



2009

New Strategies for Old Problems: The Fair Housing Act at 40, Symposium: New Strategies in Fair Housing

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Recommended Citation

Jeffrey D. Dillman, *New Strategies for Old Problems: The Fair Housing Act at 40, Symposium: New Strategies in Fair Housing*, 57 Clev. St. L. Rev. 197 (2009)
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NEW STRATEGIES FOR OLD PROBLEMS: THE FAIR HOUSING ACT AT 40

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I. INTRODUCTION

Anniversaries are often a time of reflection, a time to take stock of where we are, where we have come from, and where we hope to go. For civil rights advocates, 2008 was a year of highly symbolic anniversaries, even before November brought what will undoubtedly be a new anniversary, with the election of President Barack Obama.

Forty years earlier, on April 11, 1968, President Lyndon Johnson signed the Fair Housing Act (FHA),¹ signaling a federal commitment to end housing discrimination and segregation. Fair housing legislation had been debated in Congress for a number of years. Yet the passage of the FHA was in some ways a bittersweet victory, as it had taken the assassination of Dr. Martin Luther King, Jr., on April 4, 1968, to spur Congress to finally pass a bill outlawing housing discrimination based on race, color, religion, and national origin.²

In the intervening years, numerous laws have been passed addressing various aspects of housing discrimination. The number of groups protected from

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¹Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2006)).

²Two months later in 1968, the Supreme Court held that the Civil Rights Act of 1866, 42 U.S.C. §§1981-1982, prohibited discrimination by private individuals, not merely by the government, in housing. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968). This statute only prohibits "racial" discrimination, unlike the FHA, although the Court has defined "race" broadly to include most ethnic groups. *See, e.g., Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding Arabs are protected under Section 1981); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (holding Jews are protected under Section 1982).

discrimination under the FHA has been increased to include sex,³ familial status, and handicap.⁴ In addition, available remedies and procedural protections have been strengthened.⁵ Moreover, states, cities, and other local jurisdictions have passed laws prohibiting discrimination, in some cases broadening the protections offered under federal law by adding other protected classes, such as sexual orientation, marital status, age, creed, source of income, occupation, and other grounds.⁶

While the Congressional reaction to King's assassination was quick, the subsequent forty years have shown that without vigorous enforcement of fair housing laws, coupled with a strong commitment to ensuring racial equity and parity for all minority groups, the mere passage of a law prohibiting discrimination is not enough to undo centuries of discrimination and unequal treatment.

Addressing housing discrimination is an especially important goal. Housing discrimination in many ways has a greater impact than other types of discrimination. Housing patterns affect not only where one lives but also one's life chances through access to quality schools, transportation, jobs, and a healthy (and safe) environment.⁷

II. ADVANCES IN FAIR HOUSING SINCE 1968

Since the passage of the FHA, there have been numerous successes in the area of fair housing. From 1990 to 2007, 146,878 administrative complaints (almost 8,160 per year) were filed with the U.S. Department of Housing and Urban Development (HUD) and state and local agencies certified by HUD to conduct investigations into housing discrimination.⁸ In 2007 alone, a total of 10,154 complaints were filed, with 39% based on race or color, 43% based on disability, 14% based on familial status,

³Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 721, 728 (1974) (codified as amended in scattered sections of 42 U.S.C.).

⁴Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, 1619-21 (1988) (codified as amended in scattered sections of 42 U.S.C.).

⁵*Id.* at 1625-36; see ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION §§ 5:3-5:4 (West 2008) (providing details of the changes brought about by the Fair Housing Amendments Act of 1988).

⁶See, e.g., OHIO REV. CODE ANN. § 4112.02 (H)-(Q) (West 2009). In Northeast Ohio, the Housing Research & Advocacy Center (the "Housing Center") has identified fifty-four communities with local fair housing ordinances in a six-county region. Jeffrey D. Dillman, Carrie Pleasants & Samantha Hoover, *The State of Fair Housing in Northeast Ohio: April 2008* (Hous. Research & Advocacy Ctr. Cleveland, Ohio), Apr. 2008, at 10, available at <http://www.thehousingcenter.org/docman/Download-document/1-The-State-of-Fair-Housing-in-Northeast-Ohio-April-2008.html>.

⁷See generally SEGREGATION: THE RISING COSTS FOR AMERICA (James H. Carr & Nandinee K. Kutty, eds. 2008). Although, as noted above, fair housing laws protect a number of groups from discrimination, my comments in this Article will be primarily addressed to discrimination based on race/color, with a particular emphasis on differences between whites and African Americans. By this, I do not mean to minimize the very real discrimination that other racial or ethnic minorities experience, or that members of other protected classes experience.

⁸U.S. DEP'T OF HOUS. & URBAN DEV., THE STATE OF FAIR HOUSING: FY 2007 ANNUAL REPORT ON FAIR HOUSING 4 Chart 1.1 (2008), available at <http://www.hud.gov/offices/fheo/library/FairHousing-FY2007AnnualReport.pdf>.

and 13% based on national origin.⁹ The ability of victims of housing discrimination to utilize this relatively inexpensive and quick administrative process is certainly a success.

During this same period, private, non-profit fair housing organizations filed 2,776 lawsuits in federal and state courts nationwide, obtaining over \$255 million in damages.¹⁰ For the individuals represented in these cases, these amounts represent an important remedy, both in terms of offering compensation for the damages they suffered as well as a means of punishing defendants for illegal conduct.

To take one recent example, in July of 2008, a federal jury awarded nearly \$11 million in damages to sixty-seven residents of the Coal Run neighborhood, adjacent to Zanesville, Ohio, for having been denied water and sewer services for decades based on their race.¹¹ From the 1950s until water service was finally established in 2004 (after the Ohio Civil Rights Commission had already found probable cause of discrimination), the mostly African American residents of Coal Run were forced to pay for trucks to bring in water which was stored in cisterns, to collect rainwater, and to pay to dig wells to obtain the water necessary for bathing, cooking, and other needs.¹² Plaintiff Frederick Martin noted that due to the lack of water, he and his nine siblings shared two tubs of water among them on bath nights; Mr. Martin moved away from Coal Run in the 1970s so that his children would not have to grow up without access to water, as he had. The evidence in the case established that city, county, and township public officials denied repeated requests for water and sewer service made over decades by the residents of Coal Run, although during the same period requests were granted and services were provided to white families located further away.¹³

It is also clear that many types of housing discrimination are not as blatant as they once were. For example, explicit racial preferences and exclusions (such as statements indicating “Whites only” or “No Blacks”) are now relatively rare in most parts of the country, although research and complaints filed by fair housing

⁹*Id.* at 5 tbl.1.1. With the exception of disability-based complaints, which have risen from 38% in 2004 to 43% in 2007, the rates for race and color, familial status, and national origin complaints have remained relatively constant since 2004. *Id.*

¹⁰FAIR HOUSING CENTER OF METROPOLITAN DETROIT, \$255,000,000 AND COUNTING 25 (2008). This amount does not include damages awarded in administrative hearings held by Administrative Law Judges employed by the HUD or by equivalent adjudicators working for state or local fair housing boards, damages in cases in which a private non-profit fair housing group was not involved, or settlements with confidentiality agreements.

¹¹See Julie Carr Smythe, *Jury: Black Neighborhood Was Denied Water Service*, Associated Press, July 10, 2008; Press Release, Nancy H. Rogers, Attorney Gen., State of Ohio, Federal Jury Finds Racial Discrimination in Zanesville Water Case: Ohio Attorney General, Ohio Civil Rights Commission Praise Jury's Verdict (July 10, 2008), available at http://ag.state.oh.us/press/08/07/pr080710_2.pdf. In addition to the individual plaintiffs in the case, a non-profit fair housing organization, the Akron-based Fair Housing Advocates Associates, was also a party to the case and was awarded damages.

¹²See *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio Sept. 7, 2007) (providing facts of case in determination of summary judgment motions).

¹³See *supra* note 11.

organizations have shown an increase in such statements in internet-based advertising, compared to traditional print (i.e. newspaper) advertising.¹⁴

III. EVIDENCE OF PERSISTENT DISCRIMINATION AND SEGREGATION

Despite successes such as the Coal Run case, however, research by academics, non-profit fair housing groups, HUD, and individual complaint data show widespread racial segregation, continuing discrimination in the rental and sale of housing, and persistent racial and ethnic disparities in mortgage lending.

One of the primary aims of the FHA was to address racial discrimination and segregation. Yet forty years later, most major cities across the country remain highly racially segregated, particularly for African Americans. One of the most widely used measures of segregation—the dissimilarity index—measures the evenness of the distribution of a given population in a metropolitan area.¹⁵ Using this measure, “a metropolitan area with high segregation has very homogeneous neighborhoods, though the location of those neighborhoods within the metropolitan area does not matter. Low segregation is characterized by an even distribution of minority group members across neighborhoods.”¹⁶ Scores on the dissimilarity index measure range “from 0 (complete integration) to 1 (complete segregation) [and measure] the percentage of a group’s population that would have to change residence for each neighborhood to have the same percent[age] of that group as the metropolitan area overall.”¹⁷

In 1980, the Cleveland Metropolitan Statistical Area (MSA) was ranked the third most segregated metropolitan area in the country for African Americans, with a score of 0.854 on the dissimilarity index, meaning that 85.4% of African Americans would

¹⁴The Greater New Orleans Fair Housing Action Center documented numerous instances of racial (as well as national origin and religious-based) exclusions in the wake of Hurricane Katrina. Press Release, Greater New Orleans Fair Hous. Action Ctr., Fair Housing Center to File Discrimination Complaint Against Katrina Housing Web Sites (Dec. 22, 2005), *available at* http://gnofairhousing.org/pdfs/12-22-05-Press_release_Advertising_complaints.pdf. For example, web-based advertisements offering housing assistance to Katrina victims included statements such as “not racist, but white only,” “we do apologize but we are requesting only white or chinese [sic] families,” “should be white lady,” “we would prefer a middle class white family,” “to make things more understandable for our younger child we would like to house white children,” “as a white couple, we would be looking for a white mother and baby.” *Id.* The advertisements were placed on the websites katrinahousing.org, katrinohome.com, dhronline.org, and nolahousing.org. *Id.* In 2008, the Housing Research & Advocacy Center filed 53 charges with HUD alleging that individuals advertising on craigslist.com and other on-line providers in the Cleveland area expressed illegal preferences based on familial status, race, gender, national origin. Press Release, Hous. Research & Advocacy Ctr., Fair Housing Group Finds Widespread Discrimination in Internet Ads: Files 53 Complaints Alleging Preferences Based on Familial Status, Race, and Other Grounds (Nov. 10, 2008), *available at* <http://www.thehousingcenter.org/docman/Download-document/55-Widespread-Discrimination-Found-in-Internet-Ads.html>.

¹⁵U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000 8 (2002) *available at* www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf.

¹⁶*Id.* at 10.

¹⁷*Id.* at 8.

have to move in order to achieve complete integration in the community.¹⁸ By 2000, the Cleveland MSA had improved to the sixth-most segregated area in the country, with its dissimilarity rating decreasing to 0.768.¹⁹ During this period, the Cleveland area actually became more segregated for Hispanics/Latinos, with the dissimilarity index increasing from 0.575 in 1980 to 0.577 in 2000; ironically, the Cleveland MSA moved from being the seventh-most segregated area for Hispanics/Latinos to the eleventh-most, reflecting an increase in segregation in other areas.²⁰ While this does indicate some improvement in terms of racial segregation of African Americans, that progress has been extremely slow, and at current rates, it will take decades for the region to become integrated.

The latest national Housing Discrimination Study (HDS 2000), sponsored by HUD and conducted by the Urban Institute, found high rates of housing discrimination throughout the country in the rental and sale of housing. Nationwide, housing discrimination was discovered in 20.3% of the instances in which an African American attempted to rent an apartment and in 16.8% of the instances in which an African American attempted to purchase a home.²¹ For Hispanics/Latinos, the report found discrimination 23.4% of the time in attempted rentals and 18.3% of the time in home sales.²² Asians and Pacific Islanders experienced discrimination 21.5% of the time in rentals and 20.4% of the time in home sales,²³ and Native Americans experienced discrimination 28.5% of the time in rentals and 16.9% of the time in home sales.²⁴ Discrimination at these levels—over one in five instances for rentals

¹⁸Dillman, *supra* note 6, at 18 (citing U.S. CENSUS BUREAU, *supra* note 15, at 69 tbl. 5-4).

¹⁹*Id.*

²⁰*Id.* at 19 (citing U.S. CENSUS BUREAU, *supra* note 15, at 86 tbl. 6-4).

²¹MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 1 – SUPPLEMENT 3-1 (2003) *available at* www.huduser.org/publications/pdf/phase1_supplement_final.pdf. All of the Housing Discrimination Studies were conducted using paired testing, which has been used since at least the 1970s to detect and document housing discrimination. MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 3 – NATIVE AMERICANS I (2003) [hereinafter PHASE 3], *available at* www.huduser.org/org/Publications/pdf/hds_phase3.pdf. In this procedure, two trained testers are sent to inquire about renting or purchasing the same housing unit. *Id.* at ii. Both testers are assigned characteristics, such as income, assets, debts, family size, education level, housing preference, employment, etc., to make them equally qualified for the unit and differ based solely on the grounds being tested (e.g. race, national origin, familial status, disability). *Id.* The testers visit the rental or sales agent and record their treatment in detail, which is given to a third party for later comparison. *Id.*

²²TURNER, PHASE – SUPPLEMENT, *supra* note 21, at 3-4.

²³MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: PHASE 2 – ASIANS AND PACIFIC ISLANDERS iv (2003) *available at* http://www.huduser.org/publications/pdf/phase2_final.pdf.

²⁴PHASE 3, *supra* note 21, at iii. Because the Native American population is relatively small and highly concentrated in only a few states, rental testing was conducted in just three states—Minnesota, Montana, and New Mexico—and sales testing was conducted in New Mexico only. *Id.* at ii-iii.

among all racial and ethnic groups studied—is extremely troubling, especially decades after the passage of the FHA made such actions illegal.

Moreover, researchers and advocates have noted that this data likely understates the true amount of discrimination to a large degree.²⁵ This is due to the fact that the studies only examined discrimination at certain points in the rental and sales process, excluding both discrimination encountered during preliminary telephone contacts between a prospective renter/purchaser²⁶ as well as discrimination that occurred after an application was submitted. In addition, the studies “exclude[d] many smaller owner-occupied housing units[,] which comprise a significant portion of the rental market.”²⁷

Taking into account the limitations posed by the Urban Institute reports, the National Fair Housing Alliance commissioned a report to attempt to determine the total number of instances of housing discrimination experienced by African Americans, Latinos/Hispanics, Native Americans, and Asian Americans and Pacific Islanders. The report considers both the rates of discrimination found in the Housing Discrimination Study and the rates at which renters and home purchasers of different races and ethnicities move in a given year. Based on this data, the report estimated that nationwide, members of these groups experience a minimum of 3.7 million instances of housing discrimination annually.²⁸

The home mortgage lending market likewise has demonstrated persistent racial disparities. A recent report by the Housing Center examining 2007 mortgage lending data²⁹ in Ohio found that statewide, “African Americans and Hispanics/Latinos

²⁵See, e.g., NAT’L FAIR HOUS. ALLIANCE, 2004 FAIR HOUSING TRENDS REPORT 1-5 (2004). The reports’ authors also acknowledge some of these limitations. See, e.g., TURNER, *supra* note 23, at vi-vii.

²⁶Research has shown that most people in the United States can identify the race of someone through a brief phone conversation, often after hearing only several words. See, e.g., Thomas Purnell et al., *Perceptual and Phonetic Experiments on American English Dialect Identification*, 18 J. OF LANGUAGE & SOC. PSYCHOL. 10, 10-14 (1999); Julie H. Walton & Robert F. Orlikoff, *Speaker Race Identification from Acoustic Cues in the Vocal Signal*, 37 J. OF SPEECH & HEARING RES. 738, 738-45 (1994). This provides an avenue for discrimination in which housing providers can screen calls and either not return the calls of individuals who “sound African American” or “sound foreign” or discriminate against them in other ways. The testing program of the Housing Research & Advocacy Center has had many instances in which African American testers’ calls are not returned while white testers calling on the very same days have their calls returned and are invited to view and submit applications for apartments.

²⁷NAT’L FAIR HOUS. ALLIANCE, *supra* note 25, at 5 n.4.

²⁸*Id.* at 1. While these numbers may seem high, the general stigmatization of public expression of racial preferences or limitations has meant that most racial discrimination is now subtle and often difficult to detect without a comparison, as is provided in fair housing testing. Rather than explicitly stating that s/he will not rent to African Americans, for example, a discriminating landlord is more likely to use linguistic profiling to screen tenants, and then either not return their phone calls or engage in other types of discrimination, such as misrepresenting availability of units, quoting different terms or conditions (such as higher rents, lesser amenities, or not offering rebates or specials), etc.

²⁹The report examined data provided by lenders to the federal government under the Home Mortgage Disclosure Act (HMDA), 12 U.S.C. § 2801 (2006). The statute requires most

continued to have limited access to fair and equal credit” with both groups facing both higher denial rates and higher high-cost lending rates than whites.³⁰ Specifically, upper income African Americans were denied home purchase loans and refinance loans at higher rates than low income whites.³¹ Examining high-cost lending rates revealed even stronger racial disparities: statewide, upper income African Americans received high-cost home purchase loans 31.87% of the time, compared to 19.88% of the time for low income whites. “For refinance loans, upper income African Americans received high-cost loans 38.46% of the time . . . compared to 25.78% of the time for low income whites.”³²

In examining the data on housing segregation, complaints, and mortgage lending disparities, one could conclude, without much exaggeration, that the Fair Housing Act has been a failure—that forty years after its passage, housing discrimination and segregation remain widespread but are not a concern among most politicians or policymakers. Indeed, Professor Robert Schwemm, author of the major treatise on fair housing law, noted that the lack of compliance with the FHA, evidenced by the high degree of complaints and lawsuits that continue to be filed, as well as the high rates of discrimination revealed by the Housing Discrimination Studies, stands in contrast to other civil rights laws, such as public accommodations or employment,

mortgage lenders in metropolitan areas in the United States to report on loan applications and dispositions. While lenders who make few loans in metropolitan areas or who have small asset size are not required to report the data, it is widely acknowledged to provide the most thorough information on mortgage lending. See, e.g., Theresa Singleton et al., *Subprime and Predatory Lending in Rural America: Mortgage Lending Practices that can Trap Low-Income Rural People*, Policy Brief No. 4 (Carsey Inst., Univ. of N.H.) Fall 2006, at 2. In 2007, the HMDA data included information on over 774,401 loan records reported by 1,150 lenders. Jeffrey D. Dillman, Samantha Hoover & Carrie Pleasants, *Persisting Racial & Ethnic Disparities in Ohio Mortgage Lending* (Hous. Res. & Advocacy Ctr. Cleveland, Ohio), Feb. 2009, at 15.

³⁰Press Release, Housing Research & Advocacy Center, *Wide Racial & Ethnic Disparities Persist in Ohio Mortgage Lending* (Feb. 2, 2009) at 1, available at <http://www.thehousingcenter.org/docman/Download-document/62-Persisting-Racial-Ethnic-Disparities-in-Ohio-Mortgage-Lending-February-2009.html>. Denial rates are useful to determine whether individuals or groups have access to credit, a key requirement of purchasing a home for most individuals in the U.S. “High-cost” loans have an annual percentage rate (APR) at least 3% (or, for second-lien mortgages 5%) above the rate on Treasury securities of comparable maturity. Dillman, *supra* note 29, at n.1. This rate was chosen by the Federal Reserve Board in an attempt to include the vast majority of subprime loans and to exclude the vast majority of prime-rate loans. FEDERAL RESERVE BOARD, FREQUENTLY ASKED QUESTIONS ABOUT THE NEW HMDA DATA 4 (2006), available at <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg200604>.

“High-cost” lending rates are useful to determine the quality of credit available to individuals and/or groups.

³¹Dillman, *supra* note 29, at 1. For home purchase loans, African Americans were denied loans 32.86% of the time, compared to 27.84% of the time for low income whites. *Id.* For refinance loans, upper income African Americans were denied loans 54.42% of the time, compared to 53.39% of the time for low income whites. *Id.*

³²*Id.* at 2.

where discrimination is widely seen as “indefensible and worthy of immediate corrective measures.”³³

If we consider the length of time it took our society to develop the legal and social structures of racism and segregation that presently exist, it is in some ways not surprising that only forty years after passage of the Fair Housing Act, we have not achieved more progress. Yet such a response avoids an examination of the reasons for such slow progress.

IV. PAST STRATEGIES: ENFORCEMENT AND EDUCATION

In evaluating possible causes for the persistence of housing discrimination and segregation, it is useful to examine the ways both public and private actors have attempted to address this problem in the past. Since the passage of the FHA, most work by fair housing groups has been aimed at one of two general categories: enforcement activities and, to a lesser extent, education and outreach activities.³⁴

Enforcement work includes the legal strategies used to pursue remedies for individuals and groups, including testing for housing discrimination, counseling and representing individuals who have experienced discrimination, and filing administrative complaints and conducting litigation in federal and state courts, as well as efforts to strengthen laws through adding additional protected classes or by providing increased remedies.³⁵ These efforts have helped many individuals who have suffered housing discrimination, providing them with remedies that they otherwise might not have received. The efforts have also led to the passage of the Fair Housing Amendments Act in 1988, which added familial status and disability as protected classes and expanded procedural and substantive remedies.³⁶

However, even if one were to imagine doubling or tripling the number of cases filed nationwide, it seems unlikely that the rate of discrimination would decrease substantially. As Professor Schwemm has argued in examining the persistence of discrimination, fair housing litigation has had “virtually no impact on rental discrimination rates nationwide.”³⁷

The other primary means used by fair housing groups to address housing discrimination is education and outreach. Such activities include trainings for housing providers (such as landlords and property managers), real estate professionals, loan officers, architects (and others involved in the design and construction of housing), and other professionals in industries covered by fair

³³Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 459 (2007).

³⁴See, e.g., Cliff Schrupp, *Structural Racism: Focusing on the Cause*, POVERTY & RACE, Vol. 16, No. 3, May/June 2007, at 8-9.

³⁵*Id.* at 9 (noting that the “first priority [of the Fair Housing Center of Metropolitan Detroit and most fair housing groups in the U.S.] was assisting in effective fair housing law enforcement”).

³⁶Pub. L. No. 100-430, 102 Stat. 1619, 1619-21 (1988) (codified as amended in scattered sections of 42 U.S.C.).

³⁷Schwemm, *supra* note 33, at 467.

housing laws.³⁸ It further includes more general “know your rights” trainings for tenants, community and religious groups, and members of the general public, as well as advertising and other public campaigns designed to raise awareness of housing discrimination. While these efforts may be useful in increasing awareness of the law among attendees, to date they have not appreciably altered compliance by producing either noticeable integration in major urban areas or in significantly reducing the incidence of discrimination against racial and ethnic minorities.³⁹

Thus, although most enforcement and education and outreach activities are indeed useful, the continuing high rates of discrimination show that they have not been effective in substantially decreasing housing discrimination or segregation. The near-glacial pace of progress in fair housing leads to the conclusion that the tactics and strategies being used have proved ineffective to date and must be changed (or at least supplemented) with new ones.⁴⁰

V. THE FUTURE OF FAIR HOUSING

Of course, identifying those strategies and tactics is the difficult task, because, as with many social problems, if the answer were obvious or easy, it likely would have been tried and the problem resolved by now. While I do not pretend to have “the answer”—and I think that there is not *one* answer to the problem but a multitude of answers—there are several general points I believe worth considering as we attempt to develop the detailed strategies needed to move forward in addressing housing discrimination and segregation forty years after the passage of the FHA.

First, fair housing advocates must become fair housing activists. What is sometimes forgotten in discussions of fair housing advocacy and strategy is the importance of community organizing and activism in creating the conditions for change. The key to passage of the FHA was not that King’s assassination finally educated Congresspeople to the evils of housing discrimination and segregation. Rather, it was that there was a fear that if something were not done, there would be a continuation of the unrest that had been gripping many communities in the 1960s and that had begun again in the wake of King’s assassination.⁴¹

³⁸See, e.g., Schupp, *supra* note 34; Rob Breymaier, *Affirmatively Furthering Fair Housing: The 21st Century Challenge*, 16 *POVERTY & RACE* 13, 10 (2007) (noting that partly through the efforts of “the fair housing movement,” members of the real estate industry are required to obtain education on fair housing); cf. Gregory D. Squires, *Fair Housing Enforcement Efforts*, in *SEGREGATION: THE RISING COSTS FOR AMERICA*, 318-319 (James H. Carr & Nandinee K. Kutty, eds., 2008) (questioning the efficacy of education aimed at consumers and housing providers in decreasing the incidence of housing discrimination).

³⁹See *supra* text accompanying notes 18-20 (segregation) and 21-32 (incidence of discrimination).

⁴⁰A possible alternative conclusion is that housing discrimination is, if not intractable, not subject to being remedied at a quicker pace or unable to be remedied at all.

⁴¹See Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 *WASHBURN L.J.* 149, 154 (1969) (noting that one of the “most persuasive” arguments in favor of the Fair Housing Act was that, “[a]t a time when riots threatened to close down every major city in the country and black militants preached the basic indecency of white America, a fair housing law could ease the frustration of blacks”). Dubofsky also notes that on April 8, 1969, after King’s assassination, the House Rules Committee held hearings on the bill “shaken by the disorders in Washington,” and that the full House debated the bill “April 10th, with

In fact, less than two months before King's assassination and the passage of the FHA, the Kerner Commission had issued its report on unrest in American cities. The Commission, set up to examine the causes of civil disturbances in a number of U.S. cities in 1967 and earlier, famously concluded that "Our Nation is moving toward two societies, one black, one white—separate and unequal."⁴² The activism of ordinary citizens provided a necessary push to convince Congress, state legislatures, and judges that change was not only beneficial but necessary, if only to forestall future demands or potentially more radical action.

Ending housing discrimination and segregation is inherently a radical act, and one that is threatening to those who support and benefit from such conditions. As Frederick Douglass noted in 1857, "[p]ower concedes nothing without a demand. It never did and it never will."⁴³

Relatedly, the fair housing community, as with much of the civil rights and progressive community in general, has become not only "professionalized" but "bureaucratized," further de-emphasizing activism and organizing. Most fair housing agencies spend most of their time conducting traditional enforcement work, such as assisting individual victims of discrimination, rather than organizing large groups of people to agitate for a more equitable society, an end to housing discrimination and segregation, and similar goals. By this I do not mean to imply that this work is not necessary or is less important than systemic work. Rather, I believe that by adopting what is more of a social service model, as opposed to a social change model, fair housing advocates have neglected a potentially powerful tool to further their work.⁴⁴

Second, as fair housing advocates, we need to move beyond a defensive posture and to think broadly and boldly about what it is that we would like to achieve. Since the 1980s, there has been a concerted campaign, initiated by conservatives but sometimes adopted by liberals, not only to delegitimize the state as a potential solution to social problems, but to consider government itself as the problem.⁴⁵ In place of the optimism that existed in the 1960s and 1970s that government could

National Guard troops called up to meet riot conditions in Washington still in the basement of the Capitol." *Id.* at 160; *see also* SCHWEMM, *supra* note 5, § 5:2 at 5-5 ("The Report of the National Advisory Commission and the urban riots that prompted it are important elements in the legislative history of the Fair Housing Act.").

⁴²REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (1968) (commonly known as the "Kerner Commission").

⁴³Frederick Douglass, *West India Emancipation*, in VOICES OF A PEOPLE'S HISTORY OF THE UNITED STATES 5 (Howard Zinn & Anthony Arnove eds., 2004).

⁴⁴*Cf.* LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE* 237 (1998) (discussing the importance to the civil rights movement of grass-roots organizing, building a broad-based coalition, engaging in public education, and seizing the moral high ground, as opposed to an "expert-driven strategy" which puts lawyers and politicians at the forefront, leading to the demobilization of the community base of support).

⁴⁵In his first inaugural address, on January 20, 1981, President Ronald Reagan proclaimed, "government is not the solution to our problem; government is the problem." Ronald Reagan, *First Inaugural Address of Ronald Reagan* (Jan. 20, 1981), transcript *available at* <http://www.reaganlibrary.com/reagan/speeches/first.asp>.

help bring about a more equitable society, a narrative of individualism, combined with an extremely narrow role for government, has been promoted and often adopted.⁴⁶ The natural result of this point of view is to consider the market as the solution. Thus, we are left to attempt to provide market incentives to reduce discrimination, to support integration, to build accessible housing, and so on.⁴⁷

These circumstances have probably contributed to much of the recent history of fair housing advocacy being characterized by a defensive posture. Rather than proposing broad and creative new goals or programs, advocates have instead focused on “holding the line” and ensuring that past successes are not further eroded by Congress or state legislatures, the executive branch, and especially the courts. While this attitude could be seen as a reaction to the overall political climate which, as was noted above, has been relatively conservative since the 1980s, it is important to remember that political climates are socially constructed and fluid. It is a truism that one cannot obtain what one does not ask for. By lowering our expectations or by only advocating for proposals considered politically “realistic,” we reduce the chances for making substantial progress.

Part of the success of conservatives in the last thirty years was that, starting in the 1960s, they began not only organizing grassroots constituencies but also developing ideas and theories for how they wanted to transform society.⁴⁸ While many liberals and progressives did not take these ideas seriously for many years, eventually many of these ideas were enacted by Congress and state legislatures. Liberals, in general, and fair housing advocates, in particular, have not invested similar resources into either organizing or developing new strategies to address our concerns.⁴⁹

⁴⁶For example, the Democratic Leadership Council, founded in 1985 by moderate and conservative Democratic Party officials, aimed to counter the rise of conservatives in the 1980s by moving the Party to the right, focusing on “market-oriented strategies for economic growth” and shifting the emphasis on social problems such as poverty and racial discrimination away from more structural explanations to individualized ones related to “personal responsibility.” FRANCES FOX PIVEN, ET AL., *KEEPING DOWN THE BLACK VOTE: RACE AND THE DEMOBILIZATION OF AMERICAN VOTERS* 128-130 (2009) (citing a speech by former Virginia Governor Charles Robb at a 1986 DLC conference in which he noted “[w]hile racial discrimination has by no means vanished from our society, it’s time to shift the primary focus from racism – the traditional enemy without – to self-defeating patterns of behavior – the enemy within.”).

⁴⁷It is true that fair housing litigation could in theory provide such a market incentive to decreasing discrimination, as a housing provider would weigh the cost of defending a lawsuit with the cost of discriminating. However, as noted earlier, in practice, such a deterrent effect has been virtually non-existent in the fair housing context. See Schwemm, *supra* note 33, at 467.

⁴⁸See, e.g., THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA* 247 (2004) (discussing conservative “movement building” including foundations, think tanks, lobbyists, media outlets, and grassroots organizers).

⁴⁹Michael H. Shuman and Merrian Fuller argue that philanthropic foundations often reinforce this tendency “through small, single-year, single-issue, project-oriented and action-over-thinking grants...[that] may well reduce the chances of effecting significant social changes, because too many foundation overseers, despite admirable intentions, discourage the long-term, systemic thinking progressives so desperately need.” Michael H. Shuman & Merrian Fuller, *Profits for Justice*, THE NATION, January 24, 2005, available at www.thenation.com/doc/20050124/shuman. Funding from HUD through its Fair Housing

The campaign and election of Barack Obama as President offer an example of the power of activism to lead to unprecedented change. When Obama announced his candidacy, many (myself included) were skeptical that the country was “ready” to elect an African American as President, a question that continued to be raised throughout most of the campaign. Yet, Obama was able to excite, motivate, and integrate an unprecedented number of volunteers into his campaign in a variety of capacities, thereby creating a new reality in which the idea of an African American President was not something that was impossible but real.⁵⁰

As Melissa Harris-Lacewell noted in an article published in November 2008, Obama’s electoral victory has not yet brought us to a “post-racial” society:

Barack Obama’s presidency will not deal a death blow to racism. Racial inequality still affects the quality of the air we breathe, the quality of our health, the likelihood of being erroneously shot by police, the likelihood of being poor, of having little education and of being unemployed. Race is sticky and racism is real. Being black will still mean living poorer and dying younger.⁵¹

Yet, we should not minimize its importance both symbolically and practically, as young children of every race grow up seeing an African American family in what was once an exclusively white neighborhood on Pennsylvania Avenue. By learning some of the lessons Obama’s campaign reinforced, and by pushing further, fair housing advocates have the potential to ensure that on the 80th anniversary of the Fair Housing Act, we can look back historically at the days of segregation and widespread discrimination, rather than repeating today’s questions of how to address them.

Initiative Program (FHIP) similarly makes long-term organizing and strategic planning difficult, as the program faces “severe funding constraints” and represents an “erratic funding stream” for non-profit fair housing groups. THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY, EXECUTIVE SUMMARY 7 (2009), available at [http://www.nationalfairhousing.org/Portals/33/National %20Commission/NFHA%20Executive%20Summary@20FINAL.pdf](http://www.nationalfairhousing.org/Portals/33/National%20Commission/NFHA%20Executive%20Summary@20FINAL.pdf).

⁵⁰CHUCK TODD, HOW BARACK OBAMA WON: A STATE-BY-STATE GUIDE TO THE HISTORIC 2008 PRESIDENTIAL ELECTION 42 (2009) (noting an “enthusiasm gap” in which “twice as many Obama supporters, 56%, were excited about the prospect of an Obama presidency” compared to McCain’s “tepid” support, with only 28% excited about the prospect of him becoming president).

⁵¹Melissa Harris-Lacewell, *We, the People*, THE NATION, Nov. 24, 2008, available at <http://www.thenation.com/doc/2008/11/24/harris-lacewell>.