

# 2: FAIR HOUSING HISTORY

## PART 1 HOW OUR METROPOLITAN REGIONS BECAME RACIALLY SEGREGATED (1890'S-1950'S)

**IN THE LATE 1800'S, MANY AFRICAN AMERICAN INDIVIDUALS AND FAMILIES BEGAN MOVING FROM THE SOUTH TO OTHER PARTS OF THE UNITED STATES.** This was the beginning of what historians often refer to as the “Great Migration,” in which over five million African Americans moved from the South to other parts of the United States before 1960.<sup>1</sup> To be sure, many families faced overt housing discrimination encountering landlords, developers, and homeowners who refused to rent or sell to them. Yet others found housing providers who were willing to convey property without regard to race. As a result, some African American households were able to acquire apartments, homes, and farms in various cities and neighborhoods throughout the United States. Even though African American people faced significant discrimination, and even violence at times, they were not systematically segregated in predominantly African American neighborhoods during this time.<sup>2</sup> The 1890 Census illustrates that no major metropolitan area showed rigid patterns of residential racial segregation.<sup>3</sup> Several events would radically change that reality.

First, in 1896, the U.S. Supreme Court ruled in *Plessy v. Ferguson* that a Louisiana law mandating segregation on rail cars was not unconstitutional. This decision established the legal foundation for many state and federal laws, sometimes referred to as “Jim Crow” laws, that enforced racial segregation. *Plessy* also advanced the proposition that “separate” could be “equal” under the law, which had a profound impact on housing policies and practices throughout the first half of the 20<sup>th</sup> Century.<sup>4</sup>

The second significant development at the turn of the century was the formation and growth of an organized real estate industry that embraced, as one of its guiding principles, the necessity of segregating the races. The National Association of Real Estate Exchanges (NAREE), formed in 1908, instructed its members as early as 1913 to not contribute to race mixing.<sup>5</sup>

Around the same time, many local governments used their legislative authority to promote racial segregation. In 1910, after the City of Baltimore passed a racial zoning ordinance, cities in Alabama, California, Colorado, Florida, Georgia, Kentucky, Maryland, Missouri, North Carolina, Oklahoma, South Carolina, Texas, and Virginia passed similar laws.<sup>6</sup> These ordinances identified the areas where people could live based on their race for the express purpose of keeping the races separated. These apartheid laws were crafted by white political leaders who were interested in “protecting” white neighborhoods from encroachment by African Americans and other people of color. An ordinance passed in 1914 by Louisville, Kentucky read:

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1 William Cohen, *The Great Migration as a Lever for Social Change*, in *Black Exodus: The Great Migration from the American South* 78 (Alferdteen Harrison ed., 1991).

2 Douglas S. Massey & Nancy A Denton, *American Apartheid: Segregation and the Making of the Underclass* 14-26 (1993).

3 Robert L. Dorman, *The Creation and Destruction of the 1890 Federal Census*, 71 *Am. Archivist* 350, 350-83 (2008).

4 Harvey Fireside, *Separate and Unequal: Homer Plessy and the Supreme Court Decision that Legalized Racism* (2005).

5 Stephen P. Meyer, *As Long As They Don't Move Next Door: Segregation and Racial Conflict in American Neighborhoods* 7 (2001).

6 Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 45-46 (2017).

“An ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks, for residences, places of abode, and places of assembly by white and colored people respectively.”<sup>7</sup>

Contrary to prior cases, a 1917 Supreme Court decision, *Buchanan v. Warley*, held that Louisville’s racial zoning ordinance was unconstitutional.<sup>8</sup> Despite this decision, the National Association for the Advancement of Colored People (NAACP) spent more than three decades challenging the continued use of racial zoning throughout the southern United States.<sup>9</sup>

Through numerous legal challenges, cities were eventually proscribed from using their zoning powers to explicitly dictate where people could live based on race. But the organized real estate industry was not easily deterred. In 1916, NAREE changed its name to National Association of Real Estate Boards (NAREB). In 1917, NAREB advocated for the use of “race restrictive covenants” on property deeds and for the development of “Homeowner Associations” to “protect” new subdivisions. Race restrictive covenants, enforceable in state courts, were used to prevent African Americans and other people of color from moving to white neighborhoods.<sup>10</sup> A 1919 covenant from a subdivision in the Milwaukee suburb of Wauwatosa, Wisconsin stated:

“At no time shall the land included in the Washington Highlands or any part thereof, or any building thereon be purchased, owned, leased or occupied by any person other than of white race. This prohibition is not intended to include domestic servants while employed by the owner or occupant of any land included in the tract.”<sup>11</sup>

By 1924, NAREB adopted and enforced a new Code of Ethics which made it an ethical duty for a member real estate agent or broker to discriminate based on race and national origin.<sup>12</sup> Article 34 of the Code, which remained in effect until 1950, 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 individuals whose presence will clearly be detrimental to property values in that neighborhood.”<sup>13</sup>

During this time, the leadership of NAREB was coordinating and supporting efforts by many local real estate boards to develop and implement plans to restrict the movement of African American people and other people of color to white neighborhoods. To aid local Boards with these efforts, NAREB developed and disseminated a “model” race restrictive covenant in 1927.<sup>14</sup> One provision of the model agreement that was circulated stated:

“1. The restriction that no part of said premises shall in any manner be used or occupied directly or indirectly by any negro or negroes, provided that this restriction shall not prevent the occupation, during the period of their employment, of janitors’ or chauffeurs’ quarters in the basement or in a barn or garage in the rear, or of servants’ quarters by negro janitors,

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7 Baltimore, Md., Ordinance 692 (May 15, 1911).

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

9 Richard A. Epstein, *Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence of the Progressive Era*, 51 Vand. L. Rev. 787 (1998).

10 Karl Taeuber, *The Contemporary Context of Housing Discrimination*, 6 Yale L. & Pol’y Rev. 339, 340-42 (1988).

11 Lois M. Quinn, *Racially Restrictive Covenants: The Making of All-White Suburbs in Milwaukee County* 2 (1979).

12 Joe R. Feagin, *A House is Not a Home: White Racism and U.S. Housing Practices*, in *Residential Apartheid: The American Legacy* (1994).

13 Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. Miami L. Rev. 1051 (1998).

14 Allen R. Kamp, *The History behind Hansberry v. Lee*, 20 U.C. Davis L. Rev. 481 (1987).

chauffeurs or house servants, respectively, actually employed as such for service in and about the premises by the rightful owner or occupant of said premises.”<sup>15</sup>

By 1928, half of all homes owned and occupied by white people in the United States had deeds with race restrictive covenants.<sup>16</sup> The proliferation of race restrictive covenants by a burgeoning real estate industry, enforceable by state courts of law, effectively segregated many of America’s neighborhoods by race.<sup>17</sup> In many cities, governmental racial zoning was also responsible for creating clear patterns of residential segregation.<sup>18</sup> While American cities became more segregated by race, the American economy was about to collapse.

The Great Depression of 1929 prompted the federal government to establish housing policies and programs as part of the “New Deal,” all designed to stabilize our nation’s economy and rebuild the middle class. But the “New Deal” was no deal for African American citizens. Most African American people were excluded from the benefits of programs that would ensure access to decent rental housing and home ownership opportunities. When African American participation was permitted, it was almost always on a segregated basis.<sup>19</sup>

Out of the New Deal, the Federal Home Loan Bank Act established the Federal Home Loan Bank Board (FHLBB) in 1932. The FHLBB provided funds to Savings and Loan Associations to make homeownership more accessible and affordable, but not to everyone. The Home Owners Loan Act of 1933 established the Home Owners Loan Corporation (HOLC). The HOLC, a public agency administered by the FHLBB, made refinancing available at low cost to help homeowners who were struggling to make their mortgage payments. The FHLBB commissioned the development of a rating system for neighborhoods for use by the HOLC with “Residential Security Maps” which included four categories.<sup>20</sup> The least desirable areas, where financing was not available, were neighborhoods where African American people resided and were coded “Red.” This is the origin of the practice later adopted by some lenders known as “redlining.” While the HOLC stopped purchasing loans by June 1936, the federal government continued to discriminate in its housing programs.

Congress, through the National Housing Act of 1934, created the Federal Housing Administration (FHA). The FHA adopted the residential security map system used by the HOLC but additionally aided appraisers by providing a worksheet (FHA Form 2082) that included a “Racial Occupancy Designation” with space to indicate if a neighborhood was “White,” “Mixed,” “Foreign,” or “Negro.” The FHA also provided a “Model” race restrictive covenant and **required** it to be used as a condition for obtaining FHA financing.<sup>21</sup> Here is an excerpt out of the 1938 FHA Underwriting Manual:

“Areas surrounding a location are investigated to determine whether incompatible racial and social groups are present, for the purpose of making a prediction regarding the probability of the location being invaded by such groups. If a neighborhood is to retain stability, it is necessary

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<sup>15</sup> *Id.*

<sup>16</sup> David M.P. Freund, *Colored Property: State Policy and White Racial Politics in Suburban America* 94 (2007).

<sup>17</sup> Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (1987).

<sup>18</sup> Paige Glotzer, *Exclusion in Arcadia: How Suburban Developers Circulated Ideas about Discrimination, 1890–1950*, 41 *J. Urb. Hist.* 479 (2015).

<sup>19</sup> Susan J. Popkin, George C. Galster, Kenneth Temkin, Carla Herbig, Diane K. Levy, & Elsie K. Richer, *Obstacles to Desegregating Public Housing: Lessons learned from Implementing Eight Consent Decrees*, 22 *J. Pub. Policy Analysis & Mgmt.* 181 (2003).

<sup>20</sup> Lois Lee Woods II, *The Federal Home Loan Bank Board, Redlining, and the National Proliferation of Racial Discrimination 1921-1950*, 38 *J. Urb. Hist.* 1036 (2012).

<sup>21</sup> Keith F. Gotham, *Urban Space, Restrictive Covenants and the Origins of Racial Residential Segregation in a US City, 1900-50*, 24 *Int'l J. Urb. & Reg'l Res.* 616 (2000).

that the properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally contributes to instability and a decline in values.”<sup>22</sup>

Between 1930 and 1950, three out of five homes purchased in the United States were financed by the FHA, yet less than 2% of the FHA loans were made to non-white buyers.<sup>23</sup>

By the mid-1930's the federal government provided financing for the development of public housing to alleviate overcrowding in congested urban areas and provide decent, safe, and affordable housing for families. Localities were permitted to determine both the location of public housing and who would occupy it. As a result, most public housing was initially operated on a racially segregated basis with public housing for whites located in white neighborhoods and public housing for African Americans located in predominantly black neighborhoods.<sup>24</sup>

During World War II, U.S. military troops served in fighting units segregated by race. Back in the United States, the federal government financed war worker housing that was usually segregated by race as well.<sup>25 26</sup> Following the war, returning African American veterans continued to face segregation and exclusion.<sup>27</sup> The Serviceman's Readjustment Act of 1944 enabled the Veteran's Administration (VA) to make mortgages available to returning veterans, but the VA adopted the FHA's discriminatory underwriting standards.<sup>28</sup> As a result, most African American veterans were ineligible to purchase homes through this program. Additional housing developments were built throughout the country for returning veterans and most were only available on a racially segregated basis.

The FHA and VA loan programs made homeownership a reality for the majority of white Americans. Between 1934 and 1969, the homeownership rate increased from 44 to 63 percent.<sup>29</sup> During this same period, less than one percent of all African Americans were able to obtain a mortgage through these programs.<sup>30</sup> Thus, while the federal government rebuilt the white middle-class, the opportunity to create transgenerational wealth through homeownership was denied to minority households.<sup>31</sup> As a result, white non-Hispanic households currently have a median net worth of \$79,400 compared to \$7,500 for African American households.<sup>32</sup>

Federal housing policies in the 1930's and 40's helped to solidify residential segregation in most of our nation's metropolitan regions. By 1948, 85% of all new residential developments in the United States were racially restricted.<sup>33</sup> A public policy group, Citizen's Governmental Research Bureau, in

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22 John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 *Law & Soc. Inquiry* 399, 399-434 (2007).

23 Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusions, and Inclusionary Remedies*, 14 *J. Land Use & Envtl. L.* 89 (1998).

24 Richard H. Sander, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 52 *U. Miami L. Rev.* 977 (1998).

25 *New Apartment Buildings Exclusively for Negroes*, *Milwaukee J.*, July 11, 1943.

26 *Two Negro Housing Projects Approved; to Hold 42 Units*, *Milwaukee Sentinel*, Nov. 25, 1943.

27 *Negro Housing Project Leads to Noisy Protests*, *Milwaukee Pub. Paper*, May 8, 1994.

28 Massey, *supra* note 2 at 53.

29 Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in *Segregation: The Rising Costs for America* 39-80 (James H. Carr & Nadine K. Kutty eds., 2008).

30 Stella J. Adams, *Putting Race Explicitly into the CRA*, in *Revisiting the CRA: Perspectives on the Future of the Community Reinvestment Act* 167, 168 (Prabal Chakrabarti et al. eds., 2009).

31 *Id.*

32 G. William Domhoff, *Power in America: Wealth, Income, and Power, Who Rules America?* (Apr. 2017), <https://whorulesamerica.ucsc.edu/power/wealth.html>.

33 David M. P. Freund, *Colored Property: State Policy and White Racial Politics in Suburban America* 94 (2007).

Milwaukee reported in 1946 that 90% of all land in the City of Milwaukee deeded since 1910 contained race restrictive covenants.<sup>34</sup>

A Supreme Court decision in 1948, *Shelley vs. Kramer*, declared that race restrictive covenants could not be enforced in courts of law.<sup>35</sup> This decision, however, did not deter real estate agents and homeowners from continuing to use race restrictive covenants and place them on property deeds throughout the 1950's and well into the 1960's.<sup>36</sup> Whites were able to move, often aided by federally-insured mortgages, to newer neighborhoods and suburbs that were racially restricted, while most African Americans remained isolated and contained in overcrowded central city neighborhoods and too often relegated to unsafe, unhealthy, and sub-standard housing.<sup>37</sup>

Many of the prominent leaders and thinkers within the real estate industry and government during the early part of the 20<sup>th</sup> century were concerned with preserving and protecting white neighborhoods, white privilege, and white wealth. The actions of these white men were predicated on a set of racist beliefs that African Americans and other people of color, because of their perceived inferiority, posed an inherent threat to property values and the economic interests of white people. Some of these architects of American residential segregation were transparent about their racial views and it is reflected in their writings. It is noteworthy that many of the white men (e.g., Ely, Babcock, Fisher, Hoyt, etc.) who were involved in crafting the discriminatory federal housing policies and programs that emerged from the New Deal were the same men who had been key architects of the segregationist policies advanced by the real estate industry in the 1920's, policies that had created a dual housing market and racially segregated neighborhoods in our metropolitan regions.

It is vital to understand the interplay and coordination between a real estate industry that was driven by an explicitly racist ideology and government agencies that formulated equally discriminatory federal housing policies. It is difficult to even comprehend the enormous private and public resources that were devoted to segregating the races or the massive number of people and institutions that became deeply invested in creating and sustaining residential racial segregation in the United States.

The history of housing segregation illuminates many truths about our current society. First, it is necessary that we recognize the fact that our nation, both through our government and many of our private institutions, intentionally segregated the races and that these discriminatory actions unfairly benefited white people, socially and economically, over generations. These actions systematically harmed and isolated African Americans and other people of color. Secondly, this history amply demonstrates why the American civil rights movement fought hard to pass the historic federal Fair Housing Act fifty years ago. Finally, this history also provides useful insights into what level of effort and resources may be required over time to create more open, equitable, and integrated metropolitan regions.

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34 Metropolitan Milwaukee Fair Housing Council, *Analysis of Impediments to Fair Housing: Milwaukee County, Wisconsin* 2008 98-99 (2008).

35 Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. Sch. L. Rev. 383 (1988).

36 Joe T. Darden, *Black Residential Segregation Since the 1948 Shelley v. Kraemer Decision*, 25 J. Black Stud. 680 (1995).

37 A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 Wash. U. L. Rev. 673 (1989).

## SOME OF THE ARCHITECTS OF AMERICAN SEGREGATION

**RICHARD T. ELY**, an economist, sometimes referred to as the “father of real estate” or “father of land economics,” established the Institute in Land Economics and Public Utilities at the University of Wisconsin in 1920. In his book, *Outlines of Economics* (1914) Ely attributed the poverty of African Americans to the “economic inertia and shiftlessness of Negroes themselves.”<sup>38</sup> Ely asserted that “lower strata groups” are best suited for agricultural tenancy because they “are deficient in economic qualities. The Negroes of the South furnish an illustration.”<sup>39</sup> Ely worked closely with the U.S. Dept. of Commerce in establishing the federal Home Owners Loan Corporation (HOLC) in 1933.

**NATHAN WILLIAM MACCHESNEY** served as General Counsel to the National Association of Real Estate Boards (NAREB). Nathan MacChesney authored the Realtors Code of Ethics (1924-1950) including Article 34. MacChesney also authored and, through NAREB, distributed a model race restrictive covenant available for use by Realtors in 1927.

**FREDERICK BABCOCK** was a prominent real estate appraiser. In his book, *The Valuation of Urban Real Estate* (1932), Babcock wrote, “Among the traits and characteristics of people which influence land values, racial heritage and tendencies seem to be of paramount importance.”<sup>40</sup> He added, “Most of the variations and differences between people are slight and value declines are, as a result, gradual. But there is one difference in people, namely race, which can result in a very rapid decline. Usually, such declines can be partially avoided by segregation and this device has always been in common usage in the South where white and Negro populations have been separated.”<sup>41</sup> Babcock became the chief appraiser and Assistant Administrator for the Federal Housing Administration from 1934-40 and the author of several editions of the FHA Underwriting Manual.

**ARTHUR A. MAY** was the former dean of the American Institute of Real Estate Appraisers. In *Valuation of Residential Real Estate* (1942), May explained that the essential criterion of the neighborhood is the resident’s homogeneity in income level, race and ethnic background, and, to a lesser extent, religion.<sup>42</sup> In discussing depreciation, May defined economic obsolescence as loss in value arising from decrease in owner-occupancy appeal and consequent lack of demand. He cited, “the encroachment of inharmonious racial or national groups—all these bring with them a decrease in owner-occupancy appeal and loss in value.”<sup>43</sup> In a section entitled “Infiltration of inharmonious people” May wrote, “The encroachment of an antipathetic racial or national group brings with it, first, the threat and, ultimately, the effect of decreased values... In every large city housing a proportion of foreign-born or people of races other than white, this situation must be reckoned with.”<sup>44</sup> May’s theory that the movement of inharmonious racial groups into a neighborhood adversely impacts the value of property was incorporated into federal policy. May included an appendix in his book that contained a copy of the Appraisal Report used by the Veteran’s Administration which required the appraiser to provide information on the character of the neighborhood including “Typical Influences” and the first category listed is “Racial.”<sup>45</sup>

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38 Richard T. Ely, *Outlines of Economics* (1893).

39 *Id.*

40 Frederick Babcock, *The Valuation of Urban Real Estate* (1932).

41 *Id.*

42 Arthur A. May, *Valuation of Residential Real Estate* (1942).

43 *Id.*

44 *Id.*

45 *Id.*

## ***SOME OF THE ARCHITECTS OF AMERICAN SEGREGATION (CONTINUED)***

**HOMER HOYT** was a land economist, real estate appraiser, and real estate consultant. In his book, *One Hundred Years of Land Values in Chicago*, published in 1933, Hoyt provided a “ranking” of races and nationalities for impact on property values from most beneficial (1) to most adverse (10):

1. English, Germans, Scotch, Irish & Scandinavians
2. North Italians
3. Bohemians & Czechoslovakians
4. Poles
5. Lithuanians
6. Greeks
7. Russian Jews
8. South Italians
9. Negroes
10. Mexicans<sup>46</sup>

Hoyt became an influential housing economist for the Federal Housing Administration (FHA) from 1934 -1940. While at the FHA, Hoyt developed a grading system, from A through D, to assess risk on FHA loans. “A” grade areas featured “no residents of a race other than white nor of a nationality on a lower economic scale than the old American stock” and “no factories or stores... mixed in with residences.” “D” grade areas featured “an intermixture of races and nationalities” and “a mixture of residential, industrial and commercial buildings.” The FHA would insure long-term mortgages in “A” grade areas, 20 years at B, 10 years at C, and none in D-rated areas. As grades decline, interest increases, compounding the risk identified by the FHA.

**HERBERT U. NELSON** served as the Executive Secretary of the National Association of Real Estate Boards (NAREB), the prior name of the National Association of Realtors (NAR). In his capacity as NAREB Executive Secretary, Nelson encouraged and assisted local real estate boards to adopt plans to develop “black belts” and restrict the movement of African Americans and other racial minorities. Nelson was directly involved in crafting and lobbying for the legislation that created the Home Owners Loan Corporation (HOLC) in 1933.

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<sup>46</sup> Homer Hoyt, *One Hundred Years of Land Values in Chicago* (1933).

## SOME OF THE ARCHITECTS OF AMERICAN SEGREGATION (CONTINUED)

**STANLEY L. McMICHAEL** was a real estate agent, real estate appraiser and author. *McMichael's Appraising Manual* (1931) became the National Standard for the Appraisal Profession and was Endorsed by NAREB and the American Institute of Real Estate Appraisers (AIREA).<sup>47</sup> McMichael listed "Social or racial changes" among signs of "invasion by incompatible uses" under the causes of "blighted" areas and advised appraisers to observe whether there were "undesirable racial elements in the neighborhood" and, if so, whether they were likely to expand in a way that might injure the property.<sup>48</sup> In his Book, *City Growth Essentials* (1928), McMichael recommended rigid segregation stating: "Property values have been greatly depreciated by having a single colored family settle on a street formerly occupied exclusively by white residents."<sup>49</sup> McMichael's appraisal methods were regarded as "best practices" within the real estate industry and within government housing programs for many decades.

**ERNEST M. FISHER** taught urban land economics at Columbia University from 1945 until 1961 and was appointed the first director of Columbia's Institute for Urban Land Use and Housing Studies in 1948. He was widely published in the field of real estate and public policy. After retiring from Columbia, Fisher consulted for various agencies and organizations and was appointed director of education and research for the National Association of Real Estate Boards (NAREB). Ernest M. Fisher wrote in *The Principles of Real Estate Practice* (1924), "It is a matter of common observation that the purchase of property by certain racial types is very likely to diminish the value of other property in the section."<sup>50</sup> Fischer became a prominent consulting economist for the Federal Housing Administration.

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47 Stanley L. McMichael, *McMichael's Appraising Manual*, (1931).

48 *Id.*

49 Stanley L. McMichael & Robert Fry Bingham, *City Growth Essentials* (1928).

50 Ernest M. Fisher, *Principles of Real Estate Practice* (1924).

## PART 2 THE FIGHT TO SECURE PASSAGE OF OPEN HOUSING LAWS (1950'S - 1968)

**BY 1950, THE LONG HISTORY OF GOVERNMENT ACTION AND PERVERSIVE PRIVATE MARKET HOUSING DISCRIMINATION LEFT OUR METROPOLITAN REGIONS EXTREMELY SEGREGATED BY RACE.** White people, in large numbers, moved out of congested urban areas and into suburban communities. Most African Americans were left behind often in overcrowded and impoverished urban neighborhoods, cut off from many opportunities.

In the 1940's, local citizens in New York City began organizing around the issue of fair housing. In 1943, the Metropolitan Life Insurance Company announced plans to build a \$100 million housing development called Stuyvesant Town for whites only.<sup>51</sup> This local organizing effort led to the creation of the New York State Committee on Discrimination in Housing (NYSCDH) and, by 1950, the National Committee Against Discrimination in Housing (NCDH). NCDH was dedicated to eliminating housing discrimination and segregation in the United States. NCDH became the preeminent organization that led the effort nationally to promote open housing and fair housing legislation. NCDH also became involved in promoting the passage of fair housing legislation at the local and state level.

Their efforts paid off when, in 1957, New York City became the first city in the nation to adopt a fair housing law prohibiting housing discrimination.<sup>52</sup> And by 1961, New York State passed a fair housing law that applied to public and private housing.<sup>53</sup>

During the 1960 presidential campaign, candidate John F. Kennedy stated that, if elected, he would end racial discrimination in federally aided housing "by a stroke of the presidential pen."<sup>54</sup> Months after he was elected, civil rights leaders chided the president for not picking up the pen. In November 1962, President Kennedy finally signed Executive Order 11063. President Kennedy's order mandated that the federal government take, "all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin in the sale, leasing, rental, or other disposition of residential property... provided in whole or in part with the aid of loans, advances, grants, or contributions hereafter agreed to be made by the Federal Government..."<sup>55</sup> Unfortunately, the order turned out to be more of a symbolic gesture as little effort was made to enforce the new policy. For example, the order left it up to individual housing and funding agencies to police themselves, which led to continued non-compliance in many states and localities.<sup>56</sup>

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51 Charles V. Bagli, *Other People's Money* (2013).

52 Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 *Fordham Urb. L.J.* 991 (1996).

53 *Fair Housing*, New York State Office of the Attorney General, <https://ag.ny.gov/civil-rights/fair-housing> (last visited May 29, 2018).

54 Senator John F. Kennedy, Speech at National Conference on Constitutional Rights and American Freedom (Oct. 12, 1960).

55 Exec. Order No. 11,063, 3 C.F.R. 652 (1962).

56 *Id.*

Efforts to pass fair housing legislation were met with stiff and well-funded opposition in most cities and states around the country, often led by the organized real estate industry. In Wisconsin, the Realtors Association broke rank and ultimately supported passage of an Open Housing Law in 1965. However, the Association's support came at a heavy price – state law provided only a \$10-200 fine for violators and made it illegal to anyone, including a victim of housing discrimination, to use “testing” to gather corroborative evidence to aid with enforcement of the law.<sup>57</sup> Incorporating this testing prohibition into the Open Housing Law effectively prevented its enforcement, a key factor that led to support of the law by the real estate industry.

In Illinois, the Coordinating Council of Community Organizations (CCCO), a coalition of local civil rights organizations, invited Dr. Martin Luther King, Jr. and the Southern Christian Leadership Conference (SCLC) to join a campaign in Chicago in 1965 challenging residential racial segregation.<sup>58</sup> By the summer of 1966, the Chicago Freedom Movement, as it became known, focused on open housing through non-violent marches, sit-ins, and demonstrations. These activities culminated in a summit meeting and agreement with Chicago Mayor Richard Daley to adopt a fair housing policy and take steps to implement fair housing in the Chicago area.<sup>59</sup>

Milwaukee, Wisconsin also became a hotbed of activism for open housing in the 1960s. Beginning in August 1967, Father James Groppi and the NAACP Youth Council led two hundred consecutive days of demonstrations and marches for open housing.<sup>60</sup> The marchers were often confronted by angry and violent mobs of whites as they traveled from Milwaukee's north side across the 16th Street viaduct to the predominantly white south side of Milwaukee. The marches were aimed at getting local communities, including the City of Milwaukee, to pass open housing laws, which finally occurred in 1968 shortly after the passage of the federal Fair Housing Act.

By 1968, more than four hundred citizen-based fair housing organizations existed across the country, most for the express purpose of advocating for the passage of fair housing laws. And many of these groups achieved success. More than nineteen states and the District of Columbia banned discrimination in the sale and rental of housing. Provisions in these new laws varied greatly. President Lyndon Johnson supported the passage of a federal law so that there would be more uniform coverage across the entire nation. But since the time President Johnson had introduced his first fair housing bill to Congress in 1966, there had been little support for passage of such a law.<sup>61</sup> Several important events in 1968 would give this national legislation new life.

On March 1, 1968, the National Advisory Commission on Civil Disorders, often referred to as the “Kerner Commission” after the name of Commission's chair, former Illinois Governor Otto Kerner, issued its final report.<sup>62</sup> President Johnson established the Commission in 1967 to study the widespread civil disturbances that occurred in American cities.<sup>63</sup> The Kerner report concluded that America was becoming, “two societies, one black and one white – separate and unequal.”<sup>64</sup>

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57 Wis. Stat. § 101.222.

58 Stephen P. Meyer, *As Long As They Don't Move Next Door: Segregation and Racial Conflict in American Neighborhoods* 183 (2001).

59 *Id.* at 187.

60 Jean M. White, *James Groppi - From the Church To the 'Real World'*, *Washington Post*, June 11, 1978.

61 Wendell E. Pritchett, Robert Clifton Weaver and the American City: *The Life and Times of an Urban Reformer* 257 (2008).

62 The United States Kerner Commission, *Report of the National Advisory Commission on Civil Disorders* (1968).

63 Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (Aug. 1, 1967).

64 The United States Kerner Commission, *supra* Note 49.

The report stated:

“What most white Americans have never understood, but what the Negro can never forget – is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.”<sup>65</sup>

After considering different policy alternatives, the Commission concluded, “there is no substitute for enactment of a federal fair housing law. The key to breaking down housing discrimination is universal and uniform coverage, and such coverage is only obtainable through federal legislation.”<sup>66</sup>

The topic of fair housing was not going away. On April 1 and 2, 1968, the United States Supreme Court heard oral arguments in *Jones v. Alfred H. Mayer Co.*, a case brought by Joseph Lee Jones, an African American man who attempted to purchase a home in a new subdivision in the St. Louis area and was rejected by the developer because of his race.<sup>67</sup> Jones filed his lawsuit alleging that the Civil Rights Act of 1866 (42 U.S.C. §1982), which grants the right to all citizens of the United States to “inherit, purchase, lease, sell, hold, and convey real and personal property” had been violated and that he was entitled to pursue a legal claim for damages.<sup>68</sup>

On April 4, 1968, The Rev. Dr. Martin Luther King Jr. was assassinated in Memphis, TN. Over 100 American cities erupted in violence and civil disturbances, and most members of Congress knew that something had to be done to quell the violence.<sup>69</sup> President Johnson and others in Congress saw this tragedy and crisis as an opportunity to push fair housing legislation forward. A bi-partisan bill sponsored by Sen. Edward Brooke (R) of Massachusetts and Sen. Walter Mondale (D) of Minnesota, which had been languishing in Congress for some time, sailed through both houses and passed with very little debate.<sup>70</sup> During the relatively short debate over the proposed fair housing bill, Sen Brooke stated, “fair housing does not promise an end to the ghetto,”<sup>71</sup> but added, “it promises only to demonstrate that the ghetto is not an immutable institution in America.”<sup>72</sup> The African American Senator cited his own difficulties in finding a home after he returned from military service during World War II to illustrate the prejudice in the American housing market.<sup>73</sup> Brooke proposed that to combat the, “unconscionable bitterness between white and Black Americans, it is incumbent upon our Government to act, and to act now.”<sup>74</sup> Sen. Mondale explained that the reach of the proposed law was “to replace the ghettos”<sup>75</sup> with “truly integrated and balanced living patterns.”<sup>76</sup>

Title VIII of the 1968 Civil Rights Act, also known as the federal Fair Housing Act, was signed into law by President Johnson on April 11, 1968, just one week after the murder of Dr. King.<sup>77</sup> The new law prohibited discrimination in housing based on race, religion, color, and national origin.<sup>78</sup> The U.S.

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65 *Id.*

66 *Id.*

67 *Jones v. Mayer*, 392 U.S. 409 (1968).

68 *Id.*

69 Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 *Harv. J. on Legis.* 247 (2016).

70 *Id.*

71 Edward Brooke, *Bridging the Divide: My Life* 176 (2007).

72 *Id.*

73 *History of Fair Housing*, U.S. Dep't of Housing & Urban Development, [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/aboutftheo/history](https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutftheo/history) (last visited May 29, 2018).

74 90 *Cong. Rec.* 2,281 (1968)

75 *Id.*

76 *Id.*

77 The Fair Housing Act, 42 U.S.C. § 3603 (1968).

78 42 U.S.C. § 3604.

Department of Housing and Urban Development (HUD) was given authority to enforce the new law. The U.S. Department of Justice (DOJ) also had the ability to bring claims for injunctive relief when it could identify a pattern and practice of discrimination. Finally, any individual could go directly to court to seek redress under the law.

The new law contained several restrictive provisions and exemptions that limited the enforcement powers of the federal government and the overall scope of the law. For example, one provision commonly referred to as the “Mrs. Murphy” exemption, excluded from coverage over two million housing units, primarily owner-occupied buildings with four units or less. However, owners of these smaller buildings would soon learn that they were covered under another law. On June 17, 1968, the Supreme Court issued its decision in the *Jones v. Mayer* case holding that the 1866 Civil Rights Act prohibited racial discrimination against citizens in all housing and was enforceable by filing lawsuits in federal court.<sup>79</sup>

Another important, but lesser known, provision of the federal Fair Housing Act stated that HUD and recipients of federal financial assistance must “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” the Act.<sup>80</sup> This provision was intended to ensure that, going forward, our nation’s housing and community development activities would be designed and implemented to reverse the harm caused by America’s history of housing discrimination and segregationist policies by removing the remaining barriers to housing choice and reducing residential racial segregation.

The growing national fair housing movement of the 1950’s and 60’s was largely focused on efforts to secure passage of a federal fair housing law that would prohibit discrimination in housing based on race, color, religion and national origin. While political support for passage of a fair housing law had swelled by 1968, the legislation might not have been enacted at that time but for the tragic assassination of Dr. King. Many advocates were hopeful that the new law also would compel the federal government, through its future housing and community development activities, to address the issues raised by the Kerner Commission and reverse the damage caused by our nation’s long history of segregationist policies and racial discrimination.

While the historic passage of fair housing laws explicitly made housing discrimination illegal, important questions remained. Was the law strong enough to deter future discrimination in housing? Would federal, state, and local governments devote the resources needed to vigorously enforce fair housing laws? Would local, state, and federal governments take their obligation to affirmatively further fair housing and work to remove barriers to housing choice and reduce residential racial segregation?

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<sup>79</sup> *Jones v. Mayer*, 392 U.S. 409 (1968).  
<sup>80</sup> 42 U.S.C. § 3608.

# PART 3 LESSONS LEARNED: 50 YEARS OF FEDERAL FAIR HOUSING POLICY (1968-2018)

**FOLLOWING THE PASSAGE OF THE FEDERAL FAIR HOUSING ACT (FHA) IN 1968, MANY FAIR HOUSING ADVOCATES WERE CAUTIOUSLY OPTIMISTIC THAT GOVERNMENT RESOURCES FOR ENFORCEMENT WOULD BE FORTHCOMING.** But early on it became abundantly clear that much of the work of enforcing the new law would fall disproportionately on private individuals and civil rights organizations working with attorneys to file lawsuits. Immediately following the passage of the Fair Housing Act, HUD Secretary Robert C. Weaver requested \$11 million from Congress to fund 850 new positions at HUD to help enforce the new fair housing law.<sup>81</sup> He received only \$2 million to fund about 200 positions nationally.<sup>82</sup> Dr. Weaver later told reporters that without adequate staff to enforce the law, “fair housing legislation is a meaningless gesture.”<sup>83</sup> Looking back at government enforcement for the two decades that followed the passage of the Act, those words proved to be prophetic.

But private lawsuits brought under the new Fair Housing Act did have an impact and created an impressive body of case law that supported fair housing rights. For example, in 1972, the U.S. Supreme Court held that both African American and white tenants could file a lawsuit under the FHA challenging their landlord’s alleged practice of manipulating waiting lists and using discriminatory acceptance standards based on race.<sup>84</sup> The Court recognized that the FHA protected the right of everyone to enjoy the social, business, and professional benefits of an integrated community. Due in large part to the women’s movement of the early 1970’s, the definition of “everyone” expanded explicitly to prohibit sex discrimination in Congress’s 1974 amendment of the FHA.

The ability to enforce the FHA also gained a major victory in 1975 when a federal court ruled that the anti-testing provision of the Wisconsin Open Housing Law was unconstitutional and could no longer be enforced.<sup>85</sup> This court decision and many that followed made it clear that testing was a vital investigative tool to enforce the Fair Housing Act and that this activity could not be restricted by government action.

Throughout the 1970’s private individuals routinely went to court to enforce their fair housing rights, particularly as it became increasingly clear that the enforcement powers of HUD and DOJ were limited by the text of the FHA itself. For example, HUD had no administrative enforcement authority and could only mediate complaints. DOJ could only seek injunctive relief in pattern and practice cases. Although there was no limit on compensatory damages that private litigants could seek, the Fair Housing Act prescribed a cap on punitive damages of \$1000. On top of these limitations, many enforcement agencies lacked the political will to enforce fair housing laws and were unwilling to allocate the resources needed to vigorously enforce these laws. As a result, the number of local fair housing organizations began to grow again.

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81 Wendell E. Pritchett, Robert Clifton Weaver and the American City: The Life and Times of an Urban Reformer (2008).

82 *Id.*

83 *Id.*

84 *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

85 *United States v. Wisconsin*, 395 F. Supp. 732 (W.D. Wis. 1975).

By the mid-1970's, the National Committee Against Discrimination in Housing (NCDH) was convening conferences with more than three dozen fair housing organizations participating. The missions of these organizations were quite similar. They called attention to the continuing harm caused by pervasive housing discrimination and pronounced residential racial segregation, while also providing investigative (testing) and legal resources to assist victims of discrimination to pursue their claims most often through the courts.

In 1977, HUD worked with NCDH to conduct a nationwide testing study of housing market practices in metropolitan areas.<sup>86</sup> The results showed an alarmingly high level of illegal racial discrimination in America's housing markets. The study results also spurred the formation of more local fair housing organizations around the country in the years that followed.

Fair housing organizations gained an essential tool when, in 1982, the Supreme Court held in *Havens Realty v. Coleman* that, under certain circumstances, testers and fair housing organizations have the legal standing to file lawsuits in court under the Fair Housing Act, seeking damages and injunctive relief.<sup>87</sup> In the years since the *Havens* decision, fair housing advocates have been able to open up innumerable housing units and communities by challenging and stopping illegal housing discrimination without being solely dependent on individual tenants or homebuyers to file complaints.

During this same time in New York, an important housing and school desegregation case brought by the NAACP and DOJ against the City of Yonkers and State of New York was winding its way through the federal courts.<sup>88</sup> In 1985 a federal judge issued a 600+ page decision detailing over thirty years of government decisions to build subsidized housing only in minority areas of Yonkers and maintain a segregated public school system.<sup>89</sup> After enormous local opposition, a housing remedial order was put in place to build both public housing and affordable privately-owned rental and condominium units in white areas of Yonkers to promote residential integration. The plan also included several pro-integrative housing counseling and assistance programs, such as down-payment assistance to first-time homebuyers.<sup>90</sup>

By the later 1980's, several national foundations announced that they were pulling support away from the NCDH and investing in other priorities. Unable to find other sources of funding to sustain the organization, NCDH closed its doors in 1987. The loss of NCDH happened at a time when the number of local fair housing organizations was rapidly growing. By 1988, the National Fair Housing Alliance (NFHA) was formed to fill the void left by the closing of NCDH and to provide leadership on fair housing issues at the national level.

There were numerous attempts in the late 1970's and early 1980's to pass legislation that would strengthen the federal Fair Housing Act. All of them failed until 1988.

In 1988, Congress enacted the Fair Housing Amendments Act (FHAA or "the Amendments"), which expanded the coverage and protections of the law to persons with disabilities and families with children.<sup>91</sup> The new FHAA provisions included the right to reasonable changes in rules and policies as accommodations to enable individuals with disabilities to access and use housing, and the right to

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86 Ronald E. Wienk, *Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey* (1979).

87 *Havens Realty Corp. v. Coleman*, 455 US 363 (1982).

88 Lena Williams, *Judge Finds Yonkers Has Segregation Policy*, N.Y. Times, Nov. 21, 1985.

89 *Id.*

90 *Id.*

91 Fair Housing Amendments Act of 1988. H.R. 1158, 100<sup>th</sup> Cong. 1987.

reasonable physical modifications in existing housing to provide greater accessibility.<sup>92</sup> The FHAA also required that all new multifamily housing (4 attached units or more) built after 1991 be designed and constructed with certain minimum accessible and adaptable features.<sup>93</sup>

In addition to expanded protections, the FHAA enlarged the enforcement role of both HUD and DOJ. The FHAA empowered HUD to issue initial findings of discrimination, subpoena evidence during investigations, and hold administrative hearings to determine whether the FHA had been violated. HUD administrative law judges now had the authority to order compensatory damages, injunctive relief, and civil penalties (paid to the federal government). The Amendments also granted authority to the HUD Secretary to file self-initiated administrative complaints alleging systemic forms of discrimination.<sup>94</sup>

Congress even included an alternative enforcement route in the FHAA, by requiring DOJ to file a lawsuit in court seeking relief for individual complainants after certain referrals from HUD.<sup>95</sup> And the Amendments specifically authorized DOJ to seek civil penalties for the federal government and monetary damages on behalf of aggrieved persons or individuals harmed by patterns or practices of discrimination. During the early 1990s, DOJ increased its Housing Section from a dozen to over fifty attorneys dedicated to enforcing the FHA in federal courts across the country. DOJ also initiated its own internal testing program during this same time, which conducted testing investigations that led to the filing of dozens of pattern or practice cases alleging race, national origin, disability, and familial status discrimination.

While the Amendments created some hope that government would finally provide a more efficient and effective mechanism for enforcing the FHA, two nagging questions remained. Would the government finally devote the resources needed to support this new enforcement role on a sustained basis? And, in turn, could the government be more proactive with its enforcement and less dependent on receiving individual housing discrimination complaints?

In 1990, Congress passed the American with Disabilities Act (ADA).<sup>96</sup> While the ADA has limited applications in housing, it did open many opportunities for people with disabilities to have greater access to employment, public services, places of public accommodation, transportation, and other areas of community life. In 1999, the Supreme Court decision in *Olmstead v. LC* mandated that people with disabilities not be segregated or institutionalized so that they can live in the community in the most integrated setting possible.<sup>97</sup>

Over the past five decades, many localities and states have passed fair housing laws, some mirroring the federal Fair Housing Act and others offering wider coverage or greater protections. For instance, the New York State Human Rights Law currently prohibits discrimination based on age, marital status, sexual orientation and military status.<sup>98</sup> The New York City Human Rights Law also includes citizenship/alienage status, gender identity, lawful occupation, domestic partnership status, lawful source of income, and status as a victim of domestic violence/stalking.<sup>99</sup> While the effectiveness of local and state government enforcement agencies varies greatly based on the priorities of the political leadership at

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92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 42 U.S.C. 126 § 12101.

97 *Olmstead v. LC*, 527 US 581 (1999).

98 N.Y. Exec. Law § 296(5).

99 New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101, 8-203 (2018).

any given time, both state and local laws in New York do provide a right to file a lawsuit in state court or an administrative complaint to enforce these fair housing rights.

Between 2013 and 2016, HUD promulgated significant regulations intended to aid with enforcement of the Fair Housing Act, including a regulation defining harassment claims under the FHA and one proscribing a process for states and cities receiving HUD funding to evaluate their efforts to affirmatively further fair housing. One key HUD regulation, called the Discriminatory Effects Rule, explained the burden of proof when alleging that an unjustified, facially neutral rule or policy has an adverse, disparate impact on a group of persons protected by the FHA or maintains or creates housing segregation.<sup>100</sup>

Although federal appellate courts had agreed for decades that proof of intent is not required under the FHA to establish illegal discrimination, these courts had applied different standards of proof, making enforcement uneven across the country. The Supreme Court clarified the issue in 2015 when it decided in *Inclusive Communities Project v. Texas Dept. of Housing & Comm. Affairs* that, under certain circumstances, a neutral policy may violate the FHA.<sup>101</sup> This guidance, combined with HUD's Discriminatory Effects Rule, has further strengthened fair housing enforcement.

The need to revitalize distressed neighborhoods that have historically faced disinvestment and the need to remove barriers to housing choice and reduce residential segregation are sometimes erroneously framed as competing or conflicting policy goals. The twin goals of the Fair Housing Act, as articulated by its sponsors, recognized the need for both non-discrimination in housing and the creation of integrated residential living patterns.<sup>102</sup> But sponsoring legislators also recognized that the law needed to repair the harm “to the whole community” that many decades of discrimination and disinvestment had caused.<sup>103</sup> This means that, as a nation, the law challenges us to remove barriers to housing choice and implement inclusionary policies in neighborhoods and communities that have historically been unwelcoming or closed to people based on race or national origin. It is just as essential that we promote equitable development in distressed, revitalizing, or gentrifying neighborhoods to ensure that these neighborhoods are genuinely transformed into places of opportunity for all. Both efforts require political will and a large infusion of resources. Both require equity and fairness. And to realize fair housing, our success in achieving either goal is inextricably linked to our ability to make progress on both.

Since the passage of the 1968 Fair Housing Act, the character or nature of housing discrimination has profoundly changed. This change portends significant challenges for consumers and enforcement agencies. In 1968, it was not unusual for a person of color inquiring about housing to be greeted by a slammed door or even a racial epitaph. While, sadly, that type of discrimination still occurs, it is more the exception than the rule. To understand how most housing discrimination occurs today, one must replace the image of a “slammed door” with that of a “revolving door” where people are now politely and subtly escorted in, out of, and away from the desired housing, often without knowing that discrimination occurred. If consumers are unaware they are being discriminated against, they have no reason to file a complaint. If complaints are not filed, most government agencies will not initiate any enforcement action. If no enforcement action is taken, the discrimination will continue. This reality makes testing more important than ever before because it is frequently the only tool that can be used to ferret out and eliminate discriminatory housing practices. Since organizations like the

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100 Discriminatory Effect Rule, 24 C.F.R. § 100.500 (2013).

101 *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S.Ct. 2507 (2015).

102 114 Cong. Rec. 2708 (1968).

103 *Id.*

Fair Housing Justice Center often possess the most effective testing capability, the role of private fair housing organizations continues to be critical.

In the fifty years since the passage of the federal Fair Housing Act, residential segregation has been slightly reduced and the level of illegal housing discrimination has decreased, but progress on both fronts has been exceedingly slow and incremental. Over the same period, fair housing laws were significantly strengthened. Courts continued to render decisions that affirm and effectuate the purpose of this important civil rights law. Unfortunately, all levels of government have not devoted the level of resources needed to support vigorous enforcement of fair housing laws. As a result, illegal discrimination in the rental, sale, financing and insuring of housing is still pervasive. Discriminatory barriers can still be found in some government housing policies and programs. Moreover, the duty to affirmatively further fair housing has proved to be a low priority for most governmental units receiving federal funds. As a result, our nation has failed to repair the harm caused by nearly a century of discriminatory policies and practices.

The past fifty years of federal fair housing policy has demonstrated both the value of the law and the need for more vigorous enforcement of the law. The promise of the Fair Housing Act is still largely unfulfilled. Many segments of the population do not enjoy equal housing opportunity and our metropolitan regions are still quite segregated by race and national origin. What is the harm that results from continuing discrimination and residential segregation? What actions can all of us take to reduce illegal housing discrimination and create open, accessible, and inclusive communities?