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APARTHEID-ERA CHICAGO

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> [The] Paul Cornell Award, which recognizes individuals and organizations whose work exemplifies the values and objectives of the community . . .
>
> – Hyde Park Historical Society[1]
>
> [We will] expel from [our] membership any members who sell to Negroes property in a block where there are white owners.
>
> – Resolution, Chicago Real Estate Board[2]
>
> The materials of city planning are sky, space, trees, steel, and cement in that order and that hierarchy.
>
> – Le Corbusier[3]

Paul Cornell arrived in Chicago in 1847 as a twenty-five-year-old man with his life savings contained in a small trunk.[4] Through an unfortunate series of events, the entire sum was stolen on his first night in town.[5] He wrote home to his cousin for additional

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1. Paul Cornell Award Nomination Form, HYDE PARK HIST. SOC'Y (2022), www.hydeparkhistory.org/2016/10/30/hphs-2017-paul-cornell-award-nomination-form/.

2. *Resolution (1921)*, 22 (13) NAT'L REAL ESTATE L. J. 36 (Jun. 1921) (resolution passed May 4 1921 and published in June 1921), www.calendar.eji.org/racial-injustice/may/4 [perma.cc/5ZXC-UQGT].

3. *Le Corbusier, Pioneering Architect, Is Dead*, N.Y. TIMES (Aug. 28, 1965), www.nytimes.com/1965/08/28/archives/le-corbusier-pioneering-architect-is-dead-suffers-heart-attack.html [perma.cc/TA5F-YVTS].

4. J.S. SAWYERS, CHICAGO PORTRAITS 56-7 (1991); *see also Paul Cornell*, CHI. TRIB. 46 Col. 1 (Mar. 25 1900) (ProQuest) ("He went to the Lake House [Hotel] and there his sum in money was stolen[.]").

5. SAWYERS, *supra* note 4 at 56-7.

funds,[6] which the cousin, Ezra, lamented could not be sent safely from New York to Chicago except by trusted messenger.[7] The incident helped inspire Ezra[8] to create a company specializing in the secure interstate movement of funds, now called Western Union.[9]

But Paul's luck in Chicago would take a turn for the better. By the time he reached middle age, the lands south of Chicago's downtown controlled by Paul Cornell would number close to one thousand acres,[10] and their value would make him among the wealthiest people in Chicago.[11] He developed the land with

6. *Id.*

7. Wells Fargo and The Holmes Service offered insured messenger services to carry cash between New York and Illinois at the time and this practice is representative of the market for delivery of bills and deeds prior to Western Union. A restored example of the vehicles used can be seen at 666 Walnut Street in Des Moines, IA. Only a few years later, Holmes would enter the fire alarm business and the wire messaging services business and compete with American District Telegraph in the former business and Western Union in the latter market. For more on how these businesses quickly developed alongside each other in the age of the telegraph, *see* narration within *United States v. Grinnell Corp. et al*., Civ. Act. 2785, Brief of Defendant Alarm Companies With Respect to Relief Dated 6 Apr. 1964 (D. R.I.), particularly sections paginated in the Records and Briefs of the United States Supreme Court as 203-210, www.books.google.com.pr/books?id=B1L1EOGBK7IC [perma.cc/6BPZ-R82T].

8. Notably, Ezra did not share his brother's racial prejudices or affection for the Confederacy; Western Union was among the first companies to train and hire Black telegraph machine operators and a receipt dated 1 April 1863 reports that E. Cornell made a sizeable $73 donation (about $2,500 today) to the families of Colored Volunteers of Albany County for 54th Mass. Regt., a unit composed of Black soldiers. *Receipt of E. Cornell*, (Apr. 1, 1863), www.rmc.library.cornell.edu/Ezra-exhibit/EC-life/Screen/c91receipt.JPEG [perma.cc/ZU2V-EDT2].

9. Personal Papers of Ezra Cornell, Cornell University Archive; *Ezra Cornell: A Nineteenth Century Life* curated by Elaine Engst (2000) [perma.cc/R5K8-VANA]; Western Union was founded in 1851, four years after Paul's initial misadventure in Chicago, for a detailed account of the company's founding and success, *see generally* J.D. WOLFF, WESTERN UNION AND THE CREATION OF THE AMERICAN CORPORATE ORDER (2015). To understand Western Union's importance and dominance at the time, *see* the Post Roads Act (1866 and as amended), the first attempt by the federal government to promulgate national industrial regulation in the telecom sector; its far-ranging economic implications are discussed in detail within A.M. Honsowetz, *1866 Post Roads Act* . . ., (2015) (Ph.D. Dissertation, George Mason University) www.mars.gmu.edu/bitstream/handle/1920/9839/Honsowetz_gmu_0883E_10914.pdf [perma.cc/S5JZ-TA87].

10. Beginning with the purchase of 300 acres in 1853, he eventually owned 960.2 acres in 1875. *See* Commission on Chicago Landmarks and the Chicago Department of Planning and Development, Community Area Report 444-47 (1996). As many of these acres were presumably held in corporations or trusts, sold to developers, turned into parks, donated to create the campus of the University of Chicago, and used for other purposes, it is difficult to ascertain precisely how many acres Cornell owned at the time of his death and contemporary newspaper items do not report this.

11. Cornell owned, at various times during his life, various parcels

seemingly only one guiding principle: that white Protestant people preserve a unique right to build, maintain, and enjoy a community on the idyllic shores of Lake Michigan.[12]

This is a turn-of-the-twentieth-century tale of luck, wealth, power, and prejudice. Cornell's racially restrictive covenants[13] kept Black, Jewish, and other residents out of Chicago's south side for decades. These restrictive provisions, often personally drafted and updated by Cornell himself, would outlive their author.[14] The white supremacist legal arrangements used by Cornell to keep his neighborhoods white, Protestant, and upper class eventually came before the Supreme Court twice, first in *Hansberry*[15] and later in *Shelley*.[16] They were cases that altered the path of Chicago's south side.

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encompassing most of the lakefront south side form what today would be a large triangle drawn from the South Loop to Woodlawn to Grand Crossing, in addition to other holdings as far east as the campus of the Museum of Science and Industry and as far west as 75th Street and Kedzie Avenue. W. BEST, ENCYCLOPEDIA OF CHICAGO 362-64 (Univ. of Chi. Press, 1996). Cornell reportedly paid $25 per acre. Gladys Priddy, *Swamp, Frogs, That's Start of Grand Crossing*, CHI. TRIB. 4 (June 2, 1955) (ProQuest). So significant were his transactions and disputes that Page 6 of the Sunday paper in 1872 featured gossip about his legal sparring with the heirs of millionaire John Bostwick and Ralston Palmer (of the Potter Palmer family for whom the eponymous Palmer House Hilton luxury hotel on State Street is named); the real estate in dispute was a parcel between Woodlawn and Cottage Grove Avenues on 63rd Street and worth $1.5M to $2M at that time ($2M in 1862 is over $55M today). *A Big Lawsuit*, CHI. TRIB. 6 (Dec. 29, 1872) (ProQuest). A 1947 piece in the Tribune mentions in passing that he "at one time owned all of what is now the Hyde Park area, bounded by Hyde Park Boulevard, Cottage Grove Avenue, the [University of Chicago] Midway, and the lake [in what is now Kenwood]." *Hyde Park Hotel is Purchased for About $500,000*, CHI. TRIB.10 (Dec. 14, 1947). By 1890, Cornell's fortune and business maneuvers were front-page news. CHI. TRIB. 1 (Jan. 2, 1890) (ProQuest). By 1900, Cornell was living full-time in the penthouse 1511 Hyde Park Boulevard, a building which he owned, with a view of Lake Michigan; he had recently spent $1,865,750 (about $60,000,000 today) to plant trees and do landscaping nearby, an astounding sum. *Paul Cornell*, CHI. TRIB. 46 Col. 1 (Mar. 25, 1900) (ProQuest). His estate would go on to own and maintain the 1511 Hyde Park property for decades after his death, his trustees (Helen C. and Paul C. French) selling it in 1947 to Southeast Properties, Inc., an entity controlled by Merwin S. Rosenberg; corporations were allowed to receive and hold deeds bearing Cornell's restrictive covenants, whether or not they were corporations controlled by Jews. *Hyde Park Hotel is Purchased*, *supra*, at 11.

12. *See*, *e.g.*, restrictive covenant referenced *infra* at n. 32 (barring residents according to racial classification or ethnic heritage).

13. Legal restrictions on the races or ethnicities of owners and occupants of a piece of real estate.

14. *Infra*, fn. 32.

15. Hansberry v. Lee, 311 U.S. 32, 37-8 (1940).

16. Shelley v. Kraemer, 334 U.S. 1, 10 (1948) (specifically prohibiting scenarios where property might be "occupied by any person not of the Caucasian race" and for redundancy if not clarity specifying elsewhere in separate sections: "This property shall not be used or occupied by any person or persons except those of the Caucasian race.").

White supremacy is learned. Because it can be learned, it also can be taught. It has a corpus of tactics, strategies, and practices, a manner of doing things, like the polite use of a steak knife[17] or the pronunciation of the word Shibboleth.[18] As a sign of membership[19] in a certain culture or subculture, white supremacy is more than a clutch of quietly held beliefs; it leaves evidence of harmful acts against those with more meritocratic and egalitarian views. The way Cornell chose to live his life and spend his fortune provides plenty of this evidence.

I. INTRODUCTION

Various monuments and plaques[20] near the University of Chicago's campus tell a heavily-redacted version of the tale of Paul Cornell. These plaques indicate Cornell was an attorney and real estate speculator.[21] The University's campus sits within the verdant, patrician outpost of Hyde Park on Chicago's sprawling, impoverished south side. Occupying more than two dozen blocks, the campus feels grand, yet it occupies only a fraction of the real estate once owned by Cornell.

This setting and scenario are, however, not accidents. Rather, they are the products of careful drafting by Paul Cornell, who owned much of this land and who installed racially-restrictive, white supremacist[22] covenants in tens of thousands of title documents and

17. JOHN MORGAN, DEBRETT'S GUIDE TO ETIQUETTE AND MODERN MANNERS 38-9 (St. Martin's Press 1996).

18. "שִׁבֹּלֶת" Judges 12:6. Eng. pron.: ˈshi-bə-ləth / shih-BEH-lith.

19. And non-membership too, in the case of 42,000 Ephraimites slain on the banks of the Jordan. *Id.*

20. A granite boulder inscribed with a tribute to Paul Cornell is located to the southwest of the tennis courts in Harold Washington Park "In honor of Paul Cornell . . . Father of Hyde Park . . . He created this park in 1856 and donated it to the City of Chicago." *Parks & Facilities*, CHICAGO PARK DISTRICT, www.chicagoparkdistrict.com/parks-facilities?title=paul+cornell [perma.cc/P9U3-HC7M] (last visited Feb. 27, 2022). A lifelike bronze bust and accompanying plaque are on display in the 1800 block of West 50th Street. *Id.* A bronze low-relief portrait of Cornell fifteen feet high can be seen at 1035 E. 67th Street. *Id.* A plaque commenting on Cornell's contributions to Chicago greets visitors at Cornell Square Park at 51st and Wolcott. *Id.* The most vociferous salute to Cornell, however, was a bronze plaque on the wall of Cornell Elementary, a now-demolished school at 7540 S. Cornell Ave. *Id.*; additional images available in the archives of the Chicago History Museum, 3d Floor.

21. *Paul Cornell Bust*, CHICAGO PARK DISTRICT, www.chicagoparkdistrict.com/parks-facilities/paul-cornell-bust [perma.cc/6BM8-YAN2] (last visited Feb. 27, 2022).

22. After much reflection, the Author has chosen to use "white supremacist" rather than "racist" as a classifier of both persons and policies that arbitrarily and harmfully prefer or privilege whites rather than others. It is the Author's conclusion, after much study of the topic and the pertinent literature, that nothing discussed in this Article can more properly be described as "racist" than as "white supremacist" and that the latter label is both more accurate and more

deeds, creating white pockets in the south side in the form of the Grand Crossing, Hyde Park, Jackson Park, and Kenwood neighborhoods.[23] This was not a white encampment; it was an outpost, a white *La Vendée*.[24] In the 1940s, the Supreme Court would catch a glimpse of the language that created Cornell's white Chicago enclaves in *Hansberry v. Lee*[25] and would invalidate similar covenants in *Shelley v. Kraemer*.[26] This precise legal drafting work should not be dismissed as "merely old words," since archaic language and ancient custom may evoke and even set in motion things as permanent as marriage and as severe as whipping and hanging.[27] Not boilerplate,[28] these words were committed to

descriptive as to the orientations, ideals, and prejudices of people and policies described.

23. Today, of these, per 2020 census data, only Hyde Park maintains a white ethnic majority (>45%, larger than the proportion for any other ethnic group). Illinois Population Down 0.1% in 2020, U.S. CENSUS BUREAU (Aug. 25, 2021), www.census.gov/library/stories/state-by-state/illinois-population-change-between-census-decade.html [perma.cc/SK6K-M9BD].

24. La Vendée was the stronghold of the French royalists (circa 1791-93), at one point–like Cornell's land–surrounded by (perceived) enemies on all sides except the shoreline. G.J. HILL, THE WAR IN LA VENDÉE 21-33 (Burns & Lambert Publishers 1856).

25. *Hansberry,* 311 U.S. at 33; *see also* Writ, 309 U.S. at 652 (case arose from restrictive covenant barring Black people from owning or leasing residences in Woodlawn on Chicago's south side).

26. *Shelley*, 334 U.S. at 10-2.

27. Alluding to William Shakespeare, MEASURE FOR MEASURE act 4, sc. 2 but alluding also to the fact pattern of Brown v. Mississippi, 297 U.S. 278 (1936) (Black planter suffered whipping and hanging from tree to extract confession as to murder of white farmer); Brown v. State, 173 Miss. 542 (1935) (Griffith, C.J., dissenting) ("[The trial court's] transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization."). *See also* Ogletree, C.J., *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826-45 (1987) (discussing historical context for *Brown v. Mississippi* and similar contemporary cases).

28. Cornell's language departed significantly from the standard covenants and provisions in Chicago at the time. Though up to eighty-five percent of Chicago was covered by some kind of racially restrictive covenant, most of these were pattern language covenants distributed by the Chicago Real Estate Board. *See generally* David M. Helfield & Isaac N. Groner, *Race Discrimination in Housing*, 57 YALE L.J. 426, 430, n.21 (1948) (outlining tactics, intent, and boilerplate language); *see also* Allen Kamp, *The History Behind* Hansberry v. Lee, 20 U.C. DAVIS. L. REV. 481, 483-84 (1987) (discussing narrower language used on south side of Chicago). The Chicago Real Estate Board template covenant barred Black residents but made exceptions for those of less-than-one-eighth Black heritage, people employed in the household or neighborhood in certain professions. *See* Kamp, *supra* note 28, at 484 (discussing promulgation and popularization of same). A group of white businessmen calling themselves the Woodlawn Property Owners Association embraced the Chicago Real Estate Board boilerplate but removed its carve-outs and created a restrictive covenant more like that contemplated in *Shelley*, aimed squarely at ensuring a bloc of the all- or nearly-all-white Woodlawn Property Owners Association could protect the neighborhood "against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian

documents of title[29] with great care and clear intent.

Perhaps due to our collective contemporary discomfort with the concepts, convictions, and reasonings of white supremacy, scholars tend to discuss white supremacist people (and, to a lesser extent, policies[30]) in alignment with either of two allegorical caricatures, neither of which is descriptively rich nor analytically helpful. In the first, the white supremacist person is an active champion for the belief in the superiority of the white race, the truth of the white word, and the righteousness of any plan that affects the theft of privileges and properties from other people and awards them effortlessly and non-meritocratically to white beneficiaries; this person operates *in terrorem*.[31] In the second narrative framework, the white supremacist person is a passive member in a nebulous white world that is depicted as environmental or ambient rather than cultural or structural. In this setting, the person is seen as a single fish within a much larger school, mindlessly and instinctively mirroring each turn as the school navigates into more and more objectionable shoals. The primary distinguishing characteristic between the two is that the former is a protagonist and advocate while the latter is a participant and sympathetic beneficiary of advantages built from the prototype of this prime example.

To describe Cornell as either of these simplifies his reasoning, misdescribes his involvement, and underestimates his culpability. Cornell had a nuanced, long-game plan for Chicago and it involved more than partition; it involved true apartheid: a white-controlled land title system, a white-controlled land use regime, a white-controlled separate police force, and more. And he likely died thinking he'd won.

Race." Woodlawn Property Owners Association pattern covenant at 7, identical in pertinent part to the covenant contemplated by the Court in *Shelley*, 334 U.S. at 10. Those bringing suit for equitable relief to enforce the Woodlawn Property Owners Association covenants and similar covenants were very clear about the intent and what they were "protecting" their neighborhoods against: "[T]he contention of the complainant is that unless an injunction is granted, said neighborhood will become mixed, both white and colored *with its attendant evils*." *cf.* Burke v. Kleiman, 277 Ill. App. 519, 530-31 (1934) (emphasis added) (central proposition of *Burke* no longer good law post-*Shelley*). *See generally* F.B. Lindstrom, *The Negro Invasion of Washington Park Subdivision* 6 (1941) (Unpublished A.M. Thesis, on file at Thesis Archives, Block 4, Policy and Politics, Joseph Regenstein Library, 1100 E. 57th Street, Chicago, IL 60637) (one of few contemporary scholarly accounts of conditions on Chicago's post-Cornell south side in era between *Hansberry* and *Shelley*).

29. The pertinent operative language appears in letters of conveyancing, memoranda to the offices of the county recorder, and the deed and title documents more familiar to contemporary attorneys.

30. In this Article, a policy may be white supremacist without its advocates being, unanimously, white supremacists. And a person may be a white supremacist and advocate for lower sales taxes or better automotive safety or some other cause that is not meaningfully coupled to his or her objectionable views.

31. In order to terrify.

Cornell was an attorney who was not only an advocate of–but an architect of–several of the most important aspects of structural white supremacy in Chicago. He personally promulgated restrictive covenants covering hundreds of city blocks requiring that "[n]o person of any race other than the Caucasian race shall use or occupy any building or lot . . ." within these bounds.[32] He had the influence, power, position, and opportunity to engineer a structural apartheid from which he would personally benefit in financial and nonpecuniary respects. Using the power of the courts, the system of conveyances, and the arsenal of financial and political resources at his disposal, he sought to create an apartheid enclave in which "the jews, turks, gypsies, slavs, and others"[33] would not prosper, recreate, or reside.

We do not know whether Cornell was driven primarily by white supremacist beliefs or primarily by his insight that white supremacist policies were financially attractive. Hence, rather than attempting to interrogate or somehow reverse-engineer Cornell's psychology, the following sections explore how he executed his plan and what occurred as a result. The goal of this exercise is to understand how Chicago, a city with a white minority and a troubled (and troubling) history of race relations would choose to celebrate and commemorate the life of Paul Cornell, whose profitable schemes generated enormous public costs borne in the currency of equity.

First, one must define key terms that did not exist in Cornell's time but are important in the analysis of Cornell's plan and its results and implications. The following sections explain these terms: integral white supremacy, structural apartheid, structural arbitrary advantage, and privatized urban planning. These terms

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32. *See*, *e.g.*, restrictive covenant attached to deed history for 7540 S. Drexel in Chicago, originally drafted by the law practice of Messrs. S. Black and P. Cornell and recorded as such by Shoreline Title, now part of Chicago Title. These restrictions would survive legal challenge for decades, and even be bolstered by the Supreme Court's unanimous opinion in *Corrigan*. *See* Corrigan v. Buckley, 271 U.S. 323, pin cite (1926) (upholding multiple racially restrictive covenants, good law until *Shelley* in 1948). For representative examples of the language used in Chicago by Cornell and in other parts of the country, *see* R.R.W. BROOKS, SAVING THE NEIGHBORHOOD 26, 28, 35, 37-40 (Harvard 2013) (general discussion of racially restrictive covenants and survey of language used around the United States); *see also* DAVID G. GARCÍA, STRATEGIES OF SEGREGATION: RACE, RESIDENCE, AND THE STRUGGLE FOR EDUCATIONAL EQUALITY 44-6, n. 28 (California Scholarship Online 2018) (examining impacts over time on Black communities as well as other immigrant and minority groups).

33. This restriction may have been typical of the time, but the enormous footprint of Cornell's holdings meant it applied to entire sections of the city. *Compare* this restrictive covenant language used by P. Cornell in various Jackson Park deeds circa 1865 *with* covenant language used elsewhere in America at that time and later in JEFFREY D. GONDA, UNJUST DEEDS 29-30 (Univ. N.C. Press 2015).

are used differently by different authors and the usages here are carefully chosen to offer relevance and continuity of definition across very long periods of time.[34] Following this, the intersection of white supremacy and privatized urban planning are discussed (including a discussion of privatized policing), then the narrative reunites these concepts with Cornell's biographical details and the relevant caselaw during and after (particularly in the 1940s) his death.

II. WHAT IS INTEGRAL WHITE SUPREMACY?[35]

Integral white supremacy is not merely the presence of a condition where whites are advantaged.[36] Without context, the rules of an unfair game by themselves do not constitute integral white supremacy.[37] Rather, integral white supremacy is fundamentally administrative, an abrasive machine that erodes gains made by non-whites and grinds them to worthless dust while recycling any shiny bits into white wealth. Inexorably ever more privileges and property accrue to whites in a zero-sum game, such as the ownership of desirable waterfront property, wherein a unit lost by non-whites is redistributed by operation of law to the collective enjoyment of whites.[38]

While there was no dissent in the Supreme Court's decision in

34. Privatized urban planning was common in Chicago, from the three-flat brewery-funded clapboard housing for Germans along the Halsted corridor in Pilsen to the "company town" housing of the Pullman neighborhood.

35. Some scholars use "integral" or "structural" white supremacy to mean an environment in which white supremacy is ambient, "covert, and highly institutionalized." In such an environment, "color-blind racism" and even innocent racism with deleterious effect is, these scholars theorize, possible. I do not use structural white supremacy with this meaning. *See*, *contra*, Jennifer C. Mueller, *Producing Colorblindness: Everyday Mechanisms of White Ignorance*, 64 SOC. PROBS. 219, 226-29 (2017) (instead, the Author advocates that "integral" white supremacy must more broadly include all mechanisms that can be put in motion to consistently and reliably favor white privileges while demoting or removing the privileges of others, even if those systems have race-neutral origins).

36. For 1950s-era discussion of these concepts using different vocabulary, *see* Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 6 (1959).

37. For contemporary framing of state action as to administering unfair or inequitable rules, *see generally* Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1108-20 (Dec. 1960).

38. Prof. Henkin summarizes the state of play and the peripheries at which the state's hands are bound, no matter how enticing or popular it may be to assist the white supremacist begging at the bar for relief: "The state cannot restrict a Negro's right to property on account of his race. It could not do so by statute. It cannot do so by the actions of its courts. Judicial action is, of course, clearly 'state action' for purposes of the fourteenth amendment." Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PENN. L. REV. 473, 475 (1962).

Shelley v. Kraemer—the landmark case invalidating white supremacist restrictive covenants in the deeds crafted by Cornell and others like him—that opinion was not 9-0 unanimous either. Justices Jackson, Reed, and Rutledge recused themselves and took no part in the consideration of the case because all three owned homes that had restrictive covenants installed in their deeds barring either Jews or Blacks from becoming subsequent owners of their properties.[39] This illustrates the pervasiveness of language of the kind Cornell drafted, and also that learned jurists as recently as the 1940s considered these protections against nonwhite subsequent owners to have some value. Indeed, if merely a worthless relic of nineteenth century draftsmanship, the provisions would not have required their recusals.[40]

III. WHAT IS STRUCTURAL APARTHEID?

Where integral white supremacy is fundamentally administrative, structural apartheid is fundamentally violent; it is

39. We do not know the Justices' privately held views on race, and they may have benefited financially or otherwise from the restrictive covenants on their homes. It is notable, however, that they felt the need to recuse themselves in the consideration of *Shelley* when, meanwhile, no Justice felt the need to recuse himself in *Corrigan* in 1926. Notably, the Court had one-hundred percent turnover during this relatively short epoch, so no Justice heard both *Corrigan* and *Shelley*. Also notable is that Justice Brandeis, the first Jewish person confirmed to sit on the Supreme Court, joined Justice Sanford's opinion in *Corrigan*, despite restrictive covenants of the time often containing explicitly antisemitic provisions. Justice Robert H. Jackson was an outspoken advocate of civil rights and opponent of antisemitism (antisemitism being one motivator in the crafting and enforcement of restrictive covenants) around the time of *Shelley* in 1948. Two years earlier, Justice Jackson had served as the Chief United States Prosecutor in the Nuremberg trials, where he wrote he felt, even among the many horrors of World War II, particularly terrible were German efforts "to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others." The fact that three Justices of the United State Supreme Court had homes with these covenants installed, however, speaks to their prevalence in 1940s America (Jackson resided in northwest Washington, D.C. very near the neighborhood at issue in *Corrigan v. Buckley*, while Reed resided in Virginia and Rutledge maintained a home in Colorado subject to a restrictive covenant, though he would die the year after the decision in *Shelley v. Kraemer* not having returned to that property).

40. If a judge sees a potential conflict as having no bearing on a direct or monetary interest, it may not rise to the level of a conflict for purpose of recusal; acknowledgement that the Justices in question had a conflict also acknowledges, albeit indirectly, that restrictive covenants may have still had value in the 1940s. The Due Process Clause incorporates the common law rule that a judge must recuse himself (or herself) when that judge has "a direct, personal, substantial, pecuniary interest" in the case at bar or where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927); *see also* Withrow v. Larkin, 421 U.S. 35, 47 (1975) (if Justices assigned no value at all to racially-restrictive covenants then they should not have had reason to recuse themselves).

inextricably intertwined with the Northian concept of violence,[41] a monopoly a state enjoys and flaunts and uses to decisively, and sometimes fatally, attack anyone who might challenge it.

Structural apartheid is the (mis)use of the government's monopoly on violence to directly or indirectly injure people when the privileges, ornaments, or rituals of white supremacy are endangered.[42] Structural apartheid differs from integral white supremacy in that it includes the violent enforcement of rules and norms that are promulgated by the group asserting dominance.[43] And, relevant to the south side of Chicago today, structural apartheid describes scenarios where the group threatening to deploy the violence of the state is outnumbered by the group threatened with that violence.[44] Whites are a minority group in Chicago and have been for nearly fifty years.[45]

Structural apartheid is a specific type of government weapon allowing each empowered minority person to amplify one's capacity for physical harm against less-empowered but more-numerous groups. In the holster of every police officer, the inkwell of every prosecutor, and the gavel of every judge (irrevocably and fatally in states with provisions for capital punishment) live the defense mechanisms of the state's immune system, ready to attack anything that looks from a distance like a threat.

Tactics once reserved for overseas battlefields and domestic antiterrorism are now used in routine investigative and

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41. *See generally* DOUGLASS C. NORTH, JOHN J. WALLIS, & BARRY R. WEINGAST, VIOLENCE AND SOCIAL ORDERS 15-21 (Cambridge University Press 2009) (this framework considers violence as terminal recourse, ultimate decisive action vested in state actors such as police to settle scores and designate winners and losers).

42. *See generally* Civil Rights Cases, 109 U.S. 3, 11-19 (1883) (state action to enforce badges and legacies of slavery inappropriate, though Congress cannot directly legislate limits to contractual discrimination in private transactions); *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880) (state action to exclude Blacks, for instance from jury service, not appropriate and constitutes state action to limit Blacks' participation in society). The High Court would take further action to ensure the Thirteenth and Fourteenth Amendments were respected and not used to animate state action against Black participation in civic matters, though little progress would be made between 1883 and the end of the Second World War.

43. For an in-depth example of the ever-present threat of violence in the context of white officers and Black motorists, *see generally* Karl Muth, *Learning Facts from Fiction in Jay-Z's '99 Problems*,' 111 J. CRIM. L. & CRIMINOLOGY ONLINE 1 (2020).

44. No doubt protecting the few from the many is a righteous, worthwhile, and wonderful sentiment within the Constitution. *See* City of Beaufort v. Baker, 432 S.E.2d 470, 475 (1993) (Toal, J., dissenting) (important purpose of Constitution is to protect few from many). However, this is distinguishable and different from favoring a racial minority at every turn in order to ensure its wealth, dominance, and safety at the expense of the majority.

45. *See generally* decennial census results for Chicago census tracts 1970 to present, www.census.gov.

immigration matters against Black and Latinx neighborhoods. In response to a "tip" from two "concerned citizens" (quotation marks borrowed from Judge Cassell's opinion[46]),

> [Forty-seven] SWAT team members came to [a neighborhood bakery and restaurant operating during normal business hours] in [unmarked] trucks, unloaded from the trucks, secured everyone in the parking lot and inside the store, restaurant, and tortilla factory comprising La Diana by displaying their firearms, ordering everyone present to the ground, and then handcuffing everyone with [zip]ties.[47]

The owner of the bakery testified, "the officers used "military style weapons with laser sites [*sic*] pointed at the men, women and children,"[48] and that "everyone on the premises was detained, handcuffed, interrogated . . . . All were subject to drug sniffing dogs. The time of the interrogation lasted approximately three hours. All of [those detained] were asked to prove that we were on the premises legally."[49] These tactics to intimidate non-white communities using the personnel, resources, and weapons of the state[50] are not uncommon.

The structural apartheid weapon is especially effective when combined with the systematic disarmament of non-whites,[51] ensuring individuals and communities targeted are maximally vulnerable and further amplifying the power of the few to attack the

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46. Panaderia La Diana, Inc. v. Salt Lake City Corp., 342 F. Supp. 2d 1013, 1020 (D. Utah 2004)

47. *Id.*

48. *Id.* "Category C warrants are reserved for high-risk situations where there is a likelihood of violence and are executed by the SWAT team. Standard operating procedure for executing a Category C warrant includes coming in with weapons drawn, ordering individuals to the ground and enforcing compliance if necessary, and handcuffing everyone present." *Id.* at 1019.

49. *Id.* at 1020.

50. The history of assertion of white dominance and majority enforcement of power, whether economic power, electoral power, or other types of power has multi-century Euro-centric, African, pan-colonial, and New World histories that are too nuanced to explore in a footnote beyond book recommendations. *See generally* ERICA JAMES, DEMOCRATIC INSECURITIES 282-97 (Univ. of California Press 2010) (discussing assertion of whiteness and white power over non-white people in the Haitian context); NORTH, WALLIS, & WEINGAST, *supra* note 41, at 26-45 (explaining framework of violence as tool of state control rather than state action of last resort); *see also* AVIVA CHOMSKY, CENTRAL AMERICA'S FORGOTTEN HISTORY 52-9 (Beacon Press 2021) (discussing relationship between state control, privileged groups, and violence in broader Latin American context); *and see also* CHRISTOPHER BLATTMAN, WHY WE FIGHT: THE ROOTS OF WAR AND THE PATHS TO PEACE 12-38 (Penguin Press 2022) (discussing violence, rare-but-always-looming, as high-cost mode of communicating objections to present conditions).

51. For more on the engineered vulnerability and systematic disarmament of Black residents, *see* Karl Muth, *The Panther Declawed: How Blue Mayors Disarmed Black Men*, 37 HARV. BLACKLETTER L. J. 7 (2021) (explaining policy-driven disarmament of urban Black people alongside militarization of white residents and police forces).

many using the power of the state.[52]

Structural apartheid is powerful because it disenfranchises, disempowers, and disarms the non-white majority while emboldening, encouraging, and equipping the white minority to use violence.[53]

In Cornell's time, the conflict between the races was still principally waged on the battlefield of taxonomy. Across a broad portion of the spectrum of melanin and origin, whether a person was white was a matter ripe for debate. By disqualifying from whiteness[54] the Slavs, the Turks, the Jews, the Italians, and other southern Catholics of Europe (many of whom consider themselves white today), whites like Cornell could choose their allies and aim the weapon of structural apartheid with precision. Later in life, Cornell would feverishly revise his covenants, creating many different versions.[55] As waves of olive-skinned Catholic Europeans and Black participants in new waves of migratory activity replaced Jews and Poles as the prime threats to Cornell's narrow demographic ideal, the covenants changed accordingly.[56] So elaborate was the legal drafting needed to welcome some Europeans to Chicago while excluding others, inventing a time machine and

52. "Arms in the hands of the Negro aroused fear both North and South." W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 396 (1935).

53. "Only recently, this Court had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry was not a legitimate exercise of the state's police power . . . " Vinson, C.J. in Shelley v. Kraemer at 21, alluding to Oyama v. California, 332 U. S. 633 (1948).

54. *See generally* IAN LÓPEZ, WHITE BY LAW ch. 2, 27-34 (NYU Press 1996) (chapter "Racial Restrictions in the Law of Citizenship" directly discusses tensions between equality among citizens and restrictions on certain groups' abilities to exercise rights).

55. The 7540 S. Drexel covenant, *supra* note 32, is representative of Cornell's running changes, which moved from targeting the perceived threat of poor European immigrants (such as "gypsies" and "slavs" in 1882) to also targeting Spaniards and poor southern European Catholics ("Spaniards, Italians" in 1889) to eventually targeting Asians and Blacks ("it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race" in the 1890s, the latter restriction in line with the Page Act of 1875 and Chinese Exclusion Act of 1882 and as amended in 1894). This latter language specifying and prohibiting "Negro" and "Mongolian" people is present on the deed litigated in *Shelley* and also present on the deed to the author's home on S. Maryland Avenue in Chicago (conveyed by Chicago Title and on file with the author, including this restrictive covenant now without effect).

56. *See* covenant cited in *Hansberry*, "[R]espondents are owners of land within the restricted area who have either signed the agreement or acquired their land from others who did sign, and that petitioners Hansberry, who are Negroes, have, with the alleged aid of the other petitioners and with knowledge of the agreement, acquired and are occupying land in the restricted area formerly belonging to an owner who had signed the agreement." *Hansberry*, 311 U.S. at 38 (substance of covenant mechanism summarized by Stone, J.).

assassinating Philip II[57] might have proven easier.

Prior to 1940, there was little if any precedent in Illinois suggesting judges, also mostly white wealthy Protestant men, would agree with his definitions of race and force landowners on the south side of Chicago to abide by the restrictive covenants Cornell and his colleagues crafted. In the worst case, buyers of homes in Hyde Park reasoned, if Cornell thought too many of these "others" slithered into Cornell's white Eden, the white police force would respond on his behalf and the fortifications Cornell created in ink would be made flesh.

Cornell's xenophobia, his and his colleagues' legal mechanisms, and even the threat of violence from the police could not change the demographic and economic realities: there were people of all colors and persuasions interested in living in Chicago and, eventually, with cash in hand, they would find willing sellers. By the time of Cornell's death, over one-hundred Black families had already become homeowners in the areas he once controlled.[58]

IV. WHAT IS STRUCTURAL ARBITRARY ADVANTAGE IN LAW-AND-ECONOMICS?

Structural arbitrary advantage is the advantaging of one player in a game or system due to an arbitrary rule or set of rules.[59] White has an advantage in chess, but this advantage is due to the enforcement of an arbitrary rule: white always moves first. White's army of sixteen pieces is no more capable, no better-equipped than black's. But every time white chooses the style of play in a way black cannot. Black's first task is to respond to white's provocations, to find refuge in spaces white does not attack, and to mitigate harm from white's claims of dominance in what could otherwise be black's space.

So, too, in the rules of the game Cornell created.

In the context of the real estate market on the south side of Chicago, Cornell created the market as the only seller (effectively,

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57. King of Spain, the Netherlands, and Naples, and Portugal. Husband to Mary I of England. Creator of the Inquisition in Spain, convener of *Auto-da-Fé* in Portugal, and prosecutor of Anglophone Protestants in 1554.

58. *See 1900 Population Report, Census of 1900*, *infra* note 96 (may include an undercount of Black families, as families may have benefited from not disclosing their race).

59. Chess has a structural arbitrary advantage in favor of white, as explained *infra*. Meanwhile, there is no structural arbitrary advantage for either player in checkers, which should result in a draw if played "perfectly" by each player, even though such "perfect" games may take hundreds of different forms. For an in-depth technical discussion of why this is true, and commentary of structural arbitrary advantage in rule sets, *see generally* J. Schaeffer et al., *Checkers is Solved*, 317 SCIENCE 1518-22 (2007) (all games of checkers will result in draws and be even unless or until one side commits errors; it is blunder, not brilliance, that creates any opportunities for victory).

all buyers were forced to buy from Cornell, as the sole owner of the area's real estate) and inserted a set of rules (racially restrictive covenants) that favored one group years, even generations after Cornell had sold all, or essentially all, of his interest in the properties.

The consequence (or, in economic terms, cost) of this is borne in title and time by those downstream from Cornell. The problem in the market Cornell created is that equilibrium (the point at which an actor acts in self-interest and also interacts with another in the market) is reached at a point that is suboptimal.[60]

Not only do buyers pay a premium to live in a restricted neighborhood, but they also forfeit appreciation by having a smaller market of potential buyers when they eventually decide to sell. For example, Cornell, despite having sold all property rights to the land long ago, excludes the Jewish buyer offering the seller's asking price from the pool of possible purchasers.[61] Similar dynamics apply in education,[62] labor markets,[63] and other parts of society.[64] These distortions in the market destroy value for everyone by artificially limiting the pool of eligible buyers, depressing asset prices, and increasing frictions in these markets more generally.

V. WHAT IS PRIVATIZED URBAN PLANNING?

Privatized urban planning is the unilateral imposition of land use decisions in an urban setting through an assertion of title rather than democratic policy.[65] Archetypical examples of privatized urban planning include the company town (*e.g.*, Gary, Indiana, built and developed on the shore of Lake Michigan by U.S. Steel), the private port (Rotterdam, principally developed in a modern sense by the Dutch East India Company), and the fief-turned-municipality model in Europe (e.g., Florence, expanded greatly and modernized by Cosimo de' Medici). Cornell held not just influence over, but title

60. GARY BECKER, THE ECONOMICS OF DISCRIMINATION 17, 19-24 (1957).

61. *Id.*

62. MATTHEW JACKSON & ALBERTO BISIN, HANDBOOK OF SOCIAL ECONOMICS 113-200 (Jess Benhabib ed., 2011); *see also* Hanming Fang & Andrea Moro, *Theories of Statistical Discrimination and Affirmative Action: A Survey* (Nat'l Bureau of Econ. Rsch., Working Paper No. 15860) (last revised 2012) (explaining statistical discrimination can have unintended downstream consequences).

63. *See generally* Kenneth J. Arrow, *The Theory of Discrimination* in ORLEY ASCHENFELTER & ALBERT REES, DISCRIMINATION IN LABOR MARKETS (1973) (describing that even innocuous regulations without overt objectionable preferences can result in discriminatory dynamics with subsequent follow-on effects).

64. Edmund Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659-61 (1972).

65. H. GREEN, THE COMPANY TOWN 35-42, 66 (RHYW Publishing 2011) (discussing private planning of Chicago's neighborhoods with focus on Pullman neighborhood on city's south side).

to, much of Chicago's south side, personally owning nearly 970 acres at one point in the 1870s.[66]

Cornell was willing to parcel his vast holdings, so long as buyers supported his vision of a wealthy white Protestant riviera on the shores of Lake Michigan. He set aside, rather than designating for housing, substantial tracts for parks and even 183 acres for a cemetery. Jackson Park (named for Andrew Jackson) and Washington Park (named for George Washington) are sizeable areas of green space designed with mixed use[67] in mind. The Midway Plaisance would later be flooded and navigated by gondola during the World's Columbian Exposition[68] and today serves as the main parkway[69] dividing the north and south areas of the University of Chicago's campus.[70]

Oak Woods Cemetery, where Cornell would eventually be buried, was also a hands-on project and consumed more of Cornell's land (183 acres) than any project other than the Colombian Exposition Campus.[71] Oak Woods Cemetery worked with General

66. JUNE SKINNER SAWYERS, CHICAGO PORTRAITS: PAUL CORNELL 32 (Loyola Univ. Press 1991); *see also* Commission on Chicago Landmarks and the Chicago Department of Planning and Development, COMMUNITY AREA #69: GREATER GRAND CROSSING: CHICAGO HISTORIC RESOURCES SURVEY, AN INVENTORY OF ARCHITECTURALLY AND HISTORICALLY SIGNIFICANT STRUCTURES 444 (1996) (discussing Grand Crossing neighborhood and attributing plenary decision-making to Cornell's ownership of land and desire to develop commuter community near rail lines).

67. This includes areas for yachting (sailing), rowing (crew), running, and areas for playing various land-based sports.

68. The U.S. Mint offered its first commemorative coins at the Columbian Exposition, including a version of the quarter dollar featuring the gondolas and the flooded midway. *Commemorative Coins from 1892-1954*, U.S. MINT (last updated April 10, 2017), www.usmint.gov/learn/coin-and-medal-programs/commemorative-coins/commemorative-coins-from-1892-1954 [perma.cc/7LNR-TZ38].

69. *See* PETER ROSSI & ROBERT DENTLER, THE POLITICS OF URBAN RENEWAL: THE CHICAGO FINDINGS 12 (Praeger Press 1981).

70. *Compare* Hermann Heinze & A. Zeese & Co., Engravers, *Official Souvenir Map, World's Columbian Exposition at Jackson Park* (1893), LIB. OF CONGRESS, www.loc.gov/resource/g4104c.ct002834/ [perma.cc/9X6C-WWAR]) (last visited Feb 27, 2022) *with* contemporary University of Chicago campus maps (various), www.maps.uchicago.edu/ [perma.cc/AH4C-MJFT].

71. In 1890, Hyde Park called itself the world's largest village as the census had measured a population of over 85,000. JULIA ABRAHAMSON, A NEIGHBORHOOD FINDS ITSELF 4 (Biblo & Tannen Publisher 1971).

John C. Underwood,[72] of the United Confederate Veterans,[73] to arrange for 6,229 Confederate soldiers[74] to be buried there (the remains were moved from other grave sites[75]), over 4,000 of whom are memorialized by name at the site.[76] Aside from the Plaisance, Jackson Park, and Washington Park, there is a fourth park whose grounds were drawn at least in part from Cornell's portfolio, later named Harold Washington Park, which Cornell would no doubt be shocked to learn was named after Chicago's first Black mayor.[77] Mayor Washington was buried at Oak Woods Cemetery in 1987.[78] Having said in his inaugural address, "I hope someday to be remembered by history as the mayor who cared about people and who was, above all, fair," Washington drew hundreds of thousands of mourners to his funeral and related services, which lasted several days.[79]

It is not intuitively obvious whether, or to what extent, urban planning should be privatized. But when plenary decision-making is interested primarily in the preferences of a single racial group, the result is at a minimum suboptimal and, in the case of Cornell's holdings, a prelude to a subsequent century of expensive and mostly unsuccessful attempts to repurpose, redevelop, and integrate a failed urban retreat for white people. Today, the south side of Chicago remains one of the most racially segregated places in North America.[80]

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72. Underwood became involved at some point between the charter of the cemetery in 1853 and the dedication of the Confederate monument there in 1895, which he attended. It was between 1865 and 1867 that remains of Confederate dead were moved to the site. *See Confederate Mound at Oak Woods Cemetery Chicago, Illinois*, NAT'L PARK SERV., www.nps.gov/nr/travel/national_cemeteries/illinois/confederate_mound_oak_woods_cemetery.html [perma.cc/JQ7P-JTMH]) (last visited Feb. 27, 2022) ("General John C. Underwood, a regional head of the United Confederate Veterans, designed the monument and was at its dedication on May 30, 1895[.]"). Underwood was naturally attracted to the project as he spent the latter decades of his life constructing intricate genealogies of the Confederacy and raising money for the Confederate Monument in Richmond, Virginia. His letters and papers, including a wartime diary, reside in the archives of Western Kentucky University and include correspondence regarding the project.

73. The Southern counterpart to the Grand Army of the Republic.

74. Plaque, Confederate Mound, Oak Woods Cemetery.

75. *Id.*

76. Mound Placard, Oak Woods Cemetery.

77. The park does, however, contain a granite marker thanking Cornell for the donation of the land.

78. Washington Marker, Central Area, Oak Woods Cemetery.

79. LaSalle Street was closed between Lake Street and Madison Street to allow the parade of thousands of mourners per hour to pass as he lay in state and a public memorial service handled overflow of mourners who could not fit inside Christ Universal Temple church at 11901 S. Ashland. *See* Robert Davis & James Strong, *Chicago Mourns Mayor Washington*, CHI. TRIB. (Nov. 27 1987) (ProQuest) (obituary mentioning scale of services surrounding Washington's death).

80. Alana Semuels, *Chicago's Awful Divide*, ATLANTIC (Mar. 28 2018),

VI. IS WHITE SUPREMACIST URBAN PLANNING ECONOMIC SELF-INTEREST?

The dynamics of white enclaves, from an economic perspective, are more complex than they may at first appear. While one might expect white enclaves to fare worse than integrated communities, as the pool of buyers for each home on the market is vastly reduced (especially in cities like Chicago where whites are a numerical minority), some whites will pay a substantial premium to be in a neighborhood that is racially homogeneous or, more specifically, racially exclusive.[81] In fact, it is not unimaginable that this in-group premium would in some cases make up for the narrower market to which a seller of a home in a homogeneous place could appeal.[82]

This was Cornell's wager. That whites would continue to pay a premium to live in an all-white place where there would be no risk of being served coffee by a Black waiter at the Cornell-owned Hyde Park House hotel, where there would be no risk of having a neighbor who was an Asian, Black, Gypsy, Jew, Slav, Turk, or southern European (e.g., Italian or Spaniard) in Cornell-developed neighborhoods[83] like Jackson Park and Woodlawn, and where there would be no risk of one's child encountering non-white students at his Paul Cornell School at 76th and South Drexel Streets in Grand Crossing (eventually this school was racially integrated, but not long thereafter demolished).

Cornell's was not a novel or unique strategy. In 2019, voters in Louisiana approved the creation of a brand-new city in Louisiana called St. George that would instantly become the fifth largest city in the state and the second largest in East Baton Rouge Parish, with lines carefully drawn to encircle the parish's middle class and upper middle class white population and essentially all of the area's desirable schools.[84] A 2020 American Bar Association publication

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www.theatlantic.com/business/archive/2018/03/chicago-segregation-poverty/556649/ [perma.cc/4H4A-DXLS]; *see also* Natalie Moore, THE SOUTH SIDE: A PORTRAIT OF CHICAGO AND AMERICAN SEGREGATION 3 (St. Martin's 2016) (discussing Chicago's diversity and segregation).

81. BECKER, *supra* note 60, at 19-22.

82. *Id*. The formal description of this insight first appeared in Gary Becker's work on the economics of discrimination. *Id*.

83. Lest you exhale and feel relief that housing segregation is no longer used to limit stakeholdership in key places, conversations, and institutions, *see generally* Shelby County v. Holder, 570 U.S. 529 (2013) (weakening protections for Black voters and Black communities by striking down formula for Section 5 preclearance, landmark departure from Court's wholesale endorsement of same protections as recently as 1999 in Georgia v. United States, 411 U. S. 526 (1973), City of Rome v. United States, 446 U. S. 156 (1980), and Lopez v. Monterey County, 525 U. S. 266 (1999)).

84. For an in-depth discussion, including the influence of public schooling and educational resourcing on this border-drawing exercise, *see* Adam Harris, *The New Secession*, ATLANTIC (May 20, 2019),

described St. George's purpose as follows:

> Now, the original motivation behind St. George's creation was to give wealthy, white parents an affordable alternative for primary and secondary education by taking their children and their tax dollars out of the predominantly black public school system and concentrating those resources into their own almost all-white enclave.[85]

This concept of partitioning land in a way that privatizes public dividends (like good public schools) and socializes public costs is a formula Cornell may not have discovered, but that he certainly refined. Where direct control was desirable, however, Cornell was willing to absorb the costs. Controlling agents authorized to use violence was one of these aspects, and the city was willing to allow Cornell's private garrison.[86] Though linked to downtown by the

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www.theatlantic.com/education/archive/2019/05/resegregation-baton-rouge-public-schools/589381/ [perma.cc/MC6B-UDEK].

85. Nancy G. Abudu, *Following the Blueprint: How a New Generation of Segregationists is Advancing Racial Gerrymandering*, 45 AM. BAR ASSOC. HUMAN RIGHTS MAG. 7-8 (Feb. 9 2020). Ms. Abudu is the Deputy Legal Director of the Southern Poverty Law Center.

86. The city explicitly allows a private police force to operate within Hyde Park and this police force is by far the largest armed group in the city aside from the Chicago Police Department. *See* 65 ILCS 5/11-1-1, et seq. (2013 and as amended); *see also* A. Kartik-Narayan, *The Fight Over Chicago's Largest Police Force*, SOUTH SIDE WEEKLY (Jul. 16 2018), www.southsideweekly.com/the-fight-over-chicagos-largest-private-police-force-university-of-chicago-ucpd/ [perma.cc/DA7C-WNT7]. This privately-funded police force's jurisdiction was recently further extended thanks to Chicago's City Ordinance O2011-7316 (2011) (creating expanded jurisdiction

> to all that area bounded as follows: beginning at the intersection of the centerline of East Oakwood Boulevard and the centerline of South Lake Shore Drive; thence west to the centerline of Lake Park Avenue; thence north to the centerline of East 37th Street; thence west to the centerline of South Cottage Grove Avenue; thence south to the centerline of East Pershing Road; thence west to the centerline of South Langley Avenue; thence south to the centerline of East Oakwood Boulevard; thence east to the centerline of South Cottage Grove Avenue; thence south to the centerline of East 44th Street; thence west to the centerline of South St. Lawrence Avenue; thence south to the centerline of East 45th Street; thence east to the centerline of South Cottage Grove Avenue; thence south to the centerline of South Payne Drive; thence south to the centerline of East 55th Street; thence east to the centerline of South Cottage Grove Avenue; thence south to the centerline of East 64th Street; thence west to the centerline of South Evans Avenue; thence south to the centerline of East 64th Street; thence east to the centerline of South Ellis Avenue; thence south to the centerline of East 65th Street; thence east to the centerline of South University Avenue; thence north to the centerline of East 64th Street; thence east to the centerline of South Stony Island Avenue; thence north to the centerline of East 61st Street; thence east to the centerline of South Lake Shore Drive; thence, north to the place of beginning.).

Pat Dowell, William Burns, Willie Cochran, *Acceptance of Indemnity and Hold Harmless Agreement with The University of Chicago*, OFFICE OF THE CHI.

Lake Shore and Michigan Southern Railway,[87] the then-tallest-building downtown[88] is not visible from Hyde Park, raising concern as to whether the city would act to protect people and property on its frontier. The Hyde Park Township Police answered this call, a private police force controlled by Cornell. It was a powerful, military-like force, carrying then-cutting-edge weapons like the Winchester 1873, the highest-capacity cavalry rifle of the day.[89] The University of Chicago Police, the largest privately-controlled police force in the United States,[90] traces its lineage to Cornell's Hyde Park Township Police.

With a private force at his disposal, Cornell no longer had to rely upon the Chicago Police and the mechanisms of structural apartheid. And the privatized police would no longer be subject to rules of criminal procedure or safeguards for the rights of the accused.[91] A private police force, now hundreds of men and dozens of horses strong, would deliver violent reminders of the neighborhood's rules and intended racial composition. There would be no plurality of opinion about who was white and who was not, or what policing priorities topped the list; Cornell would decide

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CITY CLERK (Sept. 8 2011), www.d3qi0qp55mx5f5.cloudfront.net/safety-security/uploads/files/Chicago_City_Ordinance_O2011-7316.pdf [perma.cc/89MH-4B59]).

87. Cornell and future mayor Roswell Mason were both investors in these extensions of rail service, Cornell by virtue of his ownership of land around the 53rd Street station (Cornell deeded sixty acres to the Illinois Central Railroad in exchange for the station being in the midst of parcels he owned) and Roswell Mason as then-Vice-President of the Illinois Central Railroad. The situation around the 53rd Street station is discussed in MAX GRINNELL, THE ENCYCLOPEDIA OF CHICAGO 404 (University of Chicago Press 1986). The relevant portion of Roswell Mason's professional biography is discussed in EDWIN OSCAR GALE, REMINISCENCES OF EARLY CHICAGO AND VICINITY 389 (Revel 1902).

88. The Chicago Board of Trade Building.

89. *Mounted Hyde Park Township Police*, File for 5500-6500 S. Drexel Ave., Chicago History Museum Archives, Third Floor, Undated Photo (1890s) (two officers carrying Winchester 1873s, both also equipped with period sidearms).

90. *The University Must Disband Its Private Police Force*, UNIV. CHI. MAROON 1 (June 28, 2020); *see also* Alice Yin, *University of Chicago Students Call for Defunding, Abolishing School Police During Rally Outside University President's House*, CHI. TRIB. (Aug. 30, 2020), www.chicagotribune.com/news/breaking/ct-university-of-chicago-police-defund-abolish-protest-20200830-vrfsxflwljhbdovnu7ns5bmw2e-story.html [perma.cc/YQ43-FSS2] ("I'm angry because the University of Chicago, you know, the one that loves buzzwords like diversity and inclusion, that puts Black kids on their postcards, is the same university that owns and operates one of the largest private police forces in the country[.]" – Madeline Wright, a University of Chicago student).

91. "[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Civil Rights Cases*, 109 U.S. 3, 7 (1883) (Bradley, J.).

directly and monarchically. And under this police, it would be a time of awful rule and *white* supremacy.[92]

By 1891, Cornell had little reason to regard City Hall as a superior power; while creating his own kingdom with its own rules, he'd become a multi-millionaire. The population of his once-small township more than quintupled from just over 15,000 residents in 1880 to 85,000 in 1889.[93] Around this time, the University of Chicago was founded[94] in the area; its campus is the center of the neighborhood today.

In 1890, Congress granted Chicago the right to host the World's Columbian Exposition, which brought hundreds of thousands of tourists from around the world to the neighborhood Cornell developed; of the 260 acres used for the Exposition, every acre was owned by Paul Cornell fifteen years earlier.[95] Between 1890 and 1900, Chicago's population grew from one million people to 1.7 million.[96] A portion of this immigration was composed of wealthy white people who could afford Cornell's premium offerings.[97]

Those who bought homes from Cornell were safely ensconced within their community, guarded by a private police force, able to conduct business and social affairs with no fear of accidental socialization across ethnic lines. Their children were free to wander in an all-white nirvana, moving freely between all-white neighborhoods, all-white Protestant churches, and all-white schools.

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92. Allusion: "awful rule and *right* supremacy . . ." WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW act 5, sc. 2.

93. Population statistics for Hyde Park Township. ANN D. KEATING, THE ENCYCLOPEDIA OF CHICAGO 405 (James Grossman ed., 2004).

94. The University of Chicago was founded in 1890. *A brief history of the University of Chicago*, U. CHICAGO NEWS OFFICE, www-news.uchicago.edu/resources/brief-history.html [perma.cc/MHJ8-KQT2] (last visited Feb. 27, 2022).

95. *See* General Deed dated 1879 and captioned "Land In et Near Washington Park" in File for Hyde Park Township, Historical Documents 1870-90, Chicago History Museum Archives, Third Floor (1890s). Today, the entire area has twenty-foot setbacks from the front edge of the lot (rather than the standard Chicago setback from the parkway municipal easement), this was specified by Cornell in the deeds and still evident today across this entire area (with the exception of certain University of Chicago buildings). *See* ALFRED T. ANDREAS, HISTORY OF COOK COUNTY, ILLINOIS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 531 (A.T. Andreas 1884) (discussing evolution of area as result of railroad service expansions south of Chicago).

96. *See generally* decennial census results for Chicago (combined tracts) 1880 and 1890, www.census.gov (seventy percent population increase in only ten years meant Chicago was among the fastest-growing cities in the world).

97. Millionaire George Kimbark bought land at 51st Street and Woodlawn; John Kennicot bought a variety of properties and built his family home at 48th and Dorchester and as Kennicot expanded his real estate holdings in the area, he would eventually rename the neighborhood Kenwood. JEAN BLOCK, HYDE PARK HOUSES: AN INFORMAL HISTORY, 1865-1910 at 6-8 (Univ. Chi. Press 1978).

VII. CORNELL'S PARTING SHOT

> [The affected property shall not be] occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . .
>
> – Deed, vacant land between 61st and 62nd Streets in Chicago, Signed P. Cornell (1881)[98]

Late in Cornell's life, the covenants became more elaborate, more carefully-crafted, and more targeted toward specifically denying the possibility of Black homeownership–something Cornell had likely not foreseen as a possibility in earlier covenants focused on denying homeownership in these communities to Jews and the olive-skinned southern Europeans more likely to be Catholic (in particular, Italians).[99] A new set of covenants[100] added that there should be no "occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race," the same language the Supreme Court would scrutinize in Missouri in *Shelley v. Kraemer*.[101] The covenant for

98. Deeds and Conveyances, 6100 S. Rhodes, Archive, Chicago History Museum (on file at with Author).

99. This would be in line with other covenants in the Midwest which were beginning to consider Black migration into mostly white neighborhoods as an equal, or even greater, threat than European southern and eastern Catholic immigration. *See* GONDA, supra note 33, at 92-5 (Univ. N.C. Press 2015) (discussing variety of groups affected); *see also* BROOKS, *supra* note 32, at 24-29 (discussing variety and evolution of language employed in covenants).

100. *See* Washington Park Covenant, Installed in Principal Deed 1901 (three years prior to Cornell's death) and amended in 1907 and 1927. The language litigated in *Hansberry* was recorded at the Cook County Register of Deeds on 1 February 1928, as Document #9914711 in Book 25525, Pages 5 to 31. Though this original appendix to the Decree issued by Judge George Bristow of the Cook County Circuit Court is not available digitally, it was presumably identical to the text that appears as an Abstract as part of the appellate record labeled "Abstract, Defendants in the Illinois Supreme Court" (April Term, A. D. 1939) in the then-pending appellate matter of *Anna M. Lee v. Carl A. Hansberry* (No. 25116); note in some modern search engines the modern designation "Ill.App.1st" is needed to find appellate materials from this jurisdiction.

101. Pattern deed language used from St. Louis north to Chicago, Milwaukee, and elsewhere through and including in the 1940s. Discussed in detail in contemporary opposition pamphleteering, including *Pamphlet by St. Louis Citizens Steering Committee: An Effort to Improve American Democracy by Ending Residential Restrictive Covenants*, NAACP (1940s) and retrospectively in A.H.B. SPEAR, BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO, 1890-1920 (Univ. Chi. 1967). On battles generally involving this language and very similar language from pattern covenants, *see NAACP Group Set to Fight 'Race Zoning'*, CHI. DEFENDER 1 (June 26, 1937); for contemporary context to item immediately *supra see Restrictive Covenants Upheld by Committee*, CHI. DEFENDER (May 20, 1939). For more on how pattern deed language became popular, prevalent, and eventually ubiquitous in the upper Midwest by 1945-47, *see* W. Plotkin, *Hemmed In: The Struggle Against Racially Restrictive Covenants and Deed Restrictions in Post-WWII Chicago*, 94 J. ILL. STATE HIST. SOC. 39-69 (2001).

Washington Park was rewritten during this period in this style, and this is the covenant the Supreme Court encounters in *Hansberry*.[102]

In describing the procedural posture in prelude to *Hansberry*, Justice Stone notes,

> Respondents brought this suit in the Circuit Court of Cook County, Illinois, to enjoin the breach by petitioners of an agreement restricting the use of land within a described area of the City of Chicago, which was alleged to have been entered into by some five hundred of the landowners. The agreement stipulated that for a specified period no part of the land should be 'sold, leased to or permitted to be occupied by any person of the colored race . . . within the described area. [103]

As though in harmony, at the start of the *Shelley* opinion, Chief Justice Vinson begins by quoting the substantially similar covenant,

> [T]he said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date . . . and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.[104]

To understand the scope of restriction these covenants created in total, one must understand how installation of these covenants by a few large landowners, including Cornell, meant little acreage in Chicago was available to minority residents during this period. A piece in The Chicago Defender in 1947[105] one year prior to the decision in *Shelley v. Kraemer* noted,

> Of a total of 155 square miles of area in Chicago, Negroes occupy 10 square miles while 40 square miles are restricted against them. Of the 105 square miles remaining, 70 are zoned for industrial, business, and manufacturing, leaving only 35 square miles where Negroes may live.[106] It is unknown to what extent these 35 square miles are open

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102. The covenant in *Hansberry* bears a restriction crafted during Cornell's life substantially similar to covenants found throughout deed histories in Hyde Park, Woodlawn, Bronzeville, Gresham, Chatham, Kenwood, Douglas, Englewood, Washington Park, Park Manor, South Shore, Grand Crossing, and other neighborhoods Cornell controlled.

103. *Hansberry*, 311 U.S. at 37.

104. *Shelley*, 334 U.S. at 4-5.

105. *Restrictive Covenant Time Bomb Threatens 3,000 Chicago Families*, CHI. DEFENDER 8 (Aug. 2, 1947) (on file with Author).

106. For further demographic and economic discussion of these ratios and patterns, *see generally* RICHARD MUTH, CITIES AND HOUSING: THE SPATIAL PATTERN OF URBAN RESIDENTIAL LAND USE 55-7 (Univ. Chi. Press 1969) (discussing interaction between residential zoning and other land uses); *see also generally* BECKER, *supra* note 60, at 24-5 (discussing how preferences may

to Negro occupancy.

Indeed, a lone covenant at issue in *Hansberry* covered an enormous territory, described by Justice Jones of the Illinois Supreme Court: "The property covered by the agreement consists of *approximately twenty-seven blocks* and parts of blocks between Sixtieth and Sixty-third streets, and between Cottage Grove and South Park avenues in Chicago." [107]

VIII. WHAT SAYETH THE COURT?

> [It's] bad enough that Perlman's name has to be there, to have one Jew's name on it. . .
>
> – Then-United States Deputy Solicitor General on the authorship of the *Shelley* brief[108]

The Hansberry family, a Black family, bought a red brick home at 6140 S. Rhodes in Chicago in the neighborhood of Washington Park in 1937.[109] In *Hansberry v. Lee*,[110] the racially restrictive covenant authored by Cornell[111] to control the racial makeup of the Washington Park neighborhood[112] in Chicago (which he owned and developed as a homogeneous community two generations prior) was challenged.[113] Local jurists[114] had remarked as recently as 1928 that restrictive covenants protected Hyde Park from Blacks "like a

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change distribution of persons even if no person is explicitly racist).

107. Lee v. Hansberry, 372 Ill. 369, 370-71 (Ill. 1939) (Jones, J.) (emphasis added).

108. Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 819 (1987); *see also* GONDA, *supra* note 32, at 168 (explaining that "the four men responsible for crafting the brief were all Jewish . . . the final product, however, bore none of their names").

109. Lee v. Hansberry, 291 Ill. App. 517, 522 (1937) (on appeal from Circuit Court of Cook County).

110. *Hansberry*, 311 U.S. at 37-8.

111. The lineage of deeds in *Hansberry* led back to the property's original deed, dated 1862, when Cornell would have been forty years old and the terminal titleholder to essentially all of Hyde Park and the surrounding area.

112. The Cornell language is easily recognizable and more restrictive than the MacChesney language used on Chicago's west side and in parts of what is today Pilsen (then a ghetto for German and southern European protestant immigrants, today a mostly-Catholic Spanglophone neighborhood). Nathan William MacChesney was an attorney and member of the Chicago Plan Commission. He drafted the model covenant favored by the Chicago Real Estate Board, called the "Standard Form Restrictive Covenant." Notably, it favored whites but did not enumerate the list of targeted non-white groups (Negroes, Mongols, Italians, Catholics, etc.) as Cornell's did.

113. *See* David Belden, *Urban Renewal and the Role of the University of Chicago in the Neighborhoods of Hyde Park and Kenwood* (2017) (Ph.D. Dissertation, Depaul University) www.via.library.depaul.edu/soe_etd [perma.cc/5L9T-VSDX].

114. *Hyde Park Still In Danger Warns Judge Henry Lunt*, HYDE PARK HERALD 1 (Mar. 20 1928).

marvelous delicately woven chain of armor" protecting "all the far-flung communities of the South Side." James Cunningham, musing then as to who should be allowed to live and wander near the University of Chicago's campus, asked, "How do you tell desirable from undesirable[115] Negroes?"[116]

The covenant was upheld.[117] To force the plaintiff from the neighborhood and make any subsequent appellate activity moot, a white supremacist organization in a nearby neighborhood, euphemistically entitled the Kenwood Improvement Association, filed an injunction.[118] The plaintiffs successfully obtained an order for the Hansberry family to vacate their home; the order sought was granted in Cook County Circuit Court[119] and upheld on appeal by the Illinois Supreme Court.[120]

A mere decade following Cornell's death, the midwestern legal soil supporting Cornell's covenants began to erode. In *Buchanan*,[121] the Court agreed with Buchanan, a white plaintiff, that he should be allowed to sell his land to a Black man, reversing Kentucky's high court.[122] Interestingly, Kentucky's law did not bar whites from selling to Blacks or bar Blacks from living at any particular address (as Cornell's covenants did) but rather forbade Blacks from buying houses on blocks that were not already majority-Black and forbade whites from buying houses on blocks that were not already majority-white.[123] Justice Day did not explicitly agree that Warley,

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115. Perhaps a not-so-subtle reference to race riots in Chicago. *See generally* CARL SANDBERG, THE CHICAGO RACE RIOTS 11-2 (Harcourt, Brace & Howe 1919).

116. James Cunningham's remarks at the Hyde Park Kenwood Community Conference, drawn from contemporary accounts. ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO 170 (Univ. Chi. Press 1983).

117. For the language of a typical covenant in Chicago at that time, *see cf.* Burke v. Kleiman, 277 Ill. App. 519, 522-31 (1934). Burke also provides a glimpse into the thinking of jurists of this era:

It seems that an agreement among white owners of real estate in a particular section of a city, whereby negroes are, for a period of years, to be excluded from the ownership and occupancy of property within the area included in the agreement, is not invalid, either as contravening the fifth, thirteenth or fourteenth amendments to the federal constitution or as being contrary to public policy.

Id. at 521 (Scanlan, J.).

118. For an explanation of these organizations and community associations, and the roles they played in influencing local politics and judicial proceedings, *see* HIRSCH *supra*, note 116, at 144.

119. *Anna M. Lee v. Carl A. Hansberry* and sometimes captioned *Anna M. Lee v. Carl A. Hansberry in re 6140 Rhodes Ave*., Cook County Circuit Court Case No. 37 C 6804 (County Chancery) (Bristow, J.), www.wbhsi.net/~wendyplotkin/DeedsWeb/bristow.html [perma.cc/UJE3-PTWP].

120. *Lee*, 372 Ill. at 370-72.

121. Buchanan v. Warley, 245 U.S. 60 (1917).

122. *Id*. at 61.

123. *Id*. at 70-73.The intent and mechanics of the statute are discussed in the opinion. *Id*.

the Black man in the case's caption, should be able to buy a home on a white block, but instead voiced concern that the Kentucky law interfered with Buchanan's freedom to dispose of his property as he saw fit.[124]

While being careful to draft an opinion around the curtilage of *Buchanan*'s prohibition on sweeping citywide statutes barring these transactions, the Court found something more compelling in the plight of white supremacist neighborhoods like those Cornell created.[125] These were not cities, but localities within cities with their own norms, sensibilities, and preferences. In another unanimous decision, *Corrigan v. Buckley*[126] would endorse the rights of neighborhoods to enact racially restrictive covenants and allow the state to enforce these covenants. Here, the Court supported white supremacist covenants in a reasoning grounded in contract rather than in the Constitution.[127] The neighborhood covenants allowing only whites were private contracts[128] rather than municipal ordinances or state laws.[129] Hence, they sat beyond the reach of the meddling of judges or damages conjured by courts rather than specified within these contracts' four corners.[130]

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124. *See Buchanan*, 245 U.S. at 75 ("The question now presented makes it pertinent to enquire into the constitutional right of the white man to sell his property to a colored man," rather than the Black man's right to buy the white man's property) *see also id*. at 80 ("The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due process clause of the constitution.").

125. *Buchanan*,245 U.S. at 60-1. the Court finds not that it is reprehensible to limit the ability of Black people to buy real estate but instead that it is concerning to limit the ability of white people to sell real estate. *Id*. While the result may be similar in this particular case, one would have endorsed the agency of a disempowered group while the other expresses concern for the financial freedoms of a group whose freedoms have been historically-unblemished.*Id*.

126. Corrigan v. Buckley, 271 U.S. 323, 323-25 (1926).

127. *Buchanan*,245 U.S. at 60-1.

128. The emphasis on the sanctity of contract is clear. For a variety of such contracts (and a look at ever-evolving attempts at contract language that would survive judicial review), *see* discussion in Wendy Plotkin, *Deeds of Mistrust: Race, Housing, and Restrictive Covenants in Chicago 1900-1953* (1999) (Ph.D. Dissertation, University of Illinois), www.wbhsi.net/~wendyplotkin/DeedsWeb/newberry.html [perma.cc/5CLV-J6GK].

129. *Buchanan*, 245 U.S. at 60. Notice the contract framework from the very start of the opinion in *Buchanan*: "A white owner who has made an otherwise valid and enforceable contract to convey such a lot to a colored person . . . ." *Id*. *See also* Kamp, *supra* note 28, at 485 (elaborating on mechanisms used by white communities to bar Black people and even mixed race descendants from inhabiting these neighborhoods: "The last clause was put in to avoid problems of proof in establishing one-eighth Negro blood.").

130. *See generally* Kamp, *supra* note 28 (discussing who is and is not a "party" procedurally in context of four corners of such agreements and seeking equitable relief on basis of same, "The covenants ran with the land and any

Perhaps the assault on the citadel of privity was proceeding "apace" in 1931,[131] but that citadel was still a secure haven in 1926.

The final nail in the coffin of Cornell's drafting would come up through the state courts of Missouri.[132] The Supreme Court of Missouri would use the logic in *Corrigan* to find restrictive covenants private contracts free from judicial intervention and enforceable by the state.[133] The Black family bringing the action was barred from completing the closing on their new home in St. Louis[134] due to a covenant clause similar to those Cornell installed in the waning years of his life: no "people of the Negro or Mongolian Race" could occupy the property, and to leave no doubt at all, separately and further stating it could not be "occupied by any person not of the Caucasian race."[135] Chief Justice Vinson agreed with the lower court that the covenants were private matters of contract and that private parties could choose to abide by them, as in *Corrigan*, but deviated from earlier assertions that state action to enforce the covenants was without concern.[136] Rather, Vinson wrote for a unanimous Court, this state action to enforce private bargains unacceptably involved the machinery of the state with these contracts.[137]

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party could enforce them in equity . . . "Parties" included anyone who signed a covenant covering the same area[.]").

131. An allusion to Cardozo. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 445 (N.Y. 1931) (Cardozo arguing the dismantling of the traditional citadel of privity was proceeding "apace").

132. Kraemer v. Shelley, 355 Mo. 814 (Mo. 1947) (en banc).

133. *Id.* at 817.

134. For context on the state of play preceding the dispute: "In 1911 some of the owners of the property fronting on both sides of Labadie Avenue in the double blocks between Taylor Avenue on the east and Cora Avenue on the west in the city of St. Louis signed the restrictive agreement set out below. Thirty out of a total of thirty-nine owners signed the agreement. Of the nine owners who did not sign, five were negroes. Negroes had occupied one parcel since 1882. The entire district comprised fifty-seven parcels divided into sixty-one lots. The thirty parties who signed the agreement owned forty-seven parcels or forty-eight lots having a total frontage of 1245 feet. [and so on in greater detail . . .]" *Id.* at 819 (Douglas, J., dissenting).

135. *Agreement Regarding Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis*, recorded Monday, 27 Feb. 1911 in St. Louis County by its County Recorder and quoted in pertinent part at *Shelley*, 334 U.S. at 4-5, 10 ("occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race").

136. Put simply, private arrangements excluding or discriminating against persons of a group from the use of privately owned real estate do not *per se* violate the Fourteenth Amendment but state action to enforce these arrangements violates the Equal Protection Clause of the Fourteenth Amendment.

137. *Shelley*, 334 U.S. at 15 (citing Twining v. New Jersey, 211 U. S. 78, 90-91 (1908) and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680 (1930), (illustrating a comprehensive definition of state action)); *see Shelley*, 334

To emphasize that the Equal Protection Clause of the Fourteenth Amendment protects people from state action whether that action finds its footing in the verbiage of statutes or in the actions of officials, Vinson elaborates, "state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute."[138]

Though not discussed in the opinion, the contrast in advocacy and advocates must have been stark. Philip Perlman, the U.S. Solicitor General, had previously worked in 1925 to support the segregation of Baltimore as that municipality's City Solicitor.[139] Meanwhile, the Shelleys and McGhees, the plaintiffs-appellants and Black aspiring homeowners, were represented by a 1940s dream team[140] of three Black attorneys: George L. Vaughn (representing J.D. Shelley), Thurgood Marshall, and Loren Miller (the latter two both representing the McGhee family). Miller had recently won a series of cases[141] involving real estate disputes between people of different races,[142] inspired by his experience encountering the state-of-the-art restrictive covenants then in use

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U.S. at 15 ("giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment . . .").

138. *Shelley*, 334 U.S. at 16 (citing Strauder v. West Virginia, 100 U. S. 303, 305-06 (1880) (invalidating, for Equal Protection concern, state statute restricting jury service as privilege only available to white men)).

139. *See* Power, G., Meade v. Dennistone*: The NAACP's Test Case to Sue Jim Crow Out of Maryland with the Fourteenth Amendment*, 63 MARYLAND L. REV. 773, 775-8 (2004) (in this matter, Perlman represented residents of an all-white block bringing suit to enforce a community plenary covenant and prevent a local Black pastor from purchasing a home on the block).

140. For those interested in these advocates and this period in Black American appellate advocacy, the Author highly recommends LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (Pantheon Books 1967).

141. Sadly, the only one perhaps known to law students I've taught was McGhee v. Sipes, 316 Mich. 614 (Mich. 1947), which many legal scholars see as a "test run" for *Shelley v. Kraemer*. *McGhee*, a case arising from Wayne County in Michigan, involved two unusual complexities: it featured an unusual mixed covenant forbidding certain residential and commercial uses ("Said lot shall not be occupied by a colored person, nor for the purposes of doing a liquor business thereon.") and the heritage of the people in question was in doubt (the trial court relied on Sipes's impression of the McGhees: "that defendants, Orsel McGhee and Minnie S. McGhee, his wife, are not of the Caucasian race but are of the colored or Negro race." *Id.* at 621).

142. Miller would quote Sir Edward Coke on the special role of residential real estate when writing his history of the Supreme Court: "The home of every one is to him as his castle and fortress, as well for his defense against injury and violence as repose." MILLER, *supra* note 140, at 246. Miller writes, of equal protection implications in these cases: "In truth, our increasingly complex urban society has progressively involved the state in a myriad of activities that were once matters of purely private concern. The distinction between 'private' and 'state' action has worn so thin that it is sometimes said that what the state tolerates, the state commands." *Id.* at 329.

in his hometown of Los Angeles.[143] He would go on to another victory after *Shelley*, winning a decision in *Barrows v. Jackson*,[144] grinding the last remaining sharp edge off the restrictive covenant language– there, that a violating buyer or seller might be subject to suit for civil damages.

IX. CORNELL'S LEGACY: WHAT HATH PAUL WROUGHT?

Today, Paul Cornell continues to be celebrated as the creator of four important parks near the lakeshore of Chicago's south side: Jackson Park, (George) Washington Park, (Harold) Washington Park, and the Midway Plaisance on the University of Chicago's campus. The Hyde Park Historical Society recognizes good deeds in the community by distributing Paul Cornell Awards. Cornell Avenue shoots south from 48th Street in Chicago, eventually becoming Cornell Drive when it reaches the Jackson Park neighborhood. Paul Cornell Elementary School at the corner of 76th Street and Drexel was among the last Chicago Public Schools sites to racially integrate and was demolished amidst the "white flight" of the 1970s.[145]

Cornell's investment strategy, transforming a swampy lakeshore area into an all-white resort-like area, was only possible because integral white supremacy required and endorsed such a plan, a plan that only made sense to a sealed system of white investors, white buyers, and white residents. The tools of structural apartheid first protected the boundaries of the area; city government provided a threat to non-whites in the form of Chicago police and, later, as Cornell's fortune bloomed, Cornell's private police force provided the threat of violence at the perimeter. Those able to live in this ostensibly safer, nicer, cleaner area were able to

143. Southern California, Miller wrote, "has produced racial restrictive covenants far superior, if that is the word, to the ordinary run-of-mine racial restrictive covenant . . . .none could dwell but blond-haired, blue-eyed Aryans, certified 99.44 [percent] pure . . . all of them five feet 10 7/8" tall, addicts of Little Orphan Annie."

144. Barrows v. Jackson, 346 U.S. 249 (1953) (covenant specifying only white occupants is barred by Fourteenth Amendment).

145. *See* Ryan Goodwin, *Hyde Park Historical Society Honors Members of the UChicago Community at Awards Dinner*, UNIV. CHI. NEWS (Mar. 4 2016), www.news.uchicago.edu/story/hyde-park-historical-society-honors-members-uchicago-community-awards-dinner [perma.cc/526Z-LWYE]. For discussion of the dynamics surrounding segregation, employment, and opportunity for Black people in Chicago during the "white flight" period and the years immediately prior, *compare* John Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q. J. ECON. 175-97 (1968) *with* Paul Offner & Daniel H. Saks, *A Note on John Kain's "Housing Segregation, Negro Employment, and Metropolitan Decentralization"*, 85 Q. J. ECON. 147-60 (1971). *See also* William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 AM. SOC. REV. 425-48 (1979) (contemporaneous description of white flight phenomenon written in 1978).

do so because of structural arbitrary advantages—including intergenerational wealth and current-generation employment opportunities—given to them because of their race, class, and religion rather than because of their intelligence, hard work, or merit. The area's interior was defined by privatized urban planning designed to ensure continuity of outcome regardless of process.

And rather than adjust the model of such a community to be more inclusive and more modern, Cornell and his successors instead adjusted the legal language and policing posture protecting the community to be more xenophobic and antagonistic.

In 2021, the neighborhoods situated on land developed by Cornell are overwhelmingly Black. Grand Crossing, the neighborhood in which Cornell's eponymous elementary school sat, is 96.2 percent Black as of 2015.[146] Parkway Gardens, built on land once owned by Cornell, is where Michelle Obama grew up.[147] The planned Barack Obama Presidential Center is to be built at a location in Jackson Park[148] less than a mile from a forty-nine-foot-tall monument under which Confederate soldiers' corpses were re-buried in Cornell's Oak Woods Cemetery; atop the monument's pillar stands alone grieving Confederate soldier[149] with a fourth-story view of the more-than-95-percent-Black community surrounding the cemetery.[150] In the foreground of his vantage are the graves of Mayor Harold Washington and Ida B. Wells.[151] Mayor Washington is buried in the area where the Confederate monument was dedicated with speeches and music.[152] Former Confederate

146. *Community Demographic Snapshot: Greater Grand Crossing*, CHICAGO METROPOLITAN AGENCY FOR PLANNING (Sept. 6, 2015), www.cmap.illinois.gov/documents/10180/126764/Greater+Grand+Crossing.pdf [perma.cc/NNJ4-N6UN].

147. MICHELLE OBAMA, BECOMING 5, 36, 39 (Crown 2021).

148. A. Yin, *Barack and Michelle Obama will attend presidential center groundbreaking in Chicago's Jackson Park Tuesday*, CHI. TRIB.(Sep. 24 2021) www.chicagotribune.com/news/breaking/ct-barack-obama-presidential-center-groundbreaking-chicago-20210924-qng2tiia6vd6jl6xgic5j36giq-story.html [] (describing site and beginning of construction at same).

149. The soldier does not represent any particular person, but was meant as a general symbol of southern bravery and honor and approved by the five presidents of the Ex-Confederate Association of Chicago, which approved the sculpture. The only known surviving photograph of the five men together resides in the care of the Chicago History Museum. *Five Presidents of the ECAC*, Chicago History Museum, www.chicagohistory.org/wp-content/uploads/2018/04/IMG_4548.jpg [perma.cc/32HS-9898] (last visited Feb. 25, 2022).

150. CHICAGO METROPOLITAN AGENCY FOR PLANNING REPORT, *supra* note 146.

151. Washington Family Marker, white granite, engraved "Mayor Harold Washington, 1922-1987, He Loved Chicago." Barnett Grave Marker, white granite, engraved "Ida B. Wells & Ferdinand L. Barnett, Crusaders For Justice." Both buried just off the pavement in Section 7/7a of Oak Woods Cemetery.

152. *The Confederate Monument, dedicated at Oakwood Cemetary, 1895*,

General John Brown Gordon delivered the first remarks at the dedication; Gordon would soon thereafter become a "Grand Dragon" leading the Ku Klux Klan in the state of Georgia, then a U.S. Senator representing that state, and ultimately Governor of Georgia.[153]

In the final decades (1984-1904) of Cornell's life, he lived in the penthouse of 1511 Hyde Park Boulevard,[154] a property which had access to an uninterrupted stretch of lakefront and beach,[155] as Lake Shore Drive would not be constructed for another two generations. There, he died of pneumonia,[156] perhaps an early victim of the 1904-05 global influenza epidemic.[157] His entire estate was left in trust to provide income to his widow, Helen G. Cornell, and three children, John E., Paul Jr., and Helen, as children George and Lizzie[158] predeceased him. In the event all were dead at the expiration of the fifty-year trust, Cornell instructed that a hospital be erected in Hyde Park with the remaining funds.[159] Whether due to mismanagement of investments or spendthrift children it is unknown, but no hospital was built upon the trust's expiration.

Contemporary white people on the south side benefit from Cornell's white supremacy; any intergenerational real property wealth of white families in the area is traceable directly to Cornell. The failure of groups like the Hyde Park Historical Society to examine Cornell's allegiance to, and support of, the central concepts and arguments of white supremacy is unacceptable. Without having a meaningful conversation about white supremacy and its role in both private and public acts of urban planning, it is difficult to agree upon a hypothesis that explains today's south side of Chicago—a place that is still more segregated than any other major metropolitan environment in America. White supremacy and the

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LIB. OF CONGRESS, www.loc.gov/resource/cph.3c38762/ [perma.cc/758Y-XY6B] (last visited Feb. 22, 2022). The area where the hatless moustached man to the right of the frame stands is very close to where Mayor Harold Washington is buried.

153. Or penultimately, as Gordon would serve a final U.S. Senate term after completing his gubernatorial duties.

154. *Cornell*, *supra* note 4, at 46.

155. *Municipal Plates and Street Plan, Blocks A780-G720, Hyde Park Area, Chicago Planning Board 1895-1915*, Archives of the Chicago History Museum (dated 1914-16).

156. *Father of Hyde Park is Dead of Pneumonia*, CHI. DAILY TRIB. at p. 5 Col. 2 (Mar. 4, 1904).

157. Michael Dewar, *A Clinical Study of Influenza in the Epidemic, 1904-5*, 24 TRANS. MED. CHIR. SOC. EDINB. 229-36 (1905).

158. These children are mentioned in a profile in the TRIBUNE in 1900. *Cornell*, *supra* note 4, at 46 ("Mr. Cornell was married in July 1856 to Miss Helen M. Gray of Bowdoinham, Me., the wedding taking place at the residence of his brother-in-law, Orrington Lunt of Chicago. They have five children, George, John, Paul Jr., Lizzie, and Helen. Mr. Cornell's residence is [1511 Hyde Park Boulevard].").

159. *Paul Cornell's Will Filed*, CHI. DAILY TRIB. 3 Col. 1 (Mar. 3, 1904).

exclusion of immigrants and ethnic minorities was not merely an ingredient in the planning of Chicago's south side, it was the ultimate strategy, and, at the height of Cornell's power, must have seemed an inevitable victory. It will be difficult to ever know how many potential residents were driven away by threats, veiled or explicit, litigious or violent.

It took only a few flourishes of the pen to install poisonous, inequitable, white supremacist language that would run with the land for decades; it will take more than a century of work to flush the poison from the land. Though Cornell's language is unenforceable today, the existing distribution of homeownership will continue to divide people according to their races and their parents' races for decades to come.

Perhaps there are things one might do to uphold "values and objectives of the community" that would deserve the Hyde Park Historical Society's "Paul Cornell Award," but the values and objectives worthy of celebration in a modern Chicago or a meritocratic society are not those of Paul Cornell.