Without shame," he says, "you don't actually correct. You don't do things differently. You don't acknowledge." Nieman adds: "To overcome shame, you must actually do something to show others you are not inevitably caught in your, or your forebears, worst moments."²¹ Nieman writes that "Stevenson was profoundly affected by the stumbling stones" and that their impact is echoed in the National Lynching Memorial.²²

A combination of Rothstein's correction of the deeds and plaques on the houses seems likely to be very effective. Racial covenants have been analogized to monuments to slaveholders, Confederate soldiers,

15. GORRA, *supra* note 14, at 325.

16. NIEMAN, *supra* note 14, at 30, 276–77 (stating also that the small brass plaques memorialize "Jews, gays, Sinti, and Roma"); GORRA, *supra* note 14, at 324 (stating that the first were placed in Cologne in 1992).

17. NIEMAN, *supra* note 14, at 30, 277.

18. *Id.* at 19.

19. *Id.* at 39.

20. *Id.* at 268.

21. *Id.* at 269.

22. *Id.* at 278.

and leaders of the Ku Klux Klan.²³ Like those monuments, they are offensive, hurtful reminders of racial hatred and degradation. What has been written of the slavery, confederacy, and Klan monuments is, I think true of the racial covenants—that they “poison . . . our generations like radioactivity in the soil.”²⁴ We should act powerfully and swiftly to remove that poison.

23. This analogy is implicit in *Mason v. Adams County Recorder*, 901 F.3d, 757 (6th Cir. 2018).

24. Ayana Mathis, *The Trauma of the Civil War Lives on in Falkner’s Fiction*, N.Y. TIMES BOOK REV. 18 (Aug. 28, 2020), <https://www.nytimes.com/2020/08/25/books/review/the-saddest-words-michael-gorra.html> (reviewing GORRA, *supra* note 14). Mathis wrote that, in his final chapters, Gorra “compares America’s monuments to the Confederacy with Germany’s memorials to the Holocaust. It would be unthinkable to most Americans if such memorials celebrated the Third Reich, yet monuments to the Confederacy and its legacy of slavery are ubiquitous . . . , poisoning our generations like radioactivity in the soil.” *Id.*