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## A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation

### Cover Page Footnote

B.A., Stanford University, 1992; M.P.P., Harvard University Kennedy School of Government, 1995; J.D., Yale Law School, 1998. Thanks especially to Ian Ayres, and also to Bob Ellickson, Gail Horwitz, Erez Kalir, Jay Koh, Allison Moore, Bob Solomon, and Avital Zer-Ilan for their extensive and helpful comments. Thanks also to Richard Sander for helping me get started.

# A REQUIEM FOR BLOCKBUSTING: LAW, ECONOMICS, AND RACE-BASED REAL ESTATE SPECULATION

*Dmitri Mehlhorn\**

## INTRODUCTION

Blockbusting and panic peddling are real estate practices in which brokers encourage owners to list their homes for sale by exploiting fears of racial change within their neighborhood.

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Panic peddling and blockbusting did occur in Chicago during the 1960s and early 1970s.

However, blockbusting and panic peddling rarely, if ever, occur in Illinois today.<sup>1</sup>

WITH these words, an Illinois district court appeared to recognize the end of an era. For nearly two decades, beginning in the late 1950s, real estate speculators known as "blockbusters" profited handsomely from racial turnover in real estate markets by buying homes from urban whites and reselling them at inflated prices to blacks, or merely from the commissions available in a high-turnover market.<sup>2</sup> During this period, blockbusters were national pariahs; whites hated them for dismantling their cozy neighborhoods,<sup>3</sup> progressives hated them for harming blacks,<sup>4</sup> and newspapers and government reports blamed them for destroying neighborhoods and fostering racial tension.<sup>5</sup> By the end of the 1960s, governments at the local, state, and federal level had passed legislation designed to stop blockbusting.<sup>6</sup>

Two decades later, blockbusting appears to have disappeared from the national consciousness. Published sources rarely mention the term, except to state that the practice has vanished.<sup>7</sup> Legal academia, in particular, has ignored blockbusting's plateau and disappearance; the most recent law review article on blockbusting appeared over

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1. *Pearson v. Edgar*, 965 F. Supp. 1104, 1108-09 (N.D. Ill. 1997) (citations omitted).

2. See *infra* notes 36-43 and accompanying text.

3. See *infra* notes 47-49 and accompanying text.

4. See *infra* notes 95-115 and accompanying text.

5. See *infra* notes 49-58 and accompanying text.

6. See *infra* notes 59-78 and accompanying text.

7. See *infra* notes 81-87 and accompanying text.

twenty-five years ago, and described blockbusting as an "[i]ncreasingly [s]erious [p]roblem."<sup>8</sup> The Illinois district court cited above noted that "[t]here have been no prosecutions by the Cook County State's Attorney Office for violations of the Illinois anti-solicitation or blockbusting statutes since 1987 or 1988."<sup>9</sup> Given the harms for which blockbusting was blamed, and the success of government programs in eliminating it, the conventional wisdom about blockbusting suggests that it was a major civil rights problem that arose, and was defeated, over a period of roughly four decades.

This Article revisits the blockbusting era, using economic and historical perspectives to dispute the conventional wisdom. Although blockbusting caused some damage to race relations and racial justice, its harms were overstated. During that period, the country sought scapegoats for racial problems in housing markets, and blockbusters were the most salient candidates. This is unfortunate, because the vilification of the blockbusters obscured the positive role that they played in the struggle for racial justice. As a result, anti-blockbusting hysteria led to crude legal regimes that did more harm than good.

More importantly, the blockbusting example makes a larger point about progressives generally. The rapid rise and fall of blockbusting make it a rich, self-contained study of the interaction among racial issues, politics, law, and economics. During the blockbusting era, progressives' visceral hostility to market forces caused them to advocate simplistic solutions to the blockbusting problem. Those solutions not only harmed blacks, but also actually helped reinforce racist norms and patterns. Had the progressives not been so hostile to markets, they might have used their political energy to create effective solutions to the problem of racism in American housing markets. Thus, the blockbusting era represents an important example of how progressives can actually cause damage to the people they care about through economic ignorance.

This Article proceeds in four parts. Part I provides the history and legacy of the blockbusting era. Part II describes the various harms attributed to blockbusting, and then argues that although blockbusting was a problematic industry, its harms were overstated and it conveyed

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8. See Note, *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 Colum. J.L. & Soc. Probs. 538, 538 (1971) [hereinafter Columbia Note].

9. *Pearson v. Edgar*, 965 F. Supp. 1104, 1109 (N.D. Ill. 1997). The court explained:

There was testimony that some Chicago neighborhoods and suburbs are currently experiencing racial change; however, there was no evidence that any real estate broker is engaging in blockbusting or panic peddling within those areas.

Standard real estate solicitation and marketing techniques are neither being used to panic peddle nor contributing to any racial change currently occurring in Chicago neighborhood [sic] and suburbs.

*Id.* (citations omitted).

substantial benefits to blacks. Part III goes further, arguing that the anti-blockbusting movement did significant damage to the cause of racial justice. Part IV examines how the anti-blockbusting progressives were crippled by their hostility to market forces, and explores how they might have been more effective.

# I. THE HISTORY AND LEGACY OF BLOCKBUSTING

American residential segregation essentially did not exist prior to 1900.<sup>10</sup> Although blacks experienced discrimination, they lived closely with whites until the period around World War I.<sup>11</sup> During that time, however, demand for black workers in the South dried up just as the need for unskilled workers skyrocketed in the North.<sup>12</sup> From 1910 through the 1920s, hundreds of thousands of blacks migrated North annually.<sup>13</sup> Northern whites identified these blacks as a serious social and economic threat, and mobilized their physical, political, social, and economic resources to drive blacks into strictly-circumscribed ghettos and to punish blacks who attempted to live elsewhere.<sup>14</sup> Whites also used their power to prevent other whites

10. See, e.g., Douglas S. Massey & Nancy A. Denton, *American Apartheid* 17 (1993) ("There was a time, before 1900, when blacks and whites lived side by side in American cities. . . . In this lost urban world, blacks were more likely to share a neighborhood with whites than with other blacks."). See generally Allan H. Spear, *Black Chicago: The Making of a Negro Ghetto 1890-1920*, at 8 (1967) (arguing that "the rise of Chicago's black ghetto . . . was the result of the interplay between certain trends in the development of the city and major currents in Negro life and thought").

11. See Massey & Denton, *supra* note 10, at 20-26 (noting that blacks and whites lived closely with each other even in the South, and that black politicians, physicians, journalists, and attorneys in the North relied heavily on white support in integrated neighborhoods).

12. See *id.* at 27-29.

13. See *id.* at 29.

14. See generally Davis McEntire, *Residence and Race* (1960) (discussing sources of modern segregation); Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944) (discussing violence and hostility confronted by blacks in white neighborhoods); Robert C. Weaver, *The Negro Ghetto* (1948) (same); Reynolds Farley et al., *Barriers to the Racial Integration of Neighborhoods: The Detroit Case*, 441 *Annals Am. Acad. Pol. & Soc. Sci.* 97 (1979) (noting that nearly all blacks who expressed discomfort at the thought of moving into white areas did so because they feared the way that they would be treated).

According to Massey and Denton:

[Voluntary associations] lobbied city councils for zoning restrictions and for the closing of hotels and rooming houses that attracted blacks; they threatened boycotts of real estate agents who sold homes to blacks; they withdrew their patronage from white businesses that catered to black clients; they agitated for public investments in the neighborhood in order to increase property values and keep blacks out by economic means; they collected money to create funds to buy property from black settlers or to purchase homes that remained vacant for too long; they offered cash bonuses to black renters who agreed to leave the neighborhood. In the exclusive Chicago suburb of Wilmette, a committee of citizens went so far as to ask wealthy homeowners to lodge all maids, servants, and gardeners on premises, or else to fire all Negroes in their employ.

from selling to blacks.<sup>15</sup> Many institutions took part in this segregationist regime, including local government,<sup>16</sup> state and federal agencies,<sup>17</sup> courts,<sup>18</sup> businesses,<sup>19</sup> and the media.<sup>20</sup> Thus, by 1930, "African Americans were well on their way to experiencing a uniquely high

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Massey & Denton, *supra* note 10, at 36. Note that efforts by localities to enact segregation into law, however, were struck down by courts. *See, e.g.,* City of Richmond v. Deans, 281 U.S. 704 (mem.), *aff'g* 37 F.2d 712 (4th Cir. 1930) (enjoining enforcement of explicit segregationist law); Harmon v. Tyler, 273 U.S. 668 (1927) (mem.) (invalidating ordinance which forbade blacks from moving into white communities or whites from moving into black communities), *rev'g* Tyler v. Harmon, 104 So. 200 (La. 1925); Glover v. Atlanta, 96 S.E. 562 (Ga. 1918) (same); Jackson v. State, 103 A. 910 (Md. 1918) (same); Clinard v. City of Winston-Salem, 6 S.E.2d 867 (N.C. 1940) (same); Allen v. Oklahoma City, 52 P.2d 1054 (Okla. 1935) (same); Irvine v. City of Clifton Forge, 97 S.E. 310 (Va. 1918) (same).

15. *See* Norris Vitcheck, *Confessions of a Block-Buster*, Saturday Evening Post, July 14, 1962, at 15, 15.

After one middle-aged couple had built a suburban home and sold their former home to a speculator—and the speculator had "turned" it—several former neighbors hired a sound truck and drove to the couple's new home.

They cruised the block, shouting, "Be sure and meet your new neighbors, the Joneses. They sold out their old block to Negroes."

*Id.* at 18; *see also* Barrows v. Jackson, 346 U.S. 249, 251 (1953) (considering covenant which prohibited occupancy by "any person or persons not wholly of the white or Caucasian race"); Shelley v. Kraemer, 334 U.S. 1, 4-5 (1948) (discussing legal covenants that forbid sales to "any person not of the Caucasian race").

16. After more overt forms of discrimination were no longer legally enforceable in the 1950s, "local governments took advantage of authority granted under urban renewal legislation to raze expanding black neighborhoods that threatened key white institutions and districts, and they used federal funds to construct massive public housing projects in order to contain displaced black residents." Massey & Denton, *supra* note 10, at 188-89; *see also* Vitcheck, *supra* note 15, at 19 ("The Board of Education contributes by writing off a school once it begins to change racially, consigning it to overcrowding, double shifts and supervision by the least experienced and lowest-paid teachers—and by giving it the lowest proportion of counselors.").

17. *See, e.g.,* Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 190-230 (1985) (describing the many forces that promoted white flight, including race-based state and federal mortgage subsidies); *id.* at 196-98 (describing how federal home ownership and lending programs systematically steered financial support towards white and away from black or integrated neighborhoods); *id.* at 208 (noting that the Federal Home Administration recommended racial covenants even after the Supreme Court declared them unconstitutional). *See generally* James King, *The Impact of Federal Housing Policy on Urban African-American Families, 1930-1966* (1997) (discussing the impact that federal housing policy has had on urban African-American families); Editorial, *Feds Financed our Racial Divide*, Chi. Trib., Aug. 27, 1996, at 14 (arguing that government housing programs have played a large role in enforcing "residential separateness").

18. Courts enforced racial covenants until 1948, and hence they were used to great effect throughout the United States. *See* Brian J.L. Berry, *The Open Housing Question: Race and Housing in Chicago 1966-1976*, at 12 (1979). Such covenants were declared unenforceable in 1948 in the case of *Shelley v. Kraemer*, 334 U.S. 1 (1948), because of the use of state action. *Shelley* itself overruled decisions of the Supreme Courts of Michigan and Missouri. *See id.* at 23.

19. *See, e.g.,* Vitcheck, *supra* note 15, at 16 (noting a sequence of events where, after black students enroll in neighborhood schools, churches and businesses cease improving facilities, homeowners are turned down for home-improvement loans, small businesses begin to close, and lending institutions blacklist the area).

degree of spatial isolation in American cities."<sup>21</sup> By the 1940s, integrated neighborhoods had ceased to exist in every major city in the United States,<sup>22</sup> and segregationist values remained widespread through the 1960s.<sup>23</sup>

Perhaps the most powerful forces for segregation during this period, however, came from the real estate industry. Real estate agents, who were mostly white men,<sup>24</sup> were ideologically committed to keeping races and ethnic groups separate from each other.<sup>25</sup> Various pressures reinforced this natural inclination. From 1917 until 1950, the charter of the National Association of Real Estate Boards made it a violation of professional ethics to sell a home to someone whose race or ethnicity might disturb the neighborhood or its property values.<sup>26</sup> Even after 1950, this professional code remained an unwritten governing ethic for real estate boards.<sup>27</sup> As one real estate agent put it in the mid-1950s,

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20. See, e.g., Vitcek, *supra* note 15, at 19 (pointing out that newspaper stories about blacks are usually written only in connection with crime, welfare problems, or population increases, and not with church activity, business and educational success, or other aspects of life in black neighborhoods).

21. Massey & Denton, *supra* note 10, at 31.

22. See Karl E. Taeuber & Alma F. Taeuber, *Negroes in Cities* 28-68 (1965).

23. See, e.g., Howard Schuman et al., *Racial Attitudes in America: Trends and Interpretations* 74-75 (1985) (reporting poll of whites in 1963 in which 39% of respondents disagreed that "[w]hite people have a right to keep blacks out of their neighborhoods if they want to, and blacks should respect that right").

24. One study of real estate agents in New Haven in the 1950s noted that the New Haven Real Estate Board had virtually no women and no black members. See Stuart H. Palmer, *The Role of the Real Estate Agent in the Structuring of Residential Areas: A Study in Social Control* 49 (1955) (unpublished Ph.D. dissertation, Yale University) (on file with the Yale University Library).

25. See Rose Helper, *Racial Policies and Practices of Real Estate Brokers* 143-54 (1969). The author identifies five core beliefs of the "exclusion ideology" that dominated the profession: (1) most whites do not want black neighbors, (2) blacks lower property values, (3) integrated neighborhoods eventually become segregated, (4) whites are hurt financially and socially by the entry of blacks into their neighborhoods, and hence (5) selling to blacks in white areas is an unethical business practice. See *id.*; see also Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 Yale L.J. 808, 812 (1976) [hereinafter *Yale Note*] ("[R]acial steering is attractive to brokers on grounds of simple business efficiency. The quickest and surest sales can be made by satisfying buyer preferences, which brokers assume to be for neighborhoods inhabited by members of the buyer's own race." (citing National Neighbors, *Racial Steering: The Dual Housing Market and Multiracial Neighborhoods* 12 (1973))).

26. See Helper, *supra* note 25, at 201 ("From 1924 to 1950, . . . Article 34 of Part III [of the National Association of Real Estate Boards' *Code of Ethics*] read: 'A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence would clearly be detrimental to property values in that neighborhood.'").

27. See *id.* at 317 (stating that 72% of realtors in Chicago refused to sell blacks homes in white neighborhoods); see also Vitcek, *supra* note 15, at 18 (stating that the 1700 members of the Chicago Real Estate Board were unlikely to deal with blacks and, if they did, were unlikely to arrange sales to blacks in white neighborhoods).

It's a sort of unwritten code that respectable real estate brokers should guide people into the areas where they'll fit in socially and keep them out of areas where they won't. Everybody's happier that way. The people who live in the neighborhood are happier. The customers are happier, in the long run. And as for the broker himself, he's happier—it's good business to fit people in.

Listen. If I didn't steer people around and match them up with a neighborhood where they'd fit in, I'd be out of business so fast my kids would starve to death.<sup>28</sup>

Lenders helped as well, by refusing to provide mortgages for black purchases in white neighborhoods.<sup>29</sup> Thus, although some whites might have tolerated interracial living, ambient racism expressed in the real estate industry kept neighborhoods strictly segregated.

### A. *The Emergence of Blockbusting*

The numerous social and legal barriers against integration caused significant pressures for arbitrage. These barriers restricted the supply of urban housing for blacks at the same time that black migration to northern cities steadily increased demand. The white market, by contrast, experienced net emigration from urban centers during these decades, causing net demand for housing to fall,<sup>30</sup> while the racist regime artificially inflated the supply of homes for whites.<sup>31</sup> This situation created an enormous discrepancy between the prices of housing in the white and black markets.<sup>32</sup> As Douglas Massey and Nancy Denton wrote in their treatise on residential segregation,

Rapid black migration into a confined residential area created an intense demand for housing within the ghetto, which led to a marked inflation of rents and home prices. The racially segmented market generated real estate values in black areas that far exceeded anything in white neighborhoods, and this simple economic fact created a great potential for profits along the color line, *guaranteeing* that some real estate agent would specialize in opening up new areas to black settlement.

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28. Palmer, *supra* note 24, at 66 (quoting a New Haven real estate agent).

29. See, e.g., *id.* at 56 ("On the other hand, the mortgagor may consider refusing a mortgage to a financially capable customer . . . if the mortgagor feels the customer would be a detriment to the neighborhood in which the house to be sold is located.")

30. For a detailed description of minority migration and urban residential segregation, see United States Comm'n on Civil Rights, *Twenty Years After Brown: Equal Opportunity in Housing* (1975).

31. See, e.g., *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 334 (7th Cir. 1974) (discussing testimony of Dr. Karl Taeuber, professor of sociology, that in Chicago during the 1960s, "despite the decrease of white population in the city accompanied by a rapid increase of the black population, the supply of new housing available to whites was much greater than that available to blacks").

32. See *id.* at 338 (noting that sellers in black areas could obtain profits of 28%, compared with an industry average of 14% to 19%).



The methods that realtors used to open up neighborhoods to black entry and to reap profits during the transition came to be known as "blockbusting."<sup>33</sup>

Thus, segregation generated economic pressures in favor of integration. Blockbusters, if they could find a way to sell homes in white neighborhoods to blacks, were the economic response to this situation.

In 1948, the United States Supreme Court gave blockbusters their opportunity by removing a significant legal barrier to integration: restrictive covenants. In *Shelley v. Kraemer*, the Court held that courts could not enforce property deed provisions that prohibited sale to members of certain races.<sup>34</sup> With these overt legal barriers removed, it became legally possible to purchase homes from whites and sell them to blacks, and that is what the blockbusters did.<sup>35</sup>

To be sure, the blockbusters' methods were unsavory. In the classic example, speculators would target a white neighborhood on the border of an expanding black ghetto.<sup>36</sup> White residents feared that the expanding ghettos would jeopardize their property values or their

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33. Massey & Denton, *supra* note 10, at 37 (footnote omitted) (emphasis added).

34. See *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Court held:

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

*Id.* at 10 (footnote omitted). In 1953, the Supreme Court effectively abolished these racial covenants altogether by holding that whites who agreed to, but later violated, racial covenants could not be held liable for damages. See *Barrows v. Jackson*, 346 U.S. 249 (1953).

35. Note that blockbusting was not the only reaction. Some developers, for example, built housing intended solely for blacks, and charged higher prices than they would have been able to charge whites for comparable housing. See, e.g., *Clark*, 501 F.2d at 327 (discussing allegations that the demand among blacks for housing greatly exceeded the supply of housing available and that "defendants exploited this situation by building houses in or adjacent to black areas and selling the houses to plaintiffs at prices far in excess of the amounts which white persons paid for comparable residences in neighboring urban areas . . ."). Furthermore, the segregated market allowed black real estate professionals and other black professionals to obtain significant wealth without competition from whites. See generally Gilbert Osofsky, *Harlem: The Making of a Ghetto: Negro New York, 1890-1930* (1966) (exploring the history of the black community of New York City in the late 19th and early 20th centuries). Yet, the opportunity to simply buy homes from whites at depressed prices, and resell them to blacks at inflated prices represented a significant arbitrage opportunity as it required no more investment than whatever was necessary to break down white segregation.

36. See, e.g., David K. Shipler, *City Will Investigate Charges of East Flatbush Blockbusting*, N.Y. Times, Sept. 12, 1969, at 25 (reporting how residents in New York areas bordering on ghettos were bombarded with cards and phone solicitations from real estate agents).

safety, and the speculators encouraged this fear.<sup>37</sup> The speculators would make representations that minorities were moving in,<sup>38</sup> or deluge the residents with offers of cash for homes.<sup>39</sup> By inciting panic and offering to pay cash, the speculators procured homes at a discount which they immediately resold to blacks at a substantial markup.<sup>40</sup> If the markups failed to be profitable, blockbusters would still profit from the commissions available during the ensuing high turnover.<sup>41</sup> The blockbusters' profits were further enhanced by the financing terms; because blacks generally could not obtain mortgage financing,<sup>42</sup> they were forced to accept usurious land installment contracts.<sup>43</sup>

37. See, e.g., *New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 835 (2d Cir. 1994) ("Blockbusting is a practice whereby real estate agents artificially stimulate sales of residential property by making representations to homeowners regarding the migration of a particular racial, ethnic, religious, or social group into the neighborhood."); *Pearson v. Edgar*, 965 F. Supp. 1104, 1108 (N.D. Ill. 1997) ("In such cases, brokers capitalize upon fears that property values within the neighborhood will plummet as a result of minority entry into the community."); Seymour Marks, *The 'Locusts': Blockbusters*, Long Island Press, Dec. 8, 1970, at 1 (defining "blockbusters" as "speculators who make monumental profits by scaring whites into leaving integrated neighborhoods").

38. See, e.g., Mary Shanklin, *Many Faces of the Market*, Orlando Sentinel, Dec. 10, 1995, at J1 ("The Department of Housing and Urban Development describes [blockbusting] as real estate agents persuading customers to list their houses for sale because minorities are moving into the area.").

39. See, e.g., Marks, *supra* note 37 (reporting that fifty speculators were operating on one block in the East Flatbush and Crown Heights sections of Brooklyn).

40. See, e.g., Note, *Blockbusting*, 59 Geo. L.J. 170, 170 (1970) [hereinafter *Georgetown Note*] ("In the classic blockbusting pattern, homes are purchased at panic depressed prices by the speculator and resold at inflated rates to Negroes who have limited access to the housing market." (footnote omitted)); Columbia Note, *supra* note 8, at 543-44 (noting that the markup of resale prices for a set of properties ranged from 54% to 88%); City Comm'n on Human Rights of N.Y., Report on Blockbusting 6-7 (1963) [hereinafter *N.Y. Summary Report*] (unpublished report, on file with the *Fordham Law Review*) (finding that the average markup in a random sample of 11 properties was 73%).

41. See, e.g., *Shaffer*, 27 F.3d at 835-36 ("In its most systematic and crudest form, blockbusting entails the 'churning' of a local real estate market, a practice in which real estate brokers engage in frenzied solicitation practices that prey upon the racial and ethnic fears . . . as a means for increasing the volume of residential real estate transactions."); *Georgetown Note*, *supra* note 40, at 171, 176 (reporting that towards the end of the 1960s, blockbusters tended to profit more from high turnover and commissions than from price differentials).

42. See Massey & Denton, *supra* note 10, at 38. The N.Y. Summary Report, *supra* note 40, stated:

There is an inability of minority families to obtain on the free market adequate first mortgage financing which would bring moderate priced existing housing within their reach. This exclusion from normal mortgage finance channels coupled with a complex pattern of mortgage placement practices and the easy availability of second and third mortgages at exorbitant cost make minority families easy prey for speculators.

*Id.* at 11.

43. See *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 331 (7th Cir. 1974) ("Through the medium of exorbitant prices and severe, long-term land contract terms blacks are tied to housing in the ghetto and segregated inner-city neighborhoods from which they can only hope to escape someday without severe financial loss."); N.Y.

With these tactics, blockbusters changed the face of an enormous number of neighborhoods. By 1962, when blockbusting had been in existence for only ten to fifteen years, Chicago alone had over 100 operators.<sup>44</sup> For several years prior to 1962, blockbusters had "helped 'change' an average of two to three blocks a week in Chicago."<sup>45</sup>

### B. *The National Response to Blockbusting*

Blockbusting gained national notoriety in 1962 when *The Saturday Evening Post* published an expose entitled *Confessions of a Block-Buster*.<sup>46</sup> The piece was ghostwritten by a *Post* writer for a blockbuster using an assumed name, and in language shocking to the modern ear described how blockbusters used latent white racism to change neighborhoods from all-white to all-black.<sup>47</sup> As with later commentaries on blockbusting, the *Post* article emphasized primarily the harms

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Summary Report, *supra* note 40, at 7 ("The interest rates paid by the Negro home owner for mortgages on his property were spectacularly higher than they would have been if he had been able to finance the purchase of his home through an FHA or VA loan or through conventional lending channels.").

44. See Vitcek, *supra* note 15, at 15-16.

45. *Id.* at 16.

46. *Id.* at 15. The seminal nature of this expose was described by a law review Note some years later, which argued that this article "brought the practice [of blockbusting] into the national limelight." Georgetown Note, *supra* note 40, at 170 n.3.

47. The introductory paragraphs of the *Post* article dramatically captured the racism at work in these housing markets:

Not long ago in an all-white block on Chicago's West Side, a FOR SALE sign appeared in front of a modest frame bungalow. Immediately a wave of fear swept across the block. A Negro family already was living several blocks away. Not far beyond that was the western edge of Chicago's "Black Belt." Every year its border had been moving closer, enclosing blocks like this one along the way. Suppose the bungalow came into possession of a Negro? What would happen to the rest of the block?

All the residents were plainly worried. Among them were a widow who had been living alone and had no assets but her home, and the parents of four young children who feared what "change" might mean to the youngsters' safety. "Relax," said the bungalow owner. "I'm selling this through a white real-estate man. I won't even talk to a Negro."

Imagine their shock, then, when the FOR SALE sign came down and the new owners moved in—Negroes. And consider the impact of what happened next. Three more buildings, which were already owned by property speculators, "turned" immediately. Other Negro families arrived to look at homes in the block. Real-estate men, both white and Negro, swarmed in.

Almost overnight the family with four children sold out at a sizable loss. So did six other homeowners in quick succession. "We'll stay," a few owners said. "We're broad-minded." But the situation was out of their control. Finally the last of the whites left—whether or not they could afford to move. Like hundreds of others who have been similarly blitzed, they never really knew what had hit them.

I knew. I triggered the whole sequence of events by buying the bungalow and quickly selling it to a Negro. I am a blockbuster. Vitcek, *supra* note 15, at 15.

to whites<sup>48</sup>—how whites lost value in their homes and had to resettle.<sup>49</sup>

Although the *Post* piece itself was somewhat sympathetic to the blockbusters, other commentaries were less positive.<sup>50</sup> One law journal Note summarizing the reaction to blockbusting in New York City reported that “[b]lockbusting has also been referred to as ‘panic peddling.’ It has also been called euphemistically ‘civic suicide.’ Blockbusting has also been referred to as ‘communicide’—the murder of neighborhoods.”<sup>51</sup> Thus, although harm to blacks was noted,<sup>52</sup> and civil rights leaders joined in the national hostility to blockbusting,<sup>53</sup> the primary national reaction to the blockbusters was outraged hostility for their role in destroying white neighborhoods.

Even prior to the national press reaction to blockbusting, however, local governments had begun to respond to the practice. In 1962, Chicago’s Commission on Human Relations conducted a careful study of property transactions to determine the extent of the profit being made by real estate speculators.<sup>54</sup> The Commission found that (1) block-

48. See, e.g., Julian Krawcheck & Bill Tanner, *Is it Blockbusting? Realty Dealers’ Calls Stirred Panic on Eldamere Ave.*, Clev. Press, Aug. 16, 1961, at 1 (beginning the story with vignettes from white owners); Shieler, *supra* note 36 (mentioning only harm to whites, not blacks); N.Y. Summary Report, *supra* note 40, at 2-3 (describing how harm to whites had triggered the city-wide blockbusting hearings); see also *City of Cleveland Heights v. Lindsay*, 417 N.E.2d 1019, 1021 (Ohio Ct. App. 1979) (describing the two harms from blockbusting as the problems that “sellers are exploited” and general tension levels rise). But see Marks, *supra* note 37 (“The principal sufferer is the black, who seeks to escape the ghetto, but unwittingly helps create new ghettos.”).

49. See Vitcek, *supra* note 15, describing the harms to a white homeowner where blockbusting

happens so suddenly that he has no new neighborhood in mind, if he has to accept less living space and a higher-interest mortgage than he previously had and if he must sell his property at a loss. Several elderly persons have died because of the anguish and upheaval involved.

*Id.* at 18.

50. See, e.g., *infra* notes 79-80 and accompanying text (showing how blockbusters were portrayed as evil); see also *Block Busting—Who Benefits?*, Q. Bull. (Federal Home Loan Bank of Greensboro, Greensboro, N.C.), Mar. 31, 1955, at 3, 3 (describing the results of blockbusting as “unconscionable exploitation of minority groups, ill will and discontent in the affected community, and unsound loan portfolios in the institutions which finance the speculation”).

51. Columbia Note, *supra* note 8, at 539 n.9 (citations omitted).

52. See N.Y. Summary Report, *supra* note 40, at 1 (arguing that blockbusting investigations “revealed sordid patterns of racial and economic exploitation of New York City families desperately seeking decent places in which to live”); see also *infra* notes 96-114 and accompanying text (describing allegations that blockbusters damaged efforts at integration, drained wealth from black communities, and increased racial tensions).

53. See N.Y. Summary Report, *supra* note 40, at 1 (quoting an NAACP national official attacking blockbusting).

54. See Chicago Comm’n on Human Relations, *Selling and Buying Real Estate in a Racially Changing Neighborhood: A Survey* (1962) [hereinafter *Chicago Report*]. The Commission members selected a single block, which they thought would be representative, and conducted title searches on all 33 parcels over the period when the

busters used mostly installment-sales contracts as opposed to mortgages, since mortgages were available to the speculators but not the blacks,<sup>55</sup> and (2) that blockbusters earned enormous returns on their activities.<sup>56</sup> These findings mirrored those of other studies of the Chicago market.<sup>57</sup>

Other cities conducted their own inquiries,<sup>58</sup> and joined Chicago in passing a variety of ordinances to combat blockbusting.<sup>59</sup> These laws empowered city commissions to investigate blockbusting practices and revoke the licenses of real estate agents;<sup>60</sup> banned "For Sale" signs in certain instances;<sup>61</sup> required permits for door-to-door real estate solicitation;<sup>62</sup> and sometimes included criminal sanctions.<sup>63</sup> Certain Chicago-area ordinances, for example, included up to a year of jail time, or \$10,000 fines for a first offense.<sup>64</sup>

As the 1960s progressed, states joined municipalities in their battle against the blockbusters. Massachusetts and Vermont, for example, provided a cause of action against certain frauds, such as misrepresen-

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block went from entirely white-owned in 1950 to almost entirely black-owned by 1957. *See id.* at 3.

55. *See id.* at 8-11.

56. The blockbusters in the 33-parcel study apparently earned an average premium of 73% from their speculation. *See id.* at 5. On average, for an equity investment of \$20,000, the blockbusters earned \$10,530 per year more in their contract payments than they paid out in their mortgages. *See id.* at 9.

57. *See id.* at 8 n.1 (citing E.F. Schietinger, *Racial Succession and Changing Property Values in Residential Chicago* (1953) (unpublished Ph.D. thesis, University of Chicago), and Frederick B. Lindstrom, *The Negro Invasion of the Washington Park Subdivision* (1941) (unpublished Master's thesis, University of Chicago)).

58. *See, e.g., In re Campagna*, 536 N.E.2d 368, 370 (N.Y. 1989) (stating that "the Legislature has condemned blockbusting, recognizing it as destructive, illegal and against the common good"); N.Y. Summary Report, *supra* note 40, at 1-2 (noting that the 1962 New York City Commission on Human Rights conducted an investigation of real estate practices in Brooklyn).

59. *See City of Cleveland Heights v. Lindsay*, 417 N.E.2d 1019 (Ohio Ct. App. 1979) (upholding conviction under city's anti-solicitation ordinance); *Real Estate Brokers—New Jersey*, 7 Race Rel. L. Rep. 1262, 1262-63 (1962) (discussing the passing of an ordinance by Teaneck, N.J., restricting the content of "For Sale" and "For Rent" signs to those words and a telephone number).

60. *See Real Estate Brokers—New Jersey*, *supra* note 59, at 1262-63.

61. *See* Detroit, Mich., Ordinance 753-F (1962) (placing limits on and occasionally banning For Sale signs), *reprinted in Real Estate Brokers—Michigan*, 7 Race Rel. L. Rep. 1260, 1260 (1962); Teaneck, N.J., Ordinance 1157 (Oct. 16, 1962) (limiting size, content, and location of For Sale signs), *reprinted in Real Estate Brokers—New Jersey* *supra* note 59, at 1262.

62. *See, e.g., Mogolefsky v. Schoem*, 236 A.2d 874, 882 (N.J. 1967) (upholding a local ordinance requiring door-to-door real estate solicitors to have a local permit).

63. *See, e.g., Summer v. Township of Teaneck*, 53 N.J. 548, 552 (1969) (discussing New Jersey anti-blockbusting law which provided for fines of up to \$200 and up to 30 days in jail or both); Alex Rodriguez, *Judge Throws Out Anti-Solicitation Law: Suburbs Fear Panic Peddling*, Chi. Sun-Times, June 26, 1997, at 1 (describing several different ordinances).

64. *See, e.g., Rodriguez*, *supra* note 63 (discussing anti-solicitation laws in suburban Chicago).

tations that black buyers had already moved into nearby homes.<sup>65</sup> Other states criminalized representations about potential declines in property values; about changing racial, religious, or ethnic composition of neighborhoods; about potential increases in criminal activity; or about worsening schools.<sup>66</sup> Truth was not a defense.<sup>67</sup>

By the end of the 1960s, the federal government joined the fray. In 1968, the Supreme Court held in *Jones v. Alfred H. Mayer Co.*<sup>68</sup> that the federal government had the authority under the Thirteenth Amendment<sup>69</sup> to prohibit discrimination in private housing markets. Encouraged by *Jones*, a group of black plaintiffs brought the first federal anti-blockbusting suit in *Contract Buyers League v. F & F Investment*,<sup>70</sup> alleging that by charging blacks more than he would have charged whites, a speculator had violated the Civil Rights Act of 1866.<sup>71</sup> Although the court in *Contract Buyers League* recognized that the higher prices for blacks resulted from market dynamics,<sup>72</sup> the court held that it was illegal to profit from such market forces. Quoting language from *Jones* that § 1982 of the 1866 Act was intended "to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man,"<sup>73</sup> the *Contract Buyers League* court expressly limited the ability of profit incentives to help redress the problem of inadequate housing for blacks: "it is now understood that under § 1982 as interpreted in *Jones v. Alfred H. Mayer Co.* there cannot in this country be markets or profits based on the color of a man's skin."<sup>74</sup>

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65. See Mass. Ann. Laws ch. 112, § 87AAA (Law. Co-op. 1991); Vt. Stat. Ann. tit. 26, § 2296 (1989).

66. See Md. Code Ann., Licenses, art. 56, § 230A (1957) (repealed 1988); Ohio Rev. Code Ann. § 4112.02(H)(10) (Anderson 1998).

67. These restrictions on truthful commercial speech, even about indirect indicators such as neighborhood crime rates or demographics, were upheld by courts as justified by the major public policy threat of blockbusting. See, e.g., *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161, 163-64 (7th Cir. 1974) (upholding prohibition on "For Sale" signs on record indicating that such signs were causing "whites to move en masse and blacks to replace them"); *id.* at 163 n.1 (listing law review articles for "anecdotal and quantitative data on the related problems of blockbusting and panic peddling and their effect on both races"); see also *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) (holding that lowered protections for commercial speech apply even when regulations have content-based motives); *Breard v. Alexandria*, 341 U.S. 622, 642-45 (1951) (holding that door-to-door solicitation may be regulated because of lesser protections for commercial speech). But see *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977) (striking down an anti-blockbusting sign prohibition on First Amendment grounds).

68. 392 U.S. 409 (1968).

69. U.S. Const. amend. XIII, § 2.

70. 300 F. Supp. 210 (N.D. Ill. 1969).

71. 42 U.S.C. § 1982 (1994) (providing that all citizens should have equal rights in real property markets).

72. See *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 328 (7th Cir. 1974).

73. *Contract Buyers League*, 300 F. Supp. at 215 (citing *Jones*, 392 U.S. at 443).

74. *Id.* at 216.

Although this ruling allowed blacks to rescind onerous housing contracts, liability under § 1982 did not provide a cause of action for whites who had sold at depressed prices. Thus, blockbusters still had a profit incentive to operate from buying from whites at depressed prices, and from the commissions available in a high-turnover market. The Fair Housing Act of 1968,<sup>75</sup> enacted the year before *Contract Buyers' League* was decided, addressed this deficiency by creating civil causes of action for both blacks and whites. Specifically, § 3604(e) of the Act made it unlawful "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin."<sup>76</sup> Again, truth was not a defense,<sup>77</sup> and even honest answers to questions put by existing owners were actionable.<sup>78</sup>

### C. The Movement's Empty Victory

Thus, by the beginning of the 1970s, much of the nation had declared war on blockbusting. Cheered on by journalists and the public, government actors throughout the United States had enacted a variety of criminal and civil attacks on the practice. Lawsuits against blockbusters gained steam in the 1970s, occasionally reaching appellate state and federal courts that used the opportunities to reiterate the conventional wisdom as to the evils of the practice.<sup>79</sup>

Hindsight suggests that the anti-blockbusting movement was extraordinarily successful in its superficial goals. Blockbusters were quickly made pariahs, and even today blockbusting remains a term of opprobrium.<sup>80</sup> A quick survey suggests that blockbusting has been

75. Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-19).

76. 42 U.S.C. § 3604(e).

77. See *Brown v. State Realty Co.*, 304 F. Supp. 1236, 1241 (N.D. Ga. 1969).

78. In *Brown*, the court held that real estate agents must refrain from any such representations even though contact with the agents was initiated, and the subject of black purchasers was first raised, by the property owners. See *id.* Because the entire relationship between the agent and the owner was in the commercial context, the representations were unprotected by the First Amendment. See *id.*

79. See, e.g., *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 119 (5th Cir. 1973) ("Blockbusting has been described as a process through which individuals stimulate and prey '... on racial bigotry and fear by initiating and encouraging rumors that negroes ... [are] about to move into a given area, that all non-negroes ... [will] leave, and that the market values of properties ... [will] descend to 'panic prices' with residence in the area becoming undesirable and unsafe for non-negroes.'" (quoting *Contract Buyers League*, 300 F.2d at 214)); *Summer v. Township of Teaneck*, 251 A.2d 761, 763 (N.J. 1969) ("The evils are evident. Sellers are exploited, and hostility is excited both in those who are persuaded their economic interests are thus threatened and in the group of citizens who are given to understand their presence is a blight.").

80. See, e.g., *Bravo Realty, Inc. v. Columbia Broad. Sys., Inc.*, 406 N.E.2d 61, 63 (Ill. App. Ct. 1980) (discussing a libel suit by a realty firm over charges of "blockbusting"); *Waicker v. Scranton Times L.P.*, 688 A.2d 535, 541 n.4 (Md. App. 1997) (noting that a real estate agent sued a newspaper for defamation for analogizing his practices to blockbusting, even though the paper wrote that "[n]o one believes that [the agent]

driven underground, at least in its obvious manifestations.<sup>81</sup> Federal appellate courts have virtually ceased hearing blockbusting cases under the federal statute,<sup>82</sup> and those courts that have heard blockbusting cases have found little evidence of blockbusting.<sup>83</sup> Complaints of blockbusting to the Federal Department of Housing and Ur-

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is practicing the same blatant blockbusting tactics that others did in past decades"); see also Julian E. Barnes, Ark. Democrat-Gazette, Jan. 19, 1996, at 1A (stating that opponents of a medical school's expansion accused the school of "block-busting"); Colleen Carroll, *Mayor of Bridgeton Lashes Out at Airport: Says Home Buyouts are 'Blockbusting'*, St. Louis Post-Dispatch, July 3, 1997, at 2B (reporting that a city politician, in describing airport purchases, said "there is no other way to characterize it other than blockbusting"); Ty Clevenger, *Norton Pushes HUD On Shelter: Homeless Facility's Foes Get Support*, Wash. Times, Jan. 28, 1996, at A10 (stating that a D.C. representative opposes a homeless shelter with reference to blockbusting); Laurie Devine, *Nursing-Home Plan Dead: Concept Still Alive*, Pitt. Post-Gazette, July 24, 1996, at N3 (reporting on residents' success in blocking nursing home development by accusing it of "commercial blockbusting"); Linda F. Jarrett, *Six Seek Lambert Buyouts: Definition of 'Emergency' Is at Issue*, St. Louis Post-Dispatch, Nov. 25, 1996, at 1 (reporting that a local official accused the city of "blockbusting" by buying houses near an airport); Courtland Milloy, *Cruelty Is an Unwelcome Neighbor*, Wash. Post, Mar. 20, 1996, at C1 (noting how local politicians had opposed a new homeless shelter with references to its "blockbusting effect").

81. See, e.g., *Hawley v. Cuomo*, 389 N.E.2d 827, 828 (N.Y. 1979) (noting New York's failure to show that "prohibited racial blockbusting tactics were prevalent" or "even . . . that such practices were imminent" to strike down an anti-solicitation ordinance); Georgetown Note, *supra* note 40, at 171 n.8 (citing Interview with Alexander Ross, Deputy Chief of the Housing Division, Department of Justice, in Washington, D.C. (Jan. 20, 1970)) ("Antiblockbusting legislation has also influenced blockbusters to substitute subtle approaches for some of their more flagrant techniques."); *Signs That Can Frighten; Ban Lifted: Outlawed in Blockbusting Era, 'Sold' Signs Return to Baltimore City, County*, Balt. Sun, May 7, 1997, at 14A (explaining how Baltimore city and county decided to allow "For Sale" and "Sold" signs because "[m]any of the most irresponsible tactics employed by real estate agents during the height of blockbusting have ceased").

82. 42 U.S.C. § 3604(e) (1994).

83. See, e.g., *New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 842-43 (2d Cir. 1994) (striking down a municipal ordinance because of the state's failure to "produce any direct evidence of systematic blockbusting in the last ten years" sufficient to justify ban on solicitation, and noting that state Secretary "produced no evidence that she has adjudicated a single case of blockbusting" or "initiate[d] a single charge against a licensed real estate agent"); *Pearson v. Edgar*, 965 F. Supp. 1104, 1112-13 (N.D. Ill. 1997) (holding that the state had not demonstrated even anecdotal evidence that blockbusting was still a threat); *Greater Baltimore Bd. of Realtors, Inc. v. Baltimore County*, 752 F. Supp. 193, 198-99 (D. Md. 1990) (finding that, in light of the fact that blockbusting no longer occurred in the county, a ban on real estate solicitation was not a narrowly tailored restriction); *Help-U-Sell of Teaneck v. Township of Teaneck*, 504 A.2d 824, 828 (N.J. Super. Ct. Law Div. 1985) (holding that provisions of real estate canvassing code were restrictions of speech not justified by substantial government interest in preventing blockbusting); *Harris v. City of Buffalo*, 394 N.Y.S.2d 794, 797 (Sup. Ct. 1977) (finding that the city provided no evidence of blockbusting that might justify an anti-sign ordinance); Margaret A. Jacobs, *Court Throws Out Law in New York on Blockbusting*, Wall St. J., June 24, 1994, at B8 (reporting the *Shaffer* decision); Don R. Sampen, *Anti-solicitation Law Held Unconstitutional*, Chi. Daily L. Bull., July 1, 1997, at 5 ("[P]anic-peddling and blockbusting . . . rarely occur in Illinois today, however, and if they do, they can be prosecuted under separate federal and state laws."). But see *Illinois v. Beaulieu Realtors, Inc.*, 494



ban Development have essentially disappeared.<sup>84</sup> Even more tellingly, cities have begun voluntarily dismantling their blockbusting regimes.<sup>85</sup> Although a few locales continue to perceive a threat of blockbusting<sup>86</sup> such that they desire to continue to experiment with various solutions,<sup>87</sup> for the most part, blockbusting appears to have been an enemy that the civil rights movement targeted and eliminated with both speed and efficacy.

By almost any measure, however, this victory seems empty. One recent newspaper editorial noted that "Baltimore is losing population to the suburbs at a record rate and the number of vacant and deterio-

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N.E.2d 504, 509 (Ill. App. Ct. 1986) (affirming a \$2000 fine for a company that distributed flyers in violation of an antisolicitation ordinance).

84. Lynette Holloway, *U.S. Is Investigating Charges of Blockbusting*, N.Y. Times, Oct. 22, 1995, at 36 (noting that from 1992 to 1995, the Department of Housing and Urban Development received 45 complaints of blockbusting, out of roughly 30,000 housing discrimination complaints).

85. See, e.g., Jane Adler, *Real Estate: Group Taking Aim at Suburbs*, Crain's Small Bus.-Chi., Feb. 1, 1997, at 3, 3 (reporting that several towns rescinded anti-sign ordinances); Liz Atwood, *'Sold' Signs to Rise Again: Ban Was Remnant of Blockbusting Panics in 1970s*, Balt. Sun, Apr. 13, 1997, at 1A (same); *Baltimore Legalizing 'Sold' Signs*, Wash. Post, Apr. 19, 1997, at E14 (describing how Baltimore County no longer will ban "Sold" signs because "[t]he potential to use the signs for 'blockbusting' has passed"); John F. Hagan, *Euclid Gives Up Legal Fight to Ban 'For Sale' Signs*, Plain Dealer, Dec. 19, 1996, at 3B (reporting the ACLU's contention that blockbusting concerns were most rampant "in the '60s when integration first started," but not now that "cities and real estate companies have become much more sophisticated in handling race and housing," and thus that several cities would probably follow Euclid's decision not to seek certiorari after a Sixth Circuit panel held a sign ordinance unconstitutional).

86. See, e.g., *In re Campagna*, 536 N.E.2d 368, 371 (N.Y. 1989) ("the record establishes that the subject community [in New York] was besieged by unlawful blockbusting activity"); Pete Donohue & Russell Ben-Ali, *Feds Eying Blockbusters*, N.Y. Daily News, Nov. 5, 1995, at 1 (describing conflicting reports about modern blockbusting practices in New York); John F. Hagan & Jesse Tinsley, *Court Rejects Sign Ban: Federal Judges Say Law Unconstitutional*, Plain Dealer, July 9, 1996, at 1B (reporting that Cleveland-area mayors argued that sign bans were essential to combating blockbusting, which would return without the sign bans); Holloway, *supra* note 84 ("Blockbusting complaints resurfaced in New York in 1994 almost as soon as the state, under court order, reversed a series of bans on homeowner solicitation by brokers that began in 1971"); Bill Lubinger, *'White Flight' No Longer a Sign of the Times: While End of Ban on 'For Sale' Signs Is a Challenge, Integrated Suburbs Say That Panic, Blockbusting Can Be Avoided*, Plain Dealer, Sept. 16, 1995, at 1A (discussing reactions of various municipalities to the withdrawal of sign prohibitions); Rafael A. Olmeda, *Feds Urged to Probe Race Blockbusting*, N.Y. Daily News, Nov. 9, 1995, at 2 (describing how, one year after anti-solicitation laws were struck down by a federal court, blockbusting tactics were rising in New York).

87. See, e.g., *In re Russo*, 517 N.Y.S.2d 212, 213 (App. Div. 1987) (upholding a New York non-solicitation order because of continuing substantial interest in preventing blockbusting); Margaret A. Jacobs, *Court Throws Out Law in New York on Blockbusting*, Wall St. J., June 24, 1994, at B8 (reporting that the Second Circuit struck down an anti-solicitation ordinance issued by New York's Secretary of State in 1991); Joseph A. Kirby, *Council Puts Controversy on Hold: 1992 Flood Settlement, Other Measures to Wait*, Chi. Trib., Sept. 14, 1995, at 3 (discussing the Chicago City Council's deliberations on "For Sale" sign restrictions).

rating houses is soaring" despite the fact that "the most irresponsible tactics employed by real estate agents during the height of blockbusting have ceased."<sup>88</sup> Crimes of racial hatred in housing markets still occur with considerable frequency,<sup>89</sup> targeting not only blacks but also those who show homes to blacks in white neighborhoods,<sup>90</sup> and the dual housing market continues to exist.<sup>91</sup> Racist beliefs remain widespread among whites.<sup>92</sup> Massey and Denton, reviewing their empirical results, concluded that:

[R]esidential segregation continues unabated in the nation's largest metropolitan black communities, and this spatial isolation cannot be attributed to class. . . . [A]lthough whites now accept open housing in principle, they have not yet come to terms with its implications in practice. Whites still harbor strong antiblack sentiments and they are unwilling to tolerate more than a small percentage of blacks in their neighborhoods. [Also,] discrimination against blacks is widespread and continues at very high levels in urban housing markets.<sup>93</sup>

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88. Editorial, *Signs That Can Frighten*, Balt. Sun, May 7, 1997, at 14A.

89. Incidents of racial hatred in housing markets still appear in newspapers. See, e.g., Editorial, *A Place for Tolerance*, Boston Globe, Sept. 25, 1996, at A18 (reporting the police investigation of leads that the recent arson of a house might be related to its planned purchase by a black family); Julia Cass, *The Elmwood Incident*, Phil. Inquirer, May 4, 1986, Magazine, at 12 (discussing how white residents firebombed the home of the first black family to enter their neighborhood); Bob Herbert, *Mounting a War on Bias*, N.Y. Times, Jan. 15, 1998, at A21 (reporting that real estate brokers continue to engage in racial steering, whereby homes are only shown to members of certain racial groups); David Josar, *Feds: Man Threatened Black Couple*, Detroit News, Nov. 30, 1995, at A1 (reporting how a man threatened to "chop up" a black couple and bury them in his backyard if they moved into his white neighborhood).

90. See Herbert, *supra* note 89 (describing convictions for threats of violence against a landlord for showing homes to blacks).

91. A 1988 HUD study indicated that "housing was systematically made more available to whites in 45% of the transactions in the rental market and in 34% of those in the sales market. Whites also received more favorable credit assistance in 46% of sales encounters, and were offered more favorable terms in 17% of rental transactions." Massey & Denton, *supra* note 10, at 102-03 (summarizing John Yinger, Dep't of Hous. and Urban Dev., *Housing Discrimination Study: Incidence of Discrimination and Variations in Discriminatory Behavior* (1991)). Massey and Denton further state that "no matter what index one considers, between 60% and 90% of the housing units made available to whites were not brought to the attention of blacks." *Id.* at 104; see also *id.* at 99 (summarizing studies and audits of housing discrimination in the 1980s with discrimination in various markets ranging from 20% to 50% of the cases); Steve Kerch, *Revisiting South Suburbs to Update a Familiar Problem*, Chi. Trib., Feb. 16, 1997, at 1 (noting that dual housing markets and discrimination still exist, and that Chicago's south suburbs are still experiencing rapid racial transition from white to all-black).

92. See Massey & Denton, *supra* note 10, at 95 (citing a study indicating that 78% of non-black respondents thought blacks were less driven than other groups, 62% thought they were lazier, 56% thought they were more prone to violence, and 53% thought they were less intelligent).

93. *Id.* at 109.

Thus, the sentiment, actions, and segregation which were blamed on the blockbusters continue to exist years after the blockbusters ceased their activities.<sup>94</sup>

## II. REDEEMING THE PARIAHS: CHALLENGING THE MYTHS OF THE BLOCKBUSTING ERA

Although blockbusting caused some problems, the conventional wisdom overstates those problems and ignores the benefits that blockbusting conveyed to blacks. This part sets forth the three major evils associated with the industry, and then critically assesses each.

### A. *The Harms to Blacks Associated with Blockbusting*

Aside from the harms blockbusters inflicted on white homeowners,<sup>95</sup> a careful review of the progressive attacks on blockbusting reveals three distinct evils associated with the practice. Blockbusters were accused of: (1) damaging efforts at integration; (2) draining wealth from black communities; and (3) promoting racial stereotypes and tensions. In their strongest versions, these claims together suggested that blockbusters, almost by themselves, thwarted residential integration, exacerbated racial hostility, and created modern urban ghettos. In their milder forms, these claims alleged that blockbusting represented a market failure, where blockbusters had a profit motive to make racist claims, and did not have to internalize any of the costs of their behavior. Either way, some form of legal response appeared to be appropriate, either to punish immoral behavior or to realign the market incentives correctly. This section describes each of these accusations.

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94. Part II of this Article explores the possibility that the situation would have been even worse had the blockbusters been allowed to continue their activities.

95. The harms of blockbusting to whites lies beyond the scope of this Article. Some evidence suggests that harms to whites were relatively small. See, e.g., N.Y. Summary Report, *supra* note 40, at 6 (noting that white homes were purchased near their assessed value, and then resold at inflated values to minorities). Nonetheless, the whites clearly did not want to leave, and hence this Article deliberately fails to consider certain harms to whites from blockbusting activities. Harms to racists, which flow from their own racism, do not deserve public policy attention. See *infra* note 190. Unfortunately, not all harms to whites resulted entirely from white racism. To the extent that blockbusters contributed to a more polarized, racist society, progressive whites who yearned for a different type of society clearly suffered. Also, to the extent that some whites wanted to live in integrated neighborhoods and felt pressured to leave due to the tactics of the blockbusters, those whites suffered as well. Focusing on racial justice and harms to blacks, however, seems to capture at least some of those non-racist harms to whites. Additionally, the purpose of this Article is not to assess blockbusting in its entirety, but merely to revisit blockbusting as a civil rights initiative.

## 1. Preventing Integration

The first critique levied against the blockbusters is that they perpetuated segregation by encouraging white flight.<sup>96</sup> In order to get whites to sell, blockbusters warned whites that the coming wave of blacks would harm their property values and threaten their safety.<sup>97</sup> By giving real estate agents a profit motive to spread racist propaganda, the blockbusting industry shaped preferences so as to prevent integration.<sup>98</sup> Essential to this argument is the contention that without blockbusting, stable and integrated neighborhoods would have begun to form.<sup>99</sup> As one federal judge in Michigan argued, large cities would have

enough fair-minded people of both races, who have respect for diversity, to insure that there will indeed be integrated . . . neighborhoods . . . .

. . . [Mutual] respect and tolerance is more likely to thrive in an atmosphere where people . . . are not continually subjected to the pressures of doomsday prophets making repeated representations that their property values as well as the quality of education offered their children will decline.<sup>100</sup>

Additionally, blockbusters might have hastened the rate of blockbusting; some authors theorized that by causing blocks to change so rapidly, the blockbusters prevented informal crime-control networks from forming.<sup>101</sup> Thus, even if the blockbusters did not cause white

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96. See, e.g., *Brown v. State Realty Co.*, 304 F. Supp. 1236, 1240 (N.D. Ga. 1969) (describing blockbusting as "a fundamental element in the perpetuation of segregated neighborhoods, racial ghettos and the concomitant evils which have been universally recognized to emanate therefrom").

97. See, e.g., *City of Cleveland Heights v. Lindsay*, 417 N.E.2d 1019, 1021 (Ohio Ct. App. 1979) ("The blockbuster threatens the economic interests of homeowners by making representations that an influx of a minority group in the neighborhood will lead to rapidly falling property values, increased crime rate, deteriorating schools and other undesirable conditions.").

98. See, e.g., *id.* ("The effect of blockbusting practices is to create panic sales in a community housing market. Homeowners are induced to sell their homes for a price below its fair market value because of a racial, religious or ethnic shift in the community. Thus, a slight shift in the makeup of a community will be used to generate an even greater changeover."); Vitcheck, *supra* note 15, at 17 (stating that a blockbuster said "[t]o an elderly couple who hesitated" that "I know what waiting has meant to people like you in worry and strain. Waiting never makes it easier. If you take my cash deal while I still can offer it, you can begin looking for a new retirement home tomorrow.").

99. See, e.g., *Harris v. City of Buffalo*, 394 N.Y.S.2d 794, 796 (Sup. Ct. 1977) (stating that "the delicate process of neighborhood integration" should result in "the natural realization of economically stable, racially integrated, heterogeneous neighborhood housing").

100. *Zuch v. Hussey*, 394 F. Supp. 1028, 1054 (E.D. Mich. 1975).

101. See, e.g., *Georgetown Note*, *supra* note 40, at 176 ("Good neighborhoods are maintained by informal community understanding and social controls. Since blockbusting causes rapid transition and the newcomers are not an organized group, deterioration can occur before community concern can develop and create effective

flight, they plausibly might have exacerbated it sufficiently to warrant attention from public policy makers.

## 2. Draining Wealth from Black Communities Through Unconscionable Contracts

A more sweeping criticism of the blockbusters is that their exploitation drained so much wealth from new black neighborhoods that they doomed those neighborhoods to failure.<sup>102</sup> According to the conventional wisdom, the blockbusters did this in several mutually reinforcing ways. First, the whites that blockbusters drove out of racially transitional neighborhoods were rich in political and economic resources. Thus, by preventing integration the blockbusters also harmed the economic prospects of the neighborhood.<sup>103</sup> Second, the blockbusters used their unfair bargaining power to sell homes at sharply inflated prices<sup>104</sup> with usurious installment-contract financing.<sup>105</sup> These contracts consumed significant resources that should have been spent on home maintenance and social services,<sup>106</sup> strained

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social control." (citing Commission on Race and Housing, *Where Shall We Live?* 35-42 (1958))).

102. See, e.g., Columbia Note, *supra* note 8, at 545 ("In the end, the community is disrupted, tense and segregated—if a community remains at all. As families too poor to maintain their homes move into the neighborhood, [t]he inevitable consequence is that houses, blocks and whole neighborhoods deteriorate rapidly." (quoting Donald H. Elliot, Chairman of the City Planning Commission)); N.Y. Summary Report, *supra* note 40, at 1 (noting exploitation of blacks).

103. See, e.g., Columbia Note, *supra* note 8, at 545 ("The city's task is complicated by the lowering of the tax base which accompanies a mass exodus of middle-class homeowners. The resulting breakdown in municipal services causes the remaining whites to move if their resources permit, leaving a new all-black community behind." (footnote omitted)).

104. See, e.g., N.Y. Summary Report, *supra* note 40, at 6 ("A detailed analysis of 11 specific property transactions . . . selected at random, revealed . . . [that a]lthough the average price paid by a speculator to a white owner was just under \$12,000, the average resale price paid by a Negro purchaser was \$20,000.").

105. See, e.g., *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 331 (7th Cir. 1974) (noting that sellers to blacks demand "prices in excess of the fair market value of a house and in excess of what whites pay for comparable housing"); *Block Busting—Who Benefits?*, *supra* note 50, at 3 (claiming that buyers "are forced to overfinance to such an extent that they have little or no chance to retain their dwellings" and that "[t]hey are saddled with a debt—usually far beyond their ability to pay—and, when the time comes for foreclosure, they lose not only the cash they have invested but also lose their credit standing and are forced to defer or forget their dreams of owning a home").

106. See *Universal Builders*, 501 F.2d at 331 (claiming that blockbusters "extract from blacks resources much needed for other necessities of life, thereby reducing their standard of living and lessening their chances of escaping the vestiges of a system of slavery and oppression"); Columbia Note, *supra* note 8, at 546 (describing the inability of the newcomers to maintain their properties (citing Interview with Patrick J. Cea, Associate Counsel, New York Dep't of State, in New York City (Feb. 10, 1971))); Marks, *supra* note 37 ("Poor people trying to pay off topheavy mortgages cannot keep their white elephants in proper repair. They can't pay for heating. Some rent single rooms to help pay the freight, and soon schools are jammed by over-occu-

families by forcing parents to work longer hours,<sup>107</sup> and contributed to blight by bringing about foreclosures.<sup>108</sup> The aggregation of the individually onerous contracts, in other words, transferred significant amounts of wealth from economically borderline neighborhoods to real estate speculators.

### 3. Promoting Racism and Racial Tensions

The third indictment of the blockbusters is that the industry promoted and exploited racism.<sup>109</sup> In order to get whites to sell, the blockbusters fomented damaging racial stereotypes about blacks. Not only did blockbusters make statements about what would happen to neighborhoods when blacks arrived,<sup>110</sup> but they also staged demonstrations, such as hiring black men to commit minor acts of vandalism,<sup>111</sup> or hiring welfare mothers to walk with their many children through neighborhoods.<sup>112</sup> In addition, departing whites harbored lingering resentment against blacks simply for having been displaced.<sup>113</sup> As one critic put it:

[B]lacks who find housing through blockbusting do so at a cost too great to be considered socially beneficial. Blockbusting creates anx-

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pancy and sanitation collapses."); Vitcek, *supra* note 15, at 18 (noting that contract terms "force Negroes to overcrowd and overuse their buildings by renting out part of them, or to skimp on maintenance").

107. See, e.g., Vitcek, *supra* note 15, at 18 (relating stories of how the burden of blockbusting contracts "forces Negro mothers to work, despite the presence of youngsters at home, compels fathers to take two jobs and can lead to numerous other problems because of the financial strain and anxiety").

108. See, e.g., Columbia Note, *supra* note 8, at 546 ("Of eighteen recent real estate transactions in Crown Heights, ten have been foreclosed within a year."); Marks, *supra* note 37 ("Mortgages are foreclosed, the neighborhood becomes a segregated, poor black slum, a victim of communicate."); N.Y. Summary Report, *supra* note 40, at 5-6 (finding that the high cost of secondary financing causes minority buyers to be "faced with a large sum due and payable immediately" and that their alternatives are "borrowing a large sum of money to pay off a second mortgage, attempting to obtain refinancing, and facing foreclosure").

109. See, e.g., *Summer v. Township of Teaneck*, 251 A.2d 761, 763 (N.J. 1969) (describing racial tensions from blockbusting as self-evident).

110. See, e.g., Marks, *supra* note 37 ("They generated business by phone calls, personal calls, cards through the mails, all playing on the fears of white home owners that 'they' would take over the neighborhood, mug them, rape their wives . . . ." (quoting Patrick Cea, Associate Counsel for the New York Dep't of State)); N.Y. Summary Report, *supra* note 40, at 3 (reporting that a phone solicitor warned a housewife that her daughters would not be safe with blacks in their neighborhood).

111. See Columbia Note, *supra* note 8, at 542 (citing Interview with Florencio Linares, Deputy Executive Director, City Commission on Human Rights, in New York City (Feb. 3, 1971)); see also Krawcheck & Tanner, *supra* note 48 (describing blacks looking at homes in large numbers, walking through white neighborhoods in large groups, and driving into neighborhoods in old cars with many children).

112. See Vitcek, *supra* note 15, at 16.

113. See, e.g., Georgetown Note, *supra* note 40, at 170 ("[B]lockbusting results in social harm through the fears engendered in white homeowners and the Negroes' resentment of the white exodus which follows the arrival of blacks in the neighborhood.").

iety-ridden neighborhoods embittered by the panic peddling of dealers, speculators and brokers. The community affected is stirred to ill will, hysteria and tension. The community as a whole becomes more segregated in all aspects of life—and more prejudiced.<sup>114</sup>

Under this argument, even if blockbusting had some benefits for blacks, blockbusting still should not have been tolerated because it exploited and encouraged racism.

### B. *A Critical Assessment of the Harms to Blacks Associated with Blockbusting*

Many of the harms attributed to blockbusters cannot be softened by economic analysis. If blockbusters shaped racist preferences, destroyed intangible community relations, and immorally profited from the suffering of others, economics has little to say to rehabilitate them.

To the extent that the blockbusters were criticized for causing concrete and measurable harms, however, historical and economic perspectives can assess the validity of those criticisms. In fact, most of these problems—segregation, the difficulties faced by black neighborhoods, and racial tensions—preceded the existence of the blockbusting industry. Blockbusting thus entrenched or reinforced those problems, rather than caused them. Additionally, by helping dislodge racist whites, the blockbusters conferred benefits by providing blacks with superior housing.

#### 1. The Blockbusters' Role in Stopping Integration Was Overstated

The segregation critique of the blockbusters boils down to the argument that blockbusters encouraged white flight. Even if this is true, however, the essential issue from the perspective of racial justice is whether white flight was necessary to make homes available for black residence. The questions, therefore, are (1) would whites have let blacks in without blockbusters forcing them to do so, and (2) once blacks moved in, would whites have stayed without blockbusters? Unfortunately, the evidence suggests negative answers to both questions.

First, white racism excluded blacks long before blockbusters came along. As explained in part I, white society worked hard and successfully for decades to exclude blacks from white neighborhoods.<sup>115</sup> The mere fact that housing prices were higher for blacks than whites suggests that blacks were not able, prior to the intervention of the blockbusters, to find housing in white neighborhoods at the rate necessary

114. Columbia Note, *supra* note 8, at 540.

115. See *supra* notes 14-29 and accompanying text; see also Vitcek, *supra* note 15, at 16 (“[F]ew white neighborhoods welcome Negroes who can afford to buy there; yet the need for homes for Negroes keeps growing. I assist in the solution of this problem. My function . . . is to drive the whites from a block whether or not they want to go, then move in Negroes.”).

to meet their demand.<sup>116</sup> Although anecdotes from anti-blockbusting hearings and articles suggested that blockbusters destroyed integrated neighborhoods,<sup>117</sup> such anecdotes were both exaggerated<sup>118</sup> and contrary to the weight of evidence about American integration.<sup>119</sup> Blockbusting would not have been profitable had America been more tolerant; social and economic racism were essential for the dual housing markets which drove blockbusting profits.

Second, although the blockbusters may have exacerbated the problem, the intensity of black demand, the depth of white prejudice, and the general phenomenon of suburbanization made rapid resegregation inevitable in many neighborhoods.<sup>120</sup> This result was suggested at a theoretical level by Thomas Schelling,<sup>121</sup> whose basic assumption was that white residents would have different degrees of tolerance for black neighbors. Once the first few blacks moved into a neighborhood, the least-tolerant whites would flee, and blacks would take their place, becoming a significant minority. This, in turn, would cause the slightly-more-tolerant whites to flee. The replacement of these whites with another wave of blacks would cause still more-tolerant whites to flee, and so on. Eventually, even the most tolerant whites would move out, since they would not be willing to live as a tiny minority of a mostly-black neighborhood. Or, as one white resident put it, "I have nothing against the blacks moving in but not to take over completely."<sup>122</sup> This theoretical model appears borne out by empirical studies of the pace of racial change<sup>123</sup> and the expressed preferences

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116. In a functioning market where blacks were not excluded, one would expect blacks on average to pay the same or less for housing, given that blacks on average had lower incomes and wealth. The fact that the prices for blacks were dramatically higher than for whites therefore strongly suggests the presence of racism. See *supra* notes 31-33, 40 and accompanying text.

117. See, e.g., N.Y. Summary Report, *supra* note 40, at 3 (noting that blockbusters "induced racial tension and disorder" in "previously stable, integrated communities") (emphasis added)).

118. The "stable, integrated" community referred to, *supra* note 117, had been all-white for generations, and only recently had one or two black families moved in. See N.Y. Summary Report, *supra* note 40, at 2.

119. See *infra* notes 124, 130-34 and accompanying text.

120. See generally Julia Abrahamson, *A Neighborhood Finds Itself* 9 (1959) (describing how white flight followed the entry of even middle-class blacks due to the consequent entry of lower-class blacks and fears of "intermingling"); Jackson, *supra* note 17, at 190-218 (discussing American suburbanization and the many cases of white flight, including race-based federal mortgage subsidies); Linda Charlton, 'Blockbusting': *Dilemma in East Flatbush Area*, N.Y. Times, Dec. 9, 1969, at 57 (quoting black real estate agents as saying that white flight inevitably follows black entry, no matter how blacks move in).

121. Thomas Schelling, *Dynamic Models of Segregation*, 1 J. Mathematical Soc. 143 *passim* (1971); see Richard Morrill, *The Negro Ghetto: Problems and Alternatives*, 55 Geographical Rev. 339 (1965).

122. Charlton, *supra* note 120 (quoting a white resident).

123. See, e.g., Chicago Report, *supra* note 54, at 8 (finding an almost complete turn-over from all-white to all-Negro occupancy within a relatively short number of years); St. Clair Drake & Horace R. Cayton, *Black Metropolis: A Study of Negro Life in a*



of whites.<sup>124</sup> Thus, only whites with unusually tolerant preferences—those who simply did not care about race at all—would have been willing to stay in these neighborhoods. Even these race-blind whites, however, would have reasons to leave, given that public and private sector actors withdrew economic and social services as soon as blacks moved in.<sup>125</sup>

Schelling's argument, if correct, has mixed implications for blockbusting. On one hand, Schelling's argument may weaken the importance of blockbusters in acquiring housing for blacks. If whites were going to flee anyway, then perhaps the blockbusters were only necessary to "open" the blocks in the first place to black customers, after which whites would have been so desperate to flee that they might have contracted directly with blacks. Or, perhaps whites' preference against dealing with blacks might have trumped their preference against living with blacks, slowing integration and providing a useful role for blockbusters in facilitating transactions. On balance, however, Schelling's argument defuses the power of the "white flight" critique of the blockbusters. Even if blockbusters encouraged white flight, they did not enhance segregation. Rather, they merely shifted whole neighborhoods from white to black, moving society from segregation with inadequate black housing to segregation with slightly more adequate black housing. Additionally, as discussed in the next section, it appears that blockbusters were necessary to make housing available in all-white neighborhoods in the first place.

## 2. Blockbusters, on Balance, Improved the Situation of Most Blacks

If blockbusters did not cause segregation, the claim that they destroyed black neighborhoods relies upon the argument that blockbust-

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Northern City 189-90 (1945) (explaining the underlying dynamics of white flight); Otis Dudley Duncan & Beverly Duncan, *The Negro Population of Chicago: A Study of Residential Succession* 87-107 (1957) (studying the rapid growth of Chicago's black population from 1920 to 1950); Karl E. Taeuber & Alma F. Taeuber, *Negroes in Cities: Residential Segregation and Neighborhood Change* 105-14 (1965) (reporting that 90% of all neighborhoods of six Northern cities inhabited by blacks were all-black or clearly moving in that direction).

124. Although whites have recently begun expressing theoretical preferences for integrated housing, significant majorities of whites express discomfort at the prospect of living in communities that had a substantial minority of black residents. See Schuman, *supra* note 23, at 71-138 (tracing trends in white racial attitudes from 1942 to 1983); W.A.V. Clark, *Residential Mobility and Neighborhood Change: Some Implications for Racial Residential Segregation*, 1 *Urb. Geography* 95 (1980); W.A.V. Clark, *Residential Preferences and Neighborhood Racial Segregation: A Test of the Schelling Segregation Model*, 28 *Demography* 1, 1-4 (1991) (citing studies evaluating the role of preferences in residential choice).

125. See, e.g., Columbia Note, *supra* note 8, at 545 ("The resulting breakdown in municipal services causes the remaining whites to move if their resources permit, leaving a new all-black community behind."); see also *supra* notes 16-23 (illustrating institutional efforts to further segregation).

ing contracts drained too much wealth from black communities. This section argues that although black customers spent a great deal, they did so in exchange for a valuable service, and even the cumulative effects of all of the blockbusting transactions were not a major source of the problems of urban blight.

First, blacks entered into contracts with blockbusters voluntarily. Although blacks were under economic duress that forced them to deal with blockbusters to acquire property, blockbusters did not engage in fraud or coercion in their dealings with blacks. In an environment where hundreds of thousands of blacks were desperate for housing, with some living in kitchens and bathrooms,<sup>126</sup> the blockbusters simply had too much market power to need to engage in such tactics with blacks.<sup>127</sup> This suggests that blacks preferred the blockbusters' terms, as bad as they were, to the conditions of the older black ghettos.

Second, while blockbusters made significant amounts of money, they also bore significant risks and costs. Although in retrospect it is clear that blockbusters earned tremendous returns, the investments were considered risky at the time. Many of the blockbusters' customers were poor credit risks,<sup>128</sup> and the neighborhoods themselves were considered credit risks.<sup>129</sup> Moreover, by dealing with blacks, blockbusters earned the social sanctions of the segregationist era,<sup>130</sup> includ-

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126. See *infra* note 144 and accompanying text. See generally Massey & Denton, *supra* note 10 (discussing the perpetuation of a black underclass in American ghettos).

127. Blockbusters did, however, appear to engage in fraud with regard to whites. See Columbia Note, *supra* note 8, at 542 ("[T]he Federal Housing Authority (FHA) valuation of a house, which is determined for purposes of guaranteeing mortgage loans, may be concealed from the seller in order to procure a lower price." (citation omitted); *id.* ("In one instance, after mention was made of a new housing project a block away, the broker warned [residents] that the neighborhood was . . . not very nice and misrepresented the number of houses he had for sale on the block." (citation omitted)).

128. See Columbia Note, *supra* note 8, at 550 (citing N.Y. City Comm'n of Human Rights, Blockbusting Report: Blockbusting in the East New York Section of Brooklyn—A Report on Public Hearings Held Oct. 17 and Nov. 1 & 15, 1962, at 83 (1962) (unpublished report, on file with the N.Y. City Commission of Human Rights)). One broker in these hearings defended the financing terms as follows:

Everybody that buys a house with a little bit of money or buys a house with only a small amount of credit must have a second mortgage. It has been done before when the Jews crossed the bridge from the East Side into Williamsburg.

*Id.* at 549-50 (citing N.Y. City Comm'n of Human Rights, Blockbusting Report: Blockbusting in the East New York Section of Brooklyn—A Report on Public Hearings Held Oct. 17 and Nov. 1 & 15, 1962, at 76 (1962) (unpublished report, on file with the N.Y. City Commission of Human Rights)).

129. Banks refused to make these loans partially because they were not confident about the future of these neighborhoods. See Helper, *supra* note 25, at 337. Although these calculations were clearly racist, they nonetheless reflected the governing economic wisdom of the time, suggesting that the blockbusters were taking some risks as far as they knew.

130. See, e.g., Vitcek, *supra* note 15:

ing boycotts,<sup>131</sup> local government sanctions,<sup>132</sup> and even death threats,<sup>133</sup> which might have necessitated some premium in order for the blockbusters to stay in the business.<sup>134</sup> Given that banks would not lend to blacks, and whites would not sell to blacks, allowing the blockbusters to reap profits through financing and blockbusting may have been the only way, absent public policy intervention, for urban blacks to obtain decent housing.<sup>135</sup>

Even if individual blockbusting contracts made sense from the perspectives of both blacks and blockbusters, progressives might still point to the overall condition of urban black ghettos as proof that blockbusters caused collective harms.<sup>136</sup> Blockbusters, however, are not solely to blame for modern urban ghettos; there were a number of factors that devastated inner cities from the 1940s through the 1970s. The federal government's Federal Housing Administration ("FHA"), for example, provided extremely generous loan subsidies and guarantees to white neighborhoods, thus providing strong incentives for capital to flow out of black neighborhoods.<sup>137</sup> Per capita lending in Nassau County, New York, for example, was sixty times that of Bronx County.<sup>138</sup> The redlining procedures of the federal government also sent signals to private lenders, who themselves tended to be biased against lending to blacks, causing further sharp contractions of loan capital in minority areas of cities, and resulting in tremendous urban decline in those areas.<sup>139</sup> Other racist or inept policy decisions contributed further to the decline, such as vastly inferior police, fire, sani-

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As a result of my business dealings, I have been cursed, called "nigger lover," "vulture," and "panic-peddler," had doors slammed in my face and even been chased by an irate woman with a broom. "You're a Communist and un-American!" one owner shouted at me. "You've sold out your own race!" others have yelled.

*Id.* at 18.

131. As one New Haven real estate agent put it, "One blunder like that (selling a house in an area where the buyer and his family would not fit in and be accepted) costs two or three commissions later on, every time. People . . . remember things like that and if they want to sell or buy a house later, they go to somebody else." Palmer, *supra* note 24, at 69 (quoting a New Haven real estate agent).

132. *See, e.g., id.* at 164 (discussing a real estate agent's reception of veiled threats about his business from local government official).

133. *See, e.g., id.* at 140 (discussing threats of physical harm as one technique used to discourage blockbusters).

134. *See* Massey & Denton, *supra* note 10, at 37 (noting that "the potential profits were great enough that many whites were willing to face public opprobrium for the sake of the money to be earned").

135. The possible public policy interventions that might have furthered this end are discussed in the last part of this article. *See infra* Part IV.

136. *See supra* notes 103-08 and accompanying text.

137. *See, e.g.,* Jackson, *supra* note 17, at 206-07 (finding the FHA's loan subsidies to have "hastened the decay of inner city neighborhoods by stripping them of much of their middle-class constituency").

138. *See id.* at 211.

139. *See, e.g., id.* at 213 (noting that withdrawal of urban financing resulted in a decline in value of those areas); *see also* Massey & Denton, *supra* note 10, at 106

tation, and education services in black neighborhoods,<sup>140</sup> the creation of high-density public housing projects in ghettos with already-strained social fabrics,<sup>141</sup> and badly-designed welfare programs that discouraged marriage and caused other social problems.<sup>142</sup> In addition, broader economic changes reduced the jobs available to inner-city residents, further sapping the vitality of the new black neighborhoods.<sup>143</sup>

Thus, the blockbusters' blame for urban ghettos cannot be ascertained simply by looking at the ghettos themselves, but rather by attempting to understand how blacks would have fared in a world without blockbusting. Comparing pre-blockbusting black neighborhoods with the neighborhoods created by the blockbusters sheds some light on this issue.<sup>144</sup> The results of this comparison suggest that (1) blacks lived in extremely poor conditions prior to the intervention of the blockbusters, and (2) living conditions improved for blacks after the blockbusters intervened.

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(discussing a study documenting the withdrawal of funds from black neighborhoods). According to Massey and Denton:

As the number of minority tracts increased through black in-migration, moreover, larger and larger shares of the city were marked for disinvestment. The percentage of city tracts that received *no* mortgage money rose from 23% in 1945-1954 to 30% in 1955-1964, and finally reached 67% during 1965-1966. By the mid-1960s, life insurance companies had virtually written off the city and shifted their lending portfolios to the suburbs. This decision was taken primarily on racial grounds. As one company executive put it: "There is one big fear—that the city of Chicago will be controlled by minorities."

*Id.* (citing Karen Orren, *Corporate Power and Social Change: The Politics of the Life Insurance Industry* 115-126 (1982)).

140. *See, e.g.*, Georgetown Note, *supra* note 40, at 176 ("[S]egregated housing results in many disadvantages to Negro residents. Governmental services in black neighborhoods are often inferior, police and fire protection are inadequate, de facto segregated schools provide inferior educational opportunity, and sanitation services are often neglected which in turn can cause disinterest in neighborhood maintenance." (citing Commission on Race and Housing, *Where Shall We Live?* 1-5 (1958))).

141. *See generally* Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940-1960*, at 262-73 (1983) (discussing post-World War II development of low-income housing in Chicago).

142. *See generally* Charles Murray, *Losing Ground: American Social Policy, 1950-1980* (1984) (criticizing American welfare systems, while praising their underlying intent).

143. *See generally* William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (1996) (discussing the adverse effects of joblessness on inner-city neighborhoods).

144. Note that we probably cannot directly compare cities with blockbusting to cities without blockbusting to determine whether blockbusting caused problems. As described in part I, blockbusting resulted from the laws put into place in certain exceptionally racist housing markets. Thus, blockbusting would stem from the same conditions that caused segregated housing, and any correlation we found between blockbusting and living conditions for blacks would be difficult to translate into a causal relation.

First, ample evidence suggests that blacks lived in poor conditions prior to their involvement with blockbusters. The mere fact that blacks willingly chose to deal with blockbusters, at fairly high prices, suggests how dimly blacks viewed their pre-blockbusting living conditions. Evidence from the time corroborates this presumption, as white racism kept blacks crowded into intolerably dense neighborhoods. As reported by Massey and Denton,

As whites in adjacent neighborhoods stood firm and blocked entry, the expansion of the ghetto slowed to a crawl, and new black arrivals were accommodated by subdividing housing within the ghetto's boundaries. Apartments were carved out of bedrooms, closets, garages, basements, and sheds. As population densities within the ghetto rose, black spatial isolation increased.<sup>145</sup>

Thus, as bad as modern urban ghettos may appear, pre-blockbusting housing conditions for blacks may have been even worse.

Second, although little evidence directly compares busted neighborhoods with pre-blockbusting black ghettos,<sup>146</sup> what little evidence exists suggests that black housing actually improved during the blockbusting era. For example, one study of Chicago concluded that during the 1960s and 1970s, discriminatory pricing disappeared.<sup>147</sup> The same study concluded that the overall quality of housing for blacks during the period rose appreciably:

[M]any families were able to improve their housing condition dramatically during the decade . . . . Not only was there a dramatic improvement in the housing condition of Chicago's central-city minorities, as for example over 128,000 units were transferred from white to black occupancy, but 63,000 of the worst units in the city could be demolished at the time that tens of thousands of additional undesirable units were being abandoned.<sup>148</sup>

Whether this beneficial result stemmed from the blockbusters, or would have occurred without them, will be discussed further in part III of this Article. At the very least, this empirical result weakens the claim that blockbusters hurt blacks with regard to housing.

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145. Massey & Denton, *supra* note 10, at 43.

146. Although there is a great deal of evidence of the problems facing black neighborhoods generally, little evidence indicates that busted neighborhoods were worse than the original black ghettos. Given that this was the central claim of the anti-blockbusting coalition, the lack of evidence is surprising. In the thousands of pages of anti-blockbusting newspaper articles, legislative testimony, public hearings, law journal reports, and legal cases, one would expect at least one systematic evaluation of the circumstances of metropolitan-area blacks who purchased from blockbusters compared with those who chose not to. Such studies, however, appear not to exist.

147. See Brian J.L. Berry, *Ghetto Expansion and Single-Family Housing Prices: Chicago, 1968-1972*, 3 J. Urb. Econ. 397, 416-17 (1976).

148. *Id.* at 417.

### 3. Blockbusting Did Not Significantly Promote Racism or Racial Tensions

The claim that blockbusting contributed significantly to American racism deserves immediate skepticism. At the outset, ample evidence suggests that whites would have engaged in collective expressions of racism towards blacks without the help of the blockbusters. Whites engaged in precisely this type of behavior during the period from the 1920s through the 1950s in response to black migration to urban centers.<sup>149</sup> More specifically, evidence from the blockbusting era suggests that homeowners, not blockbusters, spread racist propaganda about blacks. Completely innocuous events incited frightened rumors.<sup>150</sup> One article from Cleveland described a white homeowner who considering selling her home in part because a blockbuster called her and said "Negroes are moving on your street and their children will be running all over the yards."<sup>151</sup> One federal district court which denied a motion to dismiss a blockbusting case noted that as soon as the first African American had moved into the neighborhood, "[n]ews of this purchase quickly spread throughout the area and precipitated much dialogue among the residents of Connie Lane. As a result, in January and early February, several of the residents on the block listed their homes for sale,"<sup>152</sup> and indeed each new home sold to African Americans created waves of frightened conversations among the remaining white homeowners.<sup>153</sup> In another Fair Housing Act case that granted a preliminary injunction against real estate agents, the court began its discussion by noting that "[p]erhaps the single most significant factor operating in this case is the racial fear of the white residents of the area involved. At times, this fear has become so irrational and pervasive that it reflects a hysterical community psyche."<sup>154</sup> Still another case suggested that blockbusters arrived only *after* the fear took hold:

The evidence at the trial disclosed many illuminating things about what happens in a residential neighborhood when it becomes racially transitional. For example, if these cases are typical—and the court believes they are—the following consequences can be predicted as *inevitable, and beyond dispute*: First, a *sense of panic and*

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149. See *supra* notes 14-29; see also Edwin S. Mills, *Urban Economics* 168 (1972) (arguing that "to blame housing segregation on realtors and mortgage lenders is like blaming bad news on the journalist").

150. See *Brown v. State Realty Co.*, 304 F. Supp. 1236, 1238 (N.D. Ga. 1969); Krawcheck & Tanner, *supra* note 48 (reporting that whites considered leaving after several blacks stopped in a neighborhood to pass out religious literature); see also N.Y. Summary Report, *supra* note 40, at 7-8 (finding that blockbusters "could not have flourished without" the "ignorance and latent prejudices of many white residents" and "continued prejudice and intolerance which denies the right of Negro and Puerto Rican families to bargain freely").

151. Krawcheck & Tanner, *supra* note 48.

152. *Brown*, 304 F. Supp. at 1237.

153. See *id.* at 1238.

154. *Zuch v. Hussey*, 394 F. Supp. 1028, 1030 (E.D. Mich. 1975).

*urgency immediately grips the neighborhood* and rumors circulate and recirculate about the extent of the intrusion (real or fancied), the effect on property values and the quality of education. Second, there are sales and rumors of sales, some true, some false. *Third, the frenzied listing and sale of houses attracts real estate agents* like flies to a leaking jug of honey.<sup>155</sup>

To the extent that this court was correct, blockbusters did not cause racial tensions; rather, racial tension was a predicate for the arrival of the blockbusters.

Perhaps more importantly, blockbusting speech and activities simply do not appear to have been particularly virulent. The primary tactic of blockbusters was to identify an area near an expanding ghetto, quietly acquire a few homes or apartments, and then sell the home to "ostentatiously lower-class blacks."<sup>156</sup> Most blockbusters did nothing more aggressive than insistently offering to pay cash for houses.<sup>157</sup> The only reason this succeeded in causing the whites to leave in droves is that the sheer quantity of solicitation created a panicky, "sell-now" mentality.<sup>158</sup> As one federal district judge put it, in a case where the court granted an injunction against blockbusters,

In this maelstrom [of a racially transitional neighborhood] the atmosphere is necessarily charged with Race, whether mentioned or not, and as a result there is very little cause or necessity for an agent to make direct representations as to race or as to what is going on.

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155. *United States v. Mitchell*, 335 F. Supp. 1004, 1005-06 (N.D. Ga. 1971) (emphasis added). This language of the district court was later quoted with approval by the Fifth Circuit in *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 124 n.13 (1973).

156. Massey & Denton, *supra* note 10, at 38.

157. See, for instance, Vitcheck, *supra* note 15:

Few large speculators [participate in more extreme blockbusting tactics] . . . .

I began my work in this case by sending a postcard to everyone in the block and others in adjacent blocks. The cards said, "I will pay cash for your building." That was all except for my phone number. The word "cash" was the key. It assured homeowners that they could get out quickly and reminded them that their neighbors could too. Then a canvasser and I headed for the block to repeat the offer in person . . . .

. . . .

The moment I make a deal, I always place a "Sold by" sign in front of the building. A few such signs—the gaudier, the better—show that events are moving. So does the ringing of doorbells. And with thirty other real-estate men working a block, including regular dealers as well as speculators, those bells ring often.

Changing the rest of this block, as in most other blocks, was easy.

*Id.* at 16-17.

158. See, e.g., *New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 835-36 (2d Cir. 1994) (discussing the "frenzied solicitation practices" of real estate brokers); Columbia Note, *supra* note 8, at 541 ("The sheer quantity of solicitation [in a transitional neighborhood] was sufficiently unnerving to stir thoughts of moving in even the most principled white homeowners." (citation omitted)).

Considering these circumstances and the scantiness of the direct evidence the court must say that it is not overly impressed with the gravity of the individual transgressions of the individual defendants and their agents.<sup>159</sup>

When the Executive Director of New York City's Commission on Human Rights wanted to demonstrate some of the "less subtle tactics" of blockbusters, he could only come up with the hiring of a gang of young black men to turn over garbage cans.<sup>160</sup> These activities do not appear to foment racism, so much as bring preexisting racism to the surface.

In sum, America suffered from deep racial hostility before, during, and after the blockbusting industry's existence; blockbusters only worked effectively in cities and neighborhoods that were already segregated and bigoted; and the actual tactics of blockbusters were extremely mild, especially by comparison with the tactics of segregationist whites.<sup>161</sup> Thus, the case that blockbusters significantly contributed to racial tensions appears implausible.

### III. THE DAMAGE CAUSED BY THE ANTI-BLOCKBUSTING MOVEMENT

The preceding part rehabilitated the blockbusting industry by arguing that its harmful effects were overstated and offset by certain benefits. This part goes further, and in three steps argues that the anti-blockbusting regime caused far more damage than it solved. First, the market would have solved the worst excesses without government intervention. Second, many anti-blockbusting laws were blunt instruments that strengthened the pre-blockbusting segregationist regime. Third, even relatively benign blockbusting laws had indirect costs that were borne by black consumers.

#### A. *How Markets Might Have Worked*

The first step in assessing the efficacy of anti-blockbusting laws involves exploring what might have happened had the laws not been enacted. In theory, the high premiums of the early blockbusting period should have been a temporary phenomenon. The blockbusting industry, after all, emerged only after several decades of black migra-

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159. *Mitchell*, 335 F. Supp. at 1006-07.

160. Columbia Note, *supra* note 8, at 542 (citing Interview with Florencio Linares, Deputy Executive Director, City Commission on Human Rights, in New York City (Feb. 3, 1971)); see also Vitcheck, *supra* note 15, at 16 (highlighting techniques of blockbusters). Vitcheck described his interaction with a resident as follows: "'How much are you asking for your building?' I asked him. 'Twenty-two thousand,' he said. 'Well,' I said, 'you might get that if you wait. But you know what is happening in this neighborhood. If you want a quick cash deal, I'll give you \$18,000.'" *Id.* (emphasis added).

161. See, e.g., Massey & Denton, *supra* note 10, at 34-35 (describing racial violence, including bombing, used to keep blacks in circumscribed ghettos).



tion to urban areas, where a solidly segregated regime denied them access to homes. When legal segregation began to be dismantled and blockbusters began their work, the pent-up demand was enormous. Since the market would only gradually move toward equilibrium, blockbusters could limit themselves to those blacks who were highest up on the demand curve, and hence charge rates far in excess of the market equilibrium rate. Blockbusters probably augmented this profit with some oligopolistic market power; blacks were desperate for housing, and thus were in no position to shop around or bargain effectively. Blacks probably also lacked good information about the market during this initial period, contributing to blockbusters' market power. These factors together should have, and did, lead to several years of poor bargains.

Over time, however, simple economic theory predicts that these high prices would have come down. First, the strongest pent-up demand was met by the early blockbusters, forcing later blockbusters to provide their services to blacks whose willingness-to-pay for housing was lower on the demand curve. Second, the supply of housing and home financing for blacks should have increased. High profits would have attracted new entrants into the market for black housing. White homeowners, facing the inevitability of blockbusting and realizing the profits to be made by selling directly to blacks, should have increasingly ignored social sanctions to sell directly to blacks. With the blockbusters having demonstrated the profitability of lending to blacks, banks would have increasingly realized the costs of their racism and should have attempted to exploit that market (perhaps directly or perhaps by setting up subsidiaries to avoid sanctions from white consumers). These supply and demand effects would have significantly eroded the ability of the blockbusters to collude tacitly to keep prices high. In addition to more competitors and less-desperate customers, the blockbusters would have also had to contend with savvier consumers, as information about the blockbusters and their products became more widespread.

We will never know for certain whether these effects would have occurred. The evidence, however, suggests that those effects were already occurring. In 1970, the Deputy Chief of the Housing Division of the U.S. Department of Justice noted that "[i]ncreased housing opportunities for Negroes and the tight money market have made speculation less profitable. Higher interest rates are costly to the dealer and *the increasing supply of housing that is open to Negroes has lowered the prices that can be extracted from them.*"<sup>162</sup> A 1976 study of Chicago's housing markets after the blockbusting of the 1950s and 1960s concluded:

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162. Georgetown Note, *supra* note 40, at 171 n.8 (citing Interview with Alexander Ross, Deputy Chief of the Housing Division, Department of Justice, in Washington, D.C. (Jan. 20, 1970) (emphasis added)).

[A] combination of accelerated filtering and rapid residential relocation produced a substantial sag in demand in areas of traditional minority residence (i.e., those areas with the greatest minority proportions) as well as in other inner city neighborhoods and communities. Little wonder, then, that we find that, by 1972, blacks and other minorities were paying less than the white majority for housing systematically controlled in the models for quality, improvements, incomes, and other neighborhood factors.<sup>163</sup>

Thus, in the early 1970s, a mere few years after the passage of the Fair Housing Act,<sup>164</sup> the salutary effects of the blockbusting industry were beginning to become empirically demonstrable.

If economic theory worked as predicted above, salutary secondary effects would have been felt beyond the busted neighborhoods. First, the costs of racism to the real estate and financial industries—in terms of foregone profits—would have been exposed. Banks in particular, looking at the profitable track record of the blockbusters, might have realized that they had exaggerated the risks of dealing with blacks. That effect by itself, even if impossible to directly trace or precisely quantify, might outweigh the harms blockbusters caused. Moreover, as more and more whites chose to cut the blockbusters out of the loop and deal directly with blacks, the social sanctions might have weakened. Whether this effect would have actually occurred will never be known. As the next section will explain, the anti-blockbusting regime effectively reinforced residential segregation just as it was beginning to weaken.

### B. *Anti-Blockbusting Laws Increased Segregation*

Most anti-blockbusting laws strengthened segregation. This was no accident. Certain anti-blockbusting provisions, such as anti-solicitation ordinances, were explicitly designed to stop market forces and preserve the status quo.<sup>165</sup> For example, anti-blockbusting forces identified gaudy "For Sale" signs as one of the blockbusters' techniques for inspiring white fear. Thus, they enacted laws that banned such signs.<sup>166</sup> "For Sale" signs, however, served to inform blacks when homes were for sale. In fact, prior to the passage of these laws, many segregationist whites voluntarily refused to put up "For Sale" signs for

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163. Berry, *supra* note 147, at 417; *see also* John F. McDonald, *Economic Analysis of an Urban Housing Market* 54-61 (1979) (criticizing Berry's methodology but agreeing that prices in all-black neighborhoods were significantly lower than prices in peripheral white neighborhoods). *But see* Robert Schafer, *Racial Discrimination in the Boston Housing Market*, 6 J. Urb. Econ. 176 (1979) (arguing that blacks tend to pay more than whites for comparable housing).

164. *See supra* note 75.

165. Even anti-blockbusting progressives appear to have seen this risk. *See, e.g.*, Columbia Note, *supra* note 8, at 562 (noting that non-solicitation area provisions "could potentially be invoked to retain segregated housing patterns merely for the purpose of quieting the nerves of an incited neighborhood").

166. *See supra* notes 61-63 and accompanying text.

fear of attracting black buyers.<sup>167</sup> Thus, the same racist actions that were explicitly designed to exclude blacks from the white housing market were codified into law by the anti-blockbusting regime.<sup>168</sup> As one court noted, "it appears that the true thrust of these sign ordinances is to promote a racial balance or more properly, a racial imbalance in order to perpetuate existing racial lines."<sup>169</sup> The court nonetheless upheld a sign ordinance on the grounds that "[i]t is within the power of the legislature to determine that the community should be . . . *well-balanced* as well as carefully patrolled."<sup>170</sup> In other words, in the name of achieving integration, blacks were excluded—if only temporarily or partially. This was true not only of sign ordinances but also of anti-solicitation laws. In one recent federal case,<sup>171</sup> for example, a judge wrote that "this Court strongly believes that community organizations, such as [the one at issue in this case], primarily use [anti-solicitation statutes] to block minority entry into their communities."<sup>172</sup>

Even those laws not explicitly designed to exclude blacks might have had that effect by virtue of poor drafting.<sup>173</sup> Honest real estate

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167. See, e.g., *Zuch v. Hussey*, 394 F. Supp. 1028, 1035 (E.D. Mich. 1975) (finding that some areas were intentionally "kept white by not putting up 'For Sale' signs").

168. See, e.g., *Adler*, *supra* note 85, at 3 ("Some town officials now . . . admit sign bans are really meant to slow the integration of a neighborhood."). Given this, the effects of the sign ordinances were predictable. See, e.g., *Hagan*, *supra* note 85 (reporting the ACLU's contention that anti-blockbusting sign ordinances did not reduce segregation).

169. *Linmark Assocs., Inc. v. Township of Willingboro*, 535 F.2d 786, 792 n.5 (3d Cir. 1976), *rev'd*, 431 U.S. 85 (1977). The court later went on to hold, with somewhat tortured reasoning, that no such motive characterized the sign ordinance at issue in the specific case before it:

Nothing in the record indicates that the thrust of the present ordinance was the maintenance of a racial balance or imbalance, or that such was the desire of the Council. And nothing of record indicates that "preserving stability" is equatable herein to "racial discrimination" or to the maintenance of a given numerical ratio of white to nonwhite persons in the community. Only by refusing to sell to a minority buyer anywhere in Willingboro, could any set population ratio of Willingboro be maintained. "Stability" herein, as the record shows, means diminution of the number of neighbors leaving on the basis of fear alone.

*Id.* at 797 (citation omitted).

170. *Id.* at 797 n.14 (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)) (emphasis added). Other courts also took pains to note that despite discriminatory intent in other cases, no discriminatory intent appeared in the cases at issue before them. See, e.g., *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161, 165 (7th Cir. 1974) (holding that in specific case, municipality acted entirely without intent to exclude blacks in adopting anti-blockbusting ordinance).

171. *Pearson v. Edgar*, 965 F. Supp. 1104 (N.D. Ill. 1997).

172. *Id.* at 1111 n.2.

173. Some progressives articulated this risk at the time these laws were adopted. See, for instance, *Columbia Note*, *supra* note 8:

According to this argument [made by some opponents of blockbusting legislation], anti-blockbusting legislation risks being turned against the end of promoting racial harmony, the end it theoretically serves. . . . If brokers feel

agents interested in avoiding liability under unclear blockbusting statutes might have given up on a variety of worthwhile activities. For example, federal anti-blockbusting law enforcement actions were sometimes predicated on blockbusting behavior such as showing homes to blacks at night with the lights on,<sup>174</sup> advertising at cheap rates in publications of mostly-black circulation,<sup>175</sup> and otherwise bringing blacks into white neighborhoods.<sup>176</sup> In all of these cases, real estate professionals were prosecuted as blockbusters largely for the crime of bringing blacks into all-white neighborhoods. As one frustrated real estate agent put it, "If we don't sell to colored, we're bigots. If we do, we're blockbusters."<sup>177</sup> In this environment, real estate agents would have tended to steer blacks away from white neighborhoods, and might not have even attempted to solicit homes in anti-blockbusting areas.<sup>178</sup>

Although some progressives argued that careful drafting could have solved the overbreadth problem,<sup>179</sup> virtually any regulations on real estate agents might have at least some risk of encouraging racial steering. Real estate agents are not legal experts, and hence any imperfections in the drafting, enforcement, or understanding of anti-blockbusting laws might have led such agents to avoid integration altogether, simply to be safe from lawsuits. As one of the few progressive opponents of blockbusting legislation put it,

no anti-blockbusting ordinance can be so phrased as to avoid inhibiting and endangering the activity of decent real estate brokers and salesmen who are simply seeking to make additional housing available to persons of excluded minority groups and are doing so in an effort to secure and promote the equality of opportunity in housing

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that they risk prosecution for expressly offering integrated housing to excluded minority groups, the brokers will refuse to make good faith efforts to promote equality of opportunity in housing.

*Id.* at 552.

174. See *Zuch v. Hussey*, 394 F. Supp. 1028, 1031 n.2 (E.D. Mich. 1975).

175. See Columbia Note, *supra* note 8, at 542.

176. See, e.g., N.Y. Summary Report, *supra* note 40, at 4 (criticizing blockbusters for "the deliberate parading of groups of Negroes, presumably prospective buyers, up and down a block to look at houses").

177. Charlton, *supra* note 120 (quoting real estate agent).

178. See, e.g., *Pearson v. Edgar*, 965 F. Supp. 1104, 1118 (N.D. Ill. 1997) (noting that fear of prosecution deters many people from seeking homes for sale in anti-blockbusting neighborhoods).

179. See, for instance, Columbia Note, *supra* note 8:

However, the hostilities and tensions and financial losses to both the black and white victims of panic peddling are the undeniable results of blockbusting and deserve the attention of the government. Whether the dangers of anti-blockbusting legislation materialize under a particular statute depends upon the effectiveness of the statutory and administrative safeguards to prevent abuse.

*Id.* at 552-53.

without discrimination based on race which is essential for the preservation and securing of our American way of life.<sup>180</sup>

The very institution of punishments for blockbusting thus encouraged racial steering—the practice whereby real estate brokers subtly pushed prospective buyers into neighborhoods of homogeneous racial groupings.<sup>181</sup>

This outcome is particularly distressing because racial steering appears to have been a significant source of segregation in the housing market.<sup>182</sup> As explained in part I, the real estate profession had strong incentives to steer customers into racially-homogeneous neighborhoods, and racial steering was a major element of the American Apartheid regime which arose during and after World War I.<sup>183</sup> “[Segregated] housing patterns are, to a significant extent, the result of the practices of the real estate brokerage industry.”<sup>184</sup> Thus, whatever positive effects anti-blockbusting laws had would have been dwarfed if they reinforced the more serious problem of racial steering.

### C. All Anti-Blockbusting Efforts Imposed Indirect Costs on Blacks

Since the blockbusting market operated to the benefit of many blacks, even anti-blockbusting laws that conferred benefits on society imposed at least some offsetting costs on black consumers. Those costs reveal themselves in examination of two of the most apparently benign laws.

Consider first the 1866 Civil Rights Act, which was interpreted in 1969 as providing a cause of action for blacks to recover sums in excess of what whites would have paid for the same properties.<sup>185</sup> Because whites could not sue under that law, blockbusters would still have been able to scare whites into selling at a discount, and then make profits either from commissions or from selling at market prices. Although this law alone would have been superior to the stronger measures ultimately taken by society, even this entails costs for black

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180. *Id.* at 552 (quoting Letter from Sol Rapkin, General Counsel of the NCDH and former director of the Anti-Defamation League Law Department, to Bernard B. Goodman 1 (May 25, 1967) (on file with the *Columbia Journal of Law and Social Problems*)).

181. See, e.g., Steve Kerch, *Revisiting South Suburbs to Update a Familiar Problem*, Chi. Trib., Feb. 16, 1997, at 1C (noting that racial steering became more widespread after federal fair housing laws curbed blockbusting). See generally Yale Note, *supra* note 25 (discussing the illegality of racial steering practices under Title VIII).

182. See, e.g., Yale Note, *supra* note 25, at 809 n.9 (citing to cases in several different states and circuits, and several consent decrees between the Department of Justice and defendant real estate agencies, and concluding that the “nationwide scope of the steering problem is suggested by the number of jurisdictions in which actions complaining of steering practices have been filed”).

183. See *supra* notes 24-28 and accompanying text.

184. Yale Note, *supra* note 25, at 809 (citing U.S. Comm’n on Civil Rights, *Equal Opportunity in Suburbia* 16 (1974)).

185. See *supra* notes 70-74 and accompanying text.

consumers. This is because white homeowners, real estate professionals, and lending institutions probably believed that dealing with blacks entailed costs—social stigma and potentially financial risks—that could be avoided by dealing with whites. By legally limiting the prices blacks could pay for houses, even the Civil Rights Act might have reduced the profit motive to deal with blacks, and hence, like all forms of price control, might have restricted the supply of a valued good, depending somewhat upon the elasticity of supply.<sup>186</sup> More generally, any laws that reduced blockbusters' profits might have weakened the ability of blacks to obtain housing or home financing. Without the profits available from blockbusting, the real estate and finance industries might not have been willing to alienate their racist white customer base by dealing with blacks, or at the very least might have slowed their activities.<sup>187</sup>

For another example of intuitively desirable laws with potential side effects, consider the federal injunctions forbidding real estate agents from mentioning race in their attempts to solicit white homes for sale.<sup>188</sup> In racist white neighborhoods, informal covenants against selling to blacks generally broke down only when blockbusters convinced residents that sales to blacks were inevitable.<sup>189</sup> By forbidding

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186. Some might argue that the blacks would still have been able to pay premiums above what whites paid, simply by choosing not to sue under the 1866 Act, or because the Act was poorly enforced. Although presumably many blacks would still pay a premium for these reasons, *Contract Buyers League v. F & F Investment*, 300 F. Supp. 210 (N.D. Ill. 1969), demonstrates why they would not have to pay a premium in all cases. In *Contract Buyers League*, blacks purchased homes from a developer at prices substantially in excess of what whites would have paid. *See id.* at 214. They thus expressed their willingness to pay. Once they had their homes, however, they formed a class and sued to get their money back. *See id.* at 213. Thus, aggressive enforcement under the 1866 Act would have prevented the real estate industry from profiting from black willingness to pay, and hence would have deprived the industry of any incentive to meet black demand.

187. Available evidence does indeed suggest that the profits available in the blockbusting industry freed real estate agents from the demands of racial steering. *See, for instance, Palmer, supra* note 24:

In all but two of the 29 interviews (with both Board or non-Board agents) where the question of Negro customers was discussed, the agents all made, in effect, the same point: They would do everything legally possible to avoid selling a house to a Negro unless the area already contained a number of Negro residents. They strongly wished to avoid being among the first to sell to Negroes in white areas. One of the two agents who did not state this makes a living by selling to Negroes in areas which are predominantly white; the other supplements his income considerably by doing so.

*Id.* at 128.

188. *See, e.g., United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 122, 127 (5th Cir. 1973) (holding that an anti-blockbusting injunction was authorized by the Thirteenth Amendment and does not violate the First Amendment); *Zuch v. Hussey*, 394 F. Supp. 1028, 1055-56 (E.D. Mich. 1975) (enjoining agents from engaging in unlawful steering).

189. *See, e.g., Vitcheck, supra* note 15, at 15 (describing how a family which had promised their neighbors that they would not sell to blacks decided to do so because they could not find white buyers).

any mention of race, federal anti-blockbusting injunctions made it illegal for blockbusters to make this argument, and thus weakened their ability to attack racist covenants.<sup>190</sup> These two examples demonstrate how any laws against blockbusting would impose at least some indirect costs on black consumers, necessitating a careful calibration of costs and benefits.

D. *The Anti-Blockbusting Movement Was Driven and Exploited by Racists*

Worse even than the harmful side effects of the anti-blockbusting regime is that it appears to have been at least somewhat consciously driven and exploited by racism. First, the purported evidence that drove national anti-blockbusting action was filtered through a racist lens. Second, the laws that passed were not only used by racists, as discussed above, but were actually designed in a racist fashion.

First, white racism drove the negative perceptions of blockbusters. Commentaries about blockbusting tended to emphasize harms to whites.<sup>191</sup> These harms, however, were largely self-inflicted because the entry of blacks would not have caused property values to decline without white racism.<sup>192</sup> More generally, much of the national hostility towards blockbusters was driven by racist whites who were upset that blacks were being introduced into their neighborhoods. These residents focused their ire on the blockbusters, since they were the most salient representatives of the change. As one court put it,

there are white residents of Northwest Detroit who do in fact correlate the entry of black families with the incidence of lower class social pathology. . . . "[I]n the minds of most people, they perceive the function of the real estate broker as being instrumental in producing change in the neighborhood, a change which increases their own apprehensions and their own instability . . . ."<sup>193</sup>

This appears to be the subtext of the accusations that blockbusters destroyed neighborhoods and incited tensions—they destroyed white neighborhoods and triggered white hostility to integration. For the

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190. An additional harmful possibility is that by prohibiting real estate agents from discussing race, the laws might have made it difficult for open-minded members of both races to deliberately seek integrated neighborhoods in which to live. *See, e.g.*, Columbia Note, *supra* note 8, at 552-53 (discussing this possibility).

191. *See supra* notes 46-53 and accompanying text.

192. *See, e.g.*, Columbia Note, *supra* note 8, at 545 (stating that "precipitate exit of whites from a neighborhood can increase the supply beyond the capacity of the Negro Market to absorb it, and result in at least a temporary depression of values" and that, therefore, "by acting on racial prejudices, the white community hurts itself economically" (citing E. Grier & G. Grier, *The Impact of Race on Neighborhood in the Metropolitan Setting* 4 (1961))).

193. *Zuch*, 394 F. Supp. at 1032 (citing the testimony of Dr. Frances Cousens, an expert for the plaintiffs seeking relief under the Fair Housing Act); *see also* Adler, *supra* note 85 (reporting realtors' claims that communities use real estate agents as scapegoats for racial change).

most part, however, this subtext was obscured, as racist opponents of blockbusting effectively deflected attention from themselves by demonizing the blockbusters and selling anti-blockbusting laws as civil rights initiatives.

While residential white racism drove public opinion, the institutional racism of the real estate industry drove anti-blockbusting legislation. Blockbusting represented a major threat to the gatekeeping function of the real estate industry. Neighborhoods lost their ability to punish real estate agents who sold homes to blacks, because blockbusting was sufficiently lucrative that blockbusters did not need the goodwill of racist whites. This angered the whites who were forced to pay for their racism, as well as the established real estate professionals who felt that the blockbusters made them look bad. One law journal Note, which discussed the New York's anti-blockbusting laws, explained that:

Both the National Committee Against Discrimination in Housing (NCDH) and the Anti-Defamation League of B'nai Brith have opposed anti-blockbusting legislation. This opposition is premised on an underlying distrust of the real estate boards which are considered silently behind the laws. Recognizing that the boards do not want fly-by-nighters taking over the market, these groups assert that the boards favor anti-blockbusting legislation as a method of excluding blacks from entering the real estate business.<sup>194</sup>

Thus, real estate boards backed the anti-blockbusting laws because they viewed those laws as a way of maintaining their racist and lucrative monopoly.

Even the "good faith" arguments against the blockbusters appear rife with problematic assumptions. For example, blockbusters were accused of paying blacks to walk through white neighborhoods with their children, paying blacks to drive through white neighborhoods in noisy cars, and advertising low prices in newspapers of black circulation, so as to induce blacks to flock to the neighborhood.<sup>195</sup> The crime the blockbusters were commonly accused of was bringing blacks into white neighborhoods. The associate counsel of the New York Department of State began investigating a neighborhood for blockbusting "as a result of the sudden appearance of large numbers of poor black and Puerto Rican families in a long-established Jewish neighborhood in Crown Heights."<sup>196</sup> Even the supposedly progressive attacks on the blockbusters, therefore, were biased by racist attitudes about the pro-

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194. Columbia Note, *supra* note 8, at 551 (citations omitted).

195. See *supra* notes 111-12 and accompanying text; see also Columbia Note, *supra* note 8, at 541-42 (discussing blockbusters accused of advertising below-market deals in publications of mostly-black circulation).

196. Marks, *supra* note 37, at 5 (explaining his actions, the associate counsel, Patrick Cea, said: "The houses they were buying indicated an opulence far beyond their means . . . so we started checking income tax returns filed by buyers for mortgage purposes.").



priety of blacks entering white neighborhoods. As one court noted, when faced with the claim that blockbusters had shown homes to African American customers at night with the lights on, "the witness also testified that under the same conditions, he would not have been concerned if the buyers had been white. There are perhaps ways to show a house to a black family at night without the aid of lights, but the Court is unable to think of any that would be either practical or effective."<sup>197</sup> This attack on the blockbusters is particularly ironic given the history of segregation, which for decades made it taboo for any real estate agent merely to be seen with a black person.<sup>198</sup>

Further evidence of problematic assumptions behind the anti-blockbusting movement comes from the way that intentionally reactionary laws, such as the anti-sign and anti-solicitation ordinances discussed in part III.B, were justified. Courts recognized that legal actions designed to reduce access of black purchasers to white homes were clearly discriminatory. Courts nonetheless permitted this discrimination in the name of neighborhood stability. Consider, for example, this quote from the Seventh Circuit:

It is urged that the ordinance is racially discriminatory in violation of the Thirteenth Amendment because it makes it more difficult for blacks to move into previously all white neighborhoods. But the right to open housing means more than the right to move from an old ghetto to a new ghetto. Rather, the goal of our national housing policy is to "replace the ghettos" with "truly integrated and balanced living patterns" for persons of all races. It is clearly consistent with the Constitution and federal housing policy for Gary to pursue a policy of encouraging stable integrated neighborhoods and discouraging brief integration followed by prompt resegregation, *even if an effect of that policy is to reduce the number of blacks moving into certain areas of the city.*<sup>199</sup>

Thus, progressive white decision-makers sacrificed the well-being of individual blacks at the altar of pro-integration policies which ultimately failed.

Even progressive advocates of anti-blockbusting laws realized that they would be used primarily by racist whites. Because whites could afford litigation and could sue prior to the blockbusters completing their work, "[i]n practice it is likely that blockbusting suits [would] be brought largely by white homeowners and Negroes [would] benefit

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197. *Zuch*, 394 F. Supp. at 1031 n.2

198. Consider this quote from a real estate agent in the early 1950s: "Those people would have killed me if they knew I was taking a Nigger out there . . . They'd have skinned me alive . . . I took that Nigger out there at two o'clock in the morning. It was so black I couldn't see him at all and I don't think he could see much of me. . . . We signed the papers [the] next day and then he was on his own." This agent was anonymously quoted in Palmer, *supra* note 24, at 141.

199. *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161, 164-65 (7th Cir. 1974) (citations omitted) (emphasis added).

only indirectly by the [blockbusting provisions of the Fair Housing] Act.”<sup>200</sup> The anti-blockbusting movement nonetheless adopted these laws under the theory that bigoted whites’ self-interest would cause them to sue blockbusters, which in turn would stop the spread of racist myths, slow white flight, etc.<sup>201</sup>

The adoption of this counter-intuitive enforcement mechanism, combined with the excessive breadth of the laws referred to in part III,<sup>202</sup> led to a predictable result: racist whites deliberately used anti-blockbusting laws to punish real estate agents who had the temerity to bring blacks into white neighborhoods. The 1975 Michigan case of *Zuch v. Hussey*<sup>203</sup> provides a fairly comprehensive look at who used anti-blockbusting laws. In *Zuch*, the defendant real estate professionals argued that the “overwhelmingly white”<sup>204</sup> plaintiffs brought the lawsuit primarily to (1) economically destroy those real estate companies that violated social norms by dealing with blacks, and (2) keep blacks out of their neighborhoods.<sup>205</sup> At the close of the trial, the district court essentially agreed with these claims. The court went on to note that:

Witnesses testified that if their communities became significantly black, they would move. There was testimony about the initial reaction of residents to the entry of the first black family into the Emerson Community. Frantic meetings were described in which racial hatred was vented and schemes were suggested to physically remove the black family from the community.<sup>206</sup>

Thus, although civil rights leaders intended the anti-blockbusting laws to help African Americans, they were initially and primarily used by whites to punish certain real estate agents and exclude their black customers.

In another federal case, a Georgia district court noted that the plaintiffs had actually tricked real estate agents into violating the law, so that they would be able to punish the agents for dealing with blacks:

[T]he court cannot omit an observation that in at least some instances the agents were more sinned against than sinning. There is clear evidence, for example, that in at least one instance a complaining witness . . . came forward as a witness . . . to “get” the real estate license of one of the defendants if she could do so. . . . At

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200. Georgetown Note, *supra* note 40, at 176 n.47.

201. See, e.g., *id.* at 175-76 n.41 (“[E]ven though white bias is essential to blockbusting, effective relief to whites will act as a further deterrent to the blockbuster . . . [and] granting relief even to the most bigoted white homeowner benefits the Negroes because it makes the practice unrewarding to the panic peddler.”)

202. See *supra* notes 165-82 and accompanying text.

203. 394 F. Supp. 1028 (E.D. Mich. 1975).

204. *Id.* at 1034.

205. See *id.* at 1030.

206. *Id.*

least two other government witnesses testified to their affiliation with a civic group . . . [whose] object was to stabilize the neighborhood. Meetings were held weekly. One of these witnesses took an examination and became an agent herself simply to find out what could be done under the law. . . . [Another witness] attended a convention of a national neighborhood group . . . and brought home circulars advising homeowners to "encourage agents to make racial representations" in violation of the Act and to "lead the agents on" until a violation of the Act was established. Some 4,000 of these circulars were distributed in her neighborhood.<sup>207</sup>

The Georgia court went on to explain that although the racist whites had successfully proven a violation of the blockbusting provisions of the Fair Housing Act, the violations were not particularly serious.<sup>208</sup> Thus, at precisely the time that racist whites had lost their legal power and were losing their economic power to force the real estate industry to keep neighborhoods segregated, the anti-blockbusting movement provided those whites with a powerful new weapon to bring the real estate industry into line.

Finally, anti-blockbusting laws had the further negative effect of harming black real estate professionals. The blockbusting industry included a number of black professionals.<sup>209</sup> Moreover, anti-solicitation laws tended to disproportionately hurt minority-owned businesses, because such businesses were less able to rely upon personal contacts for advertising.<sup>210</sup> Most importantly, black realtors tended to serve exclusively black clientele. Laws that restricted the opportunities for black home buyers thus restricted the business opportunities for black realtors. As one court noted:

One of the ironies of this suit is that among the defendants are several black real estate agencies that will now be enjoined from providing a service which in the past their clients were unable to obtain from white real estate agencies. . . . [T]he testimony in this case indicates that white realtors still will not consistently introduce black families into predominantly white communities unless they perceive that the neighborhoods are "changing."

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207. *United States v. Mitchell*, 335 F. Supp. 1004, 1006-07 (N.D. Ga. 1971).

208. *See id.* at 1007.

209. *See, e.g., Massey & Denton, supra* note 10, at 37 ("White real estate boards, of course, attempted to forestall [blockbusting] by threatening agents who violated the color line with expulsion, but because black agents were excluded from real estate boards anyway, this threat had little effect on them."); Charlton, *supra* note 120 (noting that blockbusting firms in New York employed black real estate agents); *see also* Dorothy J. Gaiter, *Fair Trade: A Black Entrepreneur Vaults Racial Barriers in a Southern Town*, Wall St. J., Apr. 29, 1992, at A1 (describing how white residents accused a black real estate broker of blockbusting).

210. *See, e.g., Pearson v. Edgar*, 965 F. Supp. 1104, 1111 n.2 (N.D. Ill. 1997) (noting that anti-blockbusting laws hurt minority-owned businesses most because such businesses tend to rely more on direct advertising to obtain business and build name recognition).

Compounding this situation is the fact that because white homeowners do not generally patronize black realtors, the black realtor is limited in his operations to either predominantly black communities or transitional communities. In attempting to generate business, therefore, he must rely a great deal on the white realtors to initiate the block busting process. . . . In a sense, therefore, this preliminary injunction while necessary, is also somewhat unfair to these defendants. Its effect will be to limit again the areas in which they can operate with any hope of being successful.<sup>211</sup>

Thus, anti-blockbusting laws were partially designed and advocated by racist real estate professionals, were applauded and approved by racist homeowners, directly hampered black consumers, and directly harmed black professionals.

#### IV. WHERE THE ANTI-BLOCKBUSTING MOVEMENT WENT WRONG

Given all of these problems, it seems astonishing that progressive elements of society supported the anti-blockbusting movement. Although a thorough understanding of the sociology and politics that led to this civil rights debacle lies beyond the scope of this paper, at least part of the problem appears to be that progressives lacked economic savvy, and in fact were openly hostile to market mechanisms. This hostility blinded them to the needs of individual blacks and allowed them to accept destructive policies. This is particularly troubling because many options were available that would have worked with markets to achieve a superior outcome.

##### A. *Undiscriminating Hostility to Market Forces*

Instead of being understood as a market reaction to deeper problems of racism, blockbusters were vilified precisely *because* they made their money from human suffering.<sup>212</sup> In a frank opinion which captured anti-market ethic of the time, one court opined:

Violations of law in the area of human rights are to be frowned upon even when the perpetrators of such violations are acting out of personal racial prejudice which is the product of social conditioning; such violations are even more intolerable, as in the case of these defendants, when the perpetrators are not necessarily acting out their own personal racial prejudices, but are vigorously seeking to exploit the racial prejudices of others in order to satisfy their commercial greed.<sup>213</sup>

Although these entrepreneurs had violated bigoted social norms to sell homes to blacks, the fact that they made a profit while doing so

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211. *Zuch*, 394 F. Supp. at 1054-55 n.12.

212. See, e.g., N.Y. Summary Report, *supra* note 40, at 7 (describing its investigation as presenting "an unsavory picture of exploitation of racial prejudice for private profit").

213. *Zuch*, 394 F. Supp. at 1055.

made them somehow more despicable than even the deepest racists. To paraphrase the sentiment, the racists, at least, were acting out of personal beliefs, while the evil blockbusters were acting *just for profit*. In other words, profit-seeking was worse than racism. Perhaps this statement was not representative of other members of the blockbusting movement, but at the very least it is clear that anti-blockbusting progressives did not engage in the type of simple economic analysis that took place in part III. Given this climate, an economically sophisticated response to blockbusting was impossible, since the essence of any market-oriented solution would have allowed for the existence of some profits.

The first way that blacks suffered from this bias by their leaders was at the individual level. Prior to anti-blockbusting laws, blacks had the choice of whether or not to patronize blockbusters. By the millions, blacks indicated that their preference was for blockbusting. The anti-market, anti-blockbusting progressives, however, refused to accept that choice as legitimate, and thus enacted laws that prevented blacks from acting upon these preferences. Perhaps some progressives genuinely felt that the decisions to patronize the blockbusters were the result of market distortions such as fraud. Others, however, refused even to accept the possibility that market mechanisms can empower individuals and reveal preferences. One court made this argument explicitly, holding that blacks should be forced to express their preferences through political, instead of market, mechanisms. According to this court, the availability of housing from blockbusters actually *reduced* the likelihood of true justice, "by offering the long-oppressed black an unattractive yet alternative choice to that of a confrontation for equal buyers' rights in a white neighborhood."<sup>214</sup>

The explicit articulation of the court's anti-market bias allows us to explore its moral and empirical flaws. At face value, the court's argument seems brutal. After all, the court appears to be agreeing that individual blacks would choose blockbusters over political confrontation. Nonetheless, the court refuses to allow them that option, preferring to force them to take political action. In addition to moral problems with overtly removing decision-making power from blacks, the court's logic has little empirical grounding. The court fails to consider the speculative nature of the eventual political relief, or the costs that would be imposed by delay while blacks waited for political reform to take effect. Moreover, it is not clear how making blacks desperate would have enhanced their ability to influence the all-white power-brokers of city government.<sup>215</sup>

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214. *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 331 (7th Cir. 1974).

215. In Chicago, for example, Mayor Richard J. Daley and his two predecessors came from the all-white Bridgeport area of the city. They and their city council regularly tabled every request for open-occupancy ordinances, "which by opening up any

In addition to disrespecting the preferences of individual black families, the anti-market bias of the progressives hampered the overall effectiveness of the fair housing movement. Blaming blockbusters diverted attention from the deeper problems that allowed the blockbusting industry to exist, and spent political energy on initiatives that did not work. Assuming that political energy is finite and the conservative forces of society tend to fight back, this misallocation of political resources may have hindered the fight for genuinely effective solutions to the problems faced by urban blacks.<sup>216</sup>

### B. *How the Civil Rights Movement Might Have Done Better*

Spelling out the lost opportunities is a complex endeavor, far beyond the scope of this article. A few examples from within the realm of political feasibility, however, suggest ways that progressive forces might have spent their energies more productively. This section groups the ideas according to ambitiousness, with the most politically plausible suggestions coming first.

First of all, this Article's recognition of the importance of market forces does not deny the importance of market regulations. Already-illegal market manipulations should have been strictly dealt with. To the extent that fraud, usury, and oligopolies were serious problems, the progressives should have emphasized enforcement of existing laws.<sup>217</sup>

Another simple solution would have been for the anti-blockbusting movement to exercise some restraint, and limit itself to the narrower

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neighborhood to Negroes who could afford to buy there would [have taken] the pressure off the few collapsing ones which are open." Vitcek, *supra* note 15, at 18-19.

216. See, e.g., Columbia Note, *supra* note 8, at 552-53 ("Anti-blockbusting legislation by itself alleviates only the symptoms of the problem by salving the nerves of white homeowners, fearful of the arrival of black neighbors. The real problem of segregated housing patterns remains to be remedied through enforceable open housing laws."). This particular anti-blockbusting author, however, did not sense that there might be a finite amount of progressive political energy, and simply argued that both ends should be sought. Progressives did, however, realize that blockbusting resulted from housing segregation, and that "[t]he most certain means of ending the practice [of blockbusting] is to achieve genuine open housing." Georgetown Note, *supra* note 40, at 189 (criticizing blockbusters and concluding that "[t]he achievement of racially integrated neighborhoods will destroy the blockbuster's economic and psychological weapons").

217. See, e.g., *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 216-18 (N.D. Ill. 1969) (discussing potential violations of anti-trust laws by race-based real estate activities); *id.* at 225-29 (discussing claims for usury and fraud along with unconscionability and breach of implied warranty); Columbia Note, *supra* note 8, at 552 ("Opponents [of anti-blockbusting legislation] assert that ample remedy against the unscrupulous realtor is available through the anti-fraud provisions promulgated by the state licensing agency." (footnote omitted)); see also Georgetown Note, *supra* note 40, at 173 (citing examples of anti-blockbusting laws that specifically targeted fraud in blockbusting transactions).

laws considered earlier in this Article.<sup>218</sup> A well-tailored set of laws might have reduced the problems caused by blockbusting without completely eliminating the benefits. Laws might have, for example, banned racist propaganda and monitored prices in a way that would have allowed markets to work slowly, while at the same time calming racial fears and stabilizing black neighborhoods. Although part III explains how these laws imposed indirect costs on some blacks, a legal regime consisting solely of such modest laws, without the more broadly destructive laws considered earlier in part III,<sup>219</sup> might have been worth the costs. The 1866 Civil Rights Act, for example, provided a cause of action allowing blacks to sue to recover excessively high housing costs. Leery of lawsuits, blockbusters might have reduced the exorbitant extent of their installment-sale contracts. Although this would have reduced their profits, and hence their incentives to "bust" open blocks, they still would have had the profits available from whites selling at a discount,<sup>220</sup> and they still would have been able to make some profits simply from commissions in a high-turnover market.<sup>221</sup> Moreover, a slightly slower rate of neighborhood turnover, while reducing the speed with which black housing was made available to needy blacks, might have also blunted the edge of white hostility that developed through media accounts and popular fear.<sup>222</sup> Most importantly, the newest black neighborhoods would have been wealthier by tens of thousands of dollars (in 1960s dollars) per resident.<sup>223</sup> Given the feedback effects among poverty, social services, and racism, this effect might have dramatically improved the prospects for urban black neighborhoods.

Other solutions may have been found if progressives would have done more than merely exercise restraint; they could have instead channeled their energies towards solving the underlying racism that

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218. See *supra* notes 183-88 and accompanying text (considering the Civil Rights Act of 1866 and interpretations of the Fair Housing Act of 1968 that prohibited representations based upon race in real estate transactions).

219. See *supra* notes 163-82 and accompanying text (considering antisolicitation laws, sign bans, and interpretations of the Fair Housing Act of 1968 that provided causes of action for whites who perceived threats from blockbusters).

220. Although blockbusters were not always able to procure homes at below-market prices from whites, they frequently were able to do so. See, e.g., Columbia Note, *supra* note 8, at 544 (noting that in six of eleven transactions examined, white sellers received less than the estimated fair market value for their property, and in all eleven transactions white sellers received less than 65% of the resale price of their homes).

221. See, e.g., *United States v. Mitchell*, 335 F. Supp. 1004, 1005 (N.D. Ga. 1971) (finding that the "earnings of real estate salesmen are derived from the commissions earned on houses they sell and from no other source"); Georgetown Note, *supra* note 40, at 171 ("The modern blockbuster . . . does not specialize in purchasing homes for resale at great price differentials. Instead, he serves as an agent in panic sales from white owners to black buyers and profits from the numerous commissions attendant to transforming a neighborhood.").

222. See *supra* notes 46-78 and accompanying text.

223. See *supra* notes 55, 56, 104 and accompanying text.

made blockbusting so prevalent. The problems faced by urban blacks, ranging from extremely poor social services to chronic shortages of mortgage financing, often represented public sector failures.<sup>224</sup> Had progressives taken the energy they wasted on the blockbusters and focused on these problems, they would have tackled the root problems that led to blockbusting.<sup>225</sup> Some groups adopted these more benign tactics during the blockbusting era,<sup>226</sup> and now that the anti-blockbusting regime is being dismantled,<sup>227</sup> progressives may increasingly turn to these more benevolent solutions.<sup>228</sup>

Progressives could have also embraced market forces and used their energies to make the markets work better. Public education represents one example; if exorbitant premiums resulted from real estate speculators taking advantage of ignorance among blacks about the terms of installment sale contracts, a public education campaign directed at blacks would have driven down the premiums charged by real estate speculators and allowed blacks to more directly benefit from the involuntary sacrifices of racist whites. Insurance represents another example; several localities have provided insurance against sharp declines in property values, providing some economic security for whites who want to stay in their neighborhoods when blacks move in.<sup>229</sup>

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224. See *supra* notes 16-23, 136-42 and accompanying text.

225. See, e.g., N.Y. Summary Report, *supra* note 40, at 9 ("The issue of mortgage financing, and its availability to moderate income minority families bent upon purchasing their own homes is central to the whole problem of blockbusting. . . . The unavailability of normal bank financing was the contributing factor in their resale to Negro and Puerto Rican families.").

226. For example, one nonprofit organization in Kansas City attempted, during the 1970s, to fight blockbusting pressures by purchasing and renovating homes in neighborhoods experiencing rapid turnover. See Bill Tammeus, *Dedicated to the Common Good*, Kan. City Star, June 6, 1997, at C8.

227. See *supra* notes 82-85 and accompanying text.

228. See, e.g., Joseph Berger, *Judge Orders State to Help Yonkers Pay for Integration*, N.Y. Times, Feb. 6, 1998, at B5 (describing a court order requiring New York State to help purchase homes for blacks in white neighborhoods because it had previously promoted segregation); Hagan, *supra* note 85 (quoting Euclid's mayor, who stated that, with anti-blockbusting provisions being struck down, the town will focus "on promoting the city, rehabilitating houses, strengthening code enforcement and, I hope, working together with Realtors for the future"); Joan Jacobson, *For Sale in Belair-Edison: Interracial Living*, Balt. Sun, Apr. 27, 1996, at 1B (describing a Baltimore neighborhood's spending \$90,000 to promote itself as a haven of integrated living, including "an ad campaign showing photos of black and white residents together" and a campaign of cleanups, picnics and youth activities).

229. See, e.g., Clayton v. Village of Oak Park, 453 N.E.2d 937, 945 (Ill. App. Ct. 1983) (upholding a village ordinance creating equity assurance program for single-family residences). These equity assurance programs would have had some deleterious effects on blockbusting. This is because, by reducing the economic pressures blockbusters could bring to bear on white homeowners, such programs would make it easier for whites to resist selling to blacks or blockbusters. Nonetheless, whites might not always have left because of economic fears; they might have left because of racism. Thus, these types of economic programs would have allowed blockbusters to capitalize on white racism to the benefit of blacks, while also allowing non-racist



More ambitiously, progressives might have facilitated contracts between resident whites and home-seeking blacks. Even whites who saw that their neighborhoods were changing and wanted to leave for racist reasons might have wanted to deal with blacks. For a variety of reasons, however, they tended not to. One blockbuster explained:

Some owners on every block consider [selling directly to blacks]. If they can close a deal directly with a Negro, usually it is for a price close to the property's book value—thus benefiting both. But most whites are reluctant to bargain with a Negro over so large a sum. They know that, in the sixty to ninety days before the closing date, he is more likely than a speculator to have to cancel the deal, despite having earnest money down.<sup>230</sup>

This difficulty whites faced in contracting directly with blacks might have exacerbated negative stereotypes and helped blockbusters justify exorbitant installment sale contracts. The laws could have addressed this in a variety of ways, by either regulating the lending institutions to force them to make more loans to blacks,<sup>231</sup> or by setting up govern-

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whites to remain in integrated neighborhoods without fear of losing their home equity. Depending upon the preferences of any given community, such a scheme might thus facilitate a slow-integration ideal.

230. Vitcek, *supra* note 15, at 17. The article continued to note that "[m]any times, although the owner has listed his property with a neighborhood agent, the real-estate man ends up by arranging a deal with me—with the seller not only accepting a depressed price but also having to pay a broker's commission." *Id.*

231. Indeed, there is considerable pressure on financial institutions to do this already, and some argue that financial institutions are already doing as much as they can. See Mag Poff, *Fair or Unfair? Fewer Blacks Are Getting Home Loans Approved, but Lenders Say It's Not Because of Discrimination*, Roanoke Times & World News, Nov. 17, 1996, at 1. Despite these claims, however, sophisticated analyses suggest that pure racism still drives many lending decisions. See Massey & Denton, *supra* note 10, at 106 ("Despite the diverse array of characteristics that have been controlled in different studies, one result consistently emerges: black and racially mixed neighborhoods receive less private credit, fewer federally insured loans, fewer home improvement loans, and less total mortgage money than socioeconomically comparable white neighborhoods." (footnote omitted)). Massey and Denton cite many analyses, including David Listokin & Stephen Casey, *Mortgage Lending and Race* (1980); Dennis Dingemans, *Redlining and Mortgage Lending in Sacramento*, 69 *Annals Ass'n Am. Geographers* 225-39 (1979); Peter Hutchinson et al., *A Survey Comparison of Redlining Influences in Urban Mortgage Lending Markets*, 5 *J. Am. Real Estate & Urb. Econ. Ass'n* 467-72 (1977); Peter J. Leahy, *Are Racial Factors Important for the Allocation of Mortgage Money? A Quasi-Experimental Approach to an Aspect of Discrimination*, 44 *Am. J. Econ. & Soc.* 185 (1985); Louis G. Pol et al., *Discrimination in the Home Lending Market: A Macro Perspective*, 63 *Soc. Sci. Q.* 716 (1982); Gregory D. Squires et al., *Insurance Redlining, Agency Location, and the Process of Urban Disinvestment*, 26 *Urb. Aff. Q.* 567 (1991); and Mike Dorning, *Who Gets Home Mortgages Still an Issue of Black and White*, *Chi. Trib.*, Dec. 2, 1990, at A1. These results hold even when econometrics are used to control for differences in economic health and housing demand between black and white neighborhoods. See Richard Hula, *The Allocation of House Credit: Market vs. Non-Market Factors*, 6 *J. Urb. Aff.* 151-65 (1982); Richard C. Hula, *Public Needs and Private Investment: The Case of Home Credit*, 62 *Soc. Sci. Q.* 685 (1981); Pol et al., *supra*; Harriet Tee Taggart & Kevin W. Smith, *Redlining: An Assessment of the Evidence of Disinvestment in Metropolitan Boston*, 17 *Urb. Aff. Q.* 91 (1981).

ment-sponsored lending institutions which would have expressly subsidized loans to black home purchases in mostly-white neighborhoods.<sup>232</sup> Or, perhaps state and local governments might have guaranteed loans for a slight charge, thus pooling the risks that blacks would default on their loans, and allowing whites to be more confident of their deals with blacks.

The point, however, is not to describe exactly what the progressives should have done about blockbusting. The range of possibilities is simply too broad and too rife with values conflicts: Libertarians might use the evidence from this Article as a justification for total government withdrawal from the arena of civil rights, while activists might advocate sweeping solutions such as a guaranteed minimum income. Rather, the point is merely to urge that progressives cannot afford to cede economics to their enemies. Markets allow an almost-democratic expression of preferences, including the preferences of society's worst-off. Just as importantly, markets will punish policy-makers who ignore them. Only by working with markets, or at least picking careful fights with them, can progressives address problems of racial and economic justice.

#### CONCLUSION

Blockbusting unquestionably represents a wonderful case study. The national attention to blockbusting for decades provides a great deal of data and the decades since blockbusting effectively disappeared provide some distance. The lessons of this case study, however, apply to all areas of modern civil rights. From rent control, to welfare rights, to health care policy, to affirmative action, to voting rights, economics provides insights into what individuals want and how policies will work. Market forces are not the enemy; they are a powerful tool that can be used to assist with the constant struggle to create a more just and prosperous society.

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232. This solution would be a justified antidote to the free market if lending institutions, in order to preserve the loyalty of white customers, chose not to lend to blacks. See Palmer, *supra* note 24, at 56; see also N.Y. Summary Report, *supra* note 40, at 12 (recommending affirmative action programs in lending to counteract unavailability of financing through free market channels). Burke Marshall, who served as Assistant Attorney General for Civil Rights in the Kennedy and Johnson administrations, recalled that Algernon Black visited him at the Justice Department to discuss raising funds to help black buyers purchase homes in middle-class white neighborhoods. See Telephone Interview with Burke Marshall, Former Assistant Attorney General for Civil Rights (Feb. 20, 1998).