PANEL DISCUSSION ON *SAVING THE NEIGHBORHOOD*: PART V

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I want to thank Carol, whom I've known for years, and Rick, for writing this book. Although, I did think that the title should be *Secured Transactions*, I suspect you'd have far fewer readers if you had entitled it *Secured Transactions*. But, in fact, one thing you can think about when you think about covenants, easements, and servitudes is that they are designed to protect the exchange value and the use value of property.

And so I thought of three ways I could work my way through this. The first is as a property guy. That's what I am. I taught property for 25 years. The second way to approach this book is to analyze it as kind of a game theory and work through the game theory. But then my mathematic skills would be revealed to be what they truly are. That would come to nothing. And the third would be to try to situate it in the work that Lani Guinier and I are doing. And we'll probably end up spending most of the time on that.

But what I think this book does do in a really important and profound way is provide a useful history in the evolution of race relations through the excavation of the law and social function of restrictive covenants. What the book demonstrates in a powerful way is how race discrimination—what you might even call racism—doesn't have to be the product of a bad heart. It's the product of social relations working themselves out driven by nonmalignant motives.

The book's importance is highlighted when you think about how little the history that they described is known. The actress Carey Mulligan was in a movie a few years ago that illustrates this. The movie was entitled *An Education*. In the movie, she is being taken advantage of by this older, more sophisticated fellow who was quite civilized and who really impressed her with his sophistication, worldliness, and wealth. How he made his money was somewhat obscure.

Then the filmmaker reveals both the source of his income and illustrates his character through one quick scene. It is a tiny scene in the movie where they have parked so that the fellow can get out to take care of some business. He greets this black family, and quite ostentatiously takes the black family up into an apartment they want to rent or a house they want to buy. She doesn't know what to think of this. And, of course, in the film there's not much more—the film doesn't make much of it. But, of course, what it reveals is that he makes his money by being a blockbuster. He's the one who is going to flip the property, depress the

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value and purchase other properties in the area. He makes his money by ostentatiously moving black people in or showing black people houses in neighborhoods where he wants to scare white owners into selling.

So when I say that the book is a useful history or an adjunct to the history of what you'd call, or what Carol calls, soft segregation or soft racism, I think that is a good way to think of it.

As a property scholar, I think that the discussion of the doctrine is actually great. And I can imagine using this for one piece that a lot of law students find difficult—at least, first-year law students find difficult to get their hands around—and that's the interplay of law and equity. So the question is: why do we need the adjunct of equity to perform these law functions? Looking at why legal rules need the adjunct of equity is important for law students to understand so that they understand the way their legal system works.

Carol and Rick also pull the curtain back on a lot of important cases in ways that reveal how formal niceties were ignored in order to accomplish goals both good and bad. This is illustrated in their discussion of the Restatement.[1] If you are a member of the American Law Institute, you understand the difficulty of reconciling complex and conflicting doctrine. Having participated in two Restatements, I read that section somewhat sheepishly because, when you do get involved in the process, what you are trying to do is to make sense of what the law says. And you sometimes, in the effort to harmonize doctrine, forget the political job that laws do. You get to be a lawyer first and policy analyst second and, of course, you want to be a lawyer's lawyer. This is what we are trained to do after all. Fascination with that kind of the technical skill becomes, in some ways, blinding.

In the same way, I thought the book indicated in important and delicate ways that what it means to win is a complicated question from one case to another. The question of who the client is is critical to parts of the book. The authors raise deep legal ethical questions, it seems to me, because, even in *Shelley v. Kraemer*,[2] there is a technical way in which they could have prevailed but would have left the mechanism intact. And if, in fact, your client is the client who wants to move into a particular place and have a particular covenant done away with, then that seems to me to be what your client wanted. If you can accomplish that, then you ought to accomplish that. But, in fact, in many ways that is not who your client really is.

Now, as I said, I could go through this in a second way and talk about game theory. But my mathematical skills are not good enough. But it does make me think about the geography of law. When I pull up old maps of Austin, Texas, the old zoning maps use racial zoning. And the color purple was the color in which they would put industrial buildings and, basically, Mexican and black people. Once that zoning was outlawed, the city leaders enforced racial segregation by building I-35, which effectively separated east and west Austin.

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1. RESTATEMENT (FIRST) OF PROP. (1944).
2. 334 U.S. 1 (1948).

I remember one time Lani was coming down to visit me in Austin, probably ten years ago now. And we were working, and we were walking around Austin. She probably doesn't even remember this: she turns to me and she says, "Where are the black people?" And it occurred to me that you can go an entire day in Austin, Texas and not see a black person. Now, Mexicans are part of the fabric of life in Austin, Texas. And so you can't go five minutes without seeing Mexican Americans, especially around me. But you can go all day and not see a black person. It is not that black people don't live in Austin. They do.

Now, let's turn to the last way to look at the book, and that's to situate this work in the work that Lani and I are doing. We are working on a book that examines the relation between social movements and durable legal change. Now, this book is not about social movements. It's about social change. And there's a distinction between social movements and social change.

But before I do that, I'm going to tell you a couple of stories. Because I'm probably the only one on the panel—probably the only one talking today—who has actually experienced all of the episodes that are described in the book.

I was born in a town called Victorville, California. Some of you may or may not know where Victorville is. It's a lovely high desert town. But I was raised in San Bernardino. I was born in my grandmother's home, a house she owned on the west side of Victorville down by the river.

And then my father went away to World War II. When he came back he wanted to buy a home in his hometown Victorville in a particular neighborhood, which was not the neighborhood in which I was born. But when he tried to buy a house, he could not buy a house in his hometown.

So my father said, "To hell with this." And we moved to the big city of San Bernardino 50 miles away. And he commuted for years, driving those 50 miles to the cement factory.

But then later on when I was a teenager, California passed an initiative essentially overturning the California fair housing law that resulted in the case of *Reitman v. Mulkey*.[3] My father was adamantly in favor of that initiative. He said he'd be damned if anybody was going to tell him who he could sell his property to.

And I had some heated conversations with my father about how we should have a different perspective on these transactions. But what it told me is that the libertarian ideal actually matters. There's kind of a fundamental American libertarianism that is deeply imbedded in property rules and property owners. So once you become a property owner, you sit in relationship to who can tell you what you can do with your property. So, despite being denied the chance to buy a home in his hometown because of rigid racial and ethnic segregation, he became a deeply committed property-rights guy with his home there in San Bernardino.

And that neighborhood where I lived in San Bernardino actually went through a number of transitions. Because, when we first moved in, it was a blue-collar neighborhood. And we were one of the first Mexican families to move in there. But then the white middle class families moved out and Mexican families

3. 387 U.S. 369 (1967).

moved in. And then black families moved in, and the Mexican families moved out, except my family stayed there. And then the black families moved out, and the Mexican nationals moved in. And that's a fact. You know, if you go through the hierarchy, that's essentially the way the covenant plays out.

So now next door to my mother—she still lives in the house that I was raised in, but I won't give you my address because I don't want you to report on my mother's neighbors—there may be some people whose legal status might not be absolutely perfect. But, you know, that is who populates my neighborhood now, where I grew up.

And I could watch, over the course of my lifetime, that neighborhood transition. Now were all the people who lived in those neighborhoods racists or people with bad hearts? The answer is no, absolutely not.

I lived in Pittsburgh for a while. And when I moved from Pittsburgh, I was going to sell my house. And as I was preparing to sell my house, my neighbors all came over to say goodbye one by one. You know, they'd bring cookies or something, but they all uniformly said: "You're not going to sell your home to—" They would never say who. But there'd be this kind of pregnant pause at the end of the sentence. And they would kind of look at me and communicate with facial expressions. But they were concerned. They didn't want me making any bad decisions.

Now, did I think my neighbors were racists? Well, I suppose I would have liked a little more enlightened attitudes. But no, I didn't think they were bad people. But I think the reason I suggested *Secured Transactions* as the book's title is this: To a certain extent, they felt that they had an investment in this neighborhood that was subject to market forces that were bigger than they were. And I suspect they were not bad people, all in all.

And then, finally, my home in Austin—when I'm in Austin—is a beautiful antebellum home, built with columns that were imported from a plantation in Alabama. And the judge who built it built it to be a replica of Tara. It's a beautiful home. And it comes complete with the columns and the broad lawn and the rose bushes and the restrictive covenant.

I also had the good fortune of being a colleague at Texas of someone who was probably the most vociferous opponent of the application of the state action doctrine in housing covenants. It was Professor Lino Graglia who basically believed the invalidation of restrictive covenants required a kind of magical doctrine. But the state action doctrine is where I'll end, because the book's treatment of the state action doctrine and it application in *Shelley* is very important. And this idea of state-facilitated activities being essentially state action for the purposes of the Fourteenth Amendment really is where the link between private action and public action lies.

Shelley v. Kraemer makes cameo appearances in contemporary law all the time. The most recent cameo was the *PPL v. Montana* case.[4] It's not a housing case. It's a public trust case, it is also an equal footing case. But the *PPL* case, if

4. PPL Montana, LLC v. Montana, 132 S. Ct. 1215 (2012).

you read it, you might think, "Well, this is just about—this is just a title dispute." How does a title dispute get to the U.S. Supreme Court? And the answer is *Shelley*.

There's also the constitutional work of Charles Black. Charles Black wrote the article—I was about to say "famous article," but if I'm the only one who knows about it, I guess it's not famous—called *State Action: The History of a Non-Concept*, in which he asks—like he did with his defense of *Brown v. Board of Education*—"What is the social meaning of these legal doctrines?" In many ways you can interpret this books as asking, "What is the social meaning of this specific legal instrument? Can we strip it of all its implications? Can we ask whether the values that animate our public law ought to be held at bay by the mere formal niceties of this clause because it isn't state action?"

Well, Charles Black, of course, said that the state is implicated in all law. And he wasn't ready to use it as a kind of universal solvent on the public–private distinction in itself. But he was willing to say that the extent to which the enforcement of private norms was in direct conflict with the public norms established through the Civil War amendments, the private norms ought to give way and things like the state action doctrine shouldn't stand in the way.

Now, as Professor Glennon shows in his history of the Montgomery bus boycott, one of the chief complaints of the people in Montgomery wasn't just that they were being made to sit in the back of the bus, because the dispute was really about the no man's land in the middle of the bus. The bus started to fill up. And the whites would fill up the front. And the blacks would fill up the back. And then you'd have to figure out where the border was. Well, who got to decide where the border was? Did an official come in and paint a line down the middle of the bus and say, "No blacks on this side of the line?" No. It was the bus driver. It was a private bus system. It was the bus driver who got to enforce these public norms.

And when you go back and read the material, what you discover, of course, is that one of the dignitary complaints was that the law would support a private enforcement of this public humiliation. And, in many ways, you can understand the assault on the restrictive covenants as being essentially the same thing—that we don't need a complicated theory of state action. What we need is to say that the norm of equal treatment will not be breached by private persons, and that the state will stand with us.

I think this book fits into that history. That is the way, ultimately, that I'd like to read it, as the newly excavated history of the interplay between public and private law as part of the history of race relations and the elimination of racism in American culture.

It's a complicated history. It's not always filled with bad people. There are bad people for sure. But unless you understand the workings out of American legal doctrine and American financial systems, unless you put those pieces together, things will seem obscure that actually are plain. And I think one of the virtues of this book is that it makes all of those mechanisms clear.