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The Parma Housing Racial Discrimination Remedy Revisited

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THE PARMA HOUSING RACIAL DISCRIMINATION REMEDY REVISITED

W. DENNIS KEATING¹

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I. INTRODUCTION

In 1980, the city of Parma, Ohio, Cleveland's largest suburban city was found guilty of violating the Fair Housing Act.² Federal District Court Judge Frank Battisti imposed an extensive remedy upon Parma.³ Upon approval by the Sixth Circuit of the imposed remedy, its implementation began in 1982.⁴ Controversy surrounded much of the remedy, and fourteen years later following Battisti's death, Federal District Court Judge Kathleen O'Malley approved a new settlement aimed at ending the court's supervision of the

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²United States v. City of Parma, 494 F. Supp. 1049 (N.D. Ohio 1980). The 1968 Fair Housing Act, Title VIII of the Civil Rights Act, prohibits racial and other types of discrimination in housing with few exceptions. The enforcement provisions allow investigation by HUD and certified state and local agencies and remedies through the courts in actions which can be brought by aggrieved individuals and also by Department of Justice. 42 U.S.C. §§ 3601 et. seq. (1997). See generally JAMES KUSHNER, FAIR HOUSING DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION (2d ed. 1995); GEORGE R. METCALF, FAIR HOUSING COMES OF AGE (1988). See also BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE (1997).

³United States v. City of Parma, 504 F. Supp. 913 (N.D. Ohio 1980). See Note, *Judicial Remedies in "Pattern and Practice" Suits under the Fair Housing Act of 1968: United States v. City of Parma*, 33 CLEV. ST. L. REV. 109 (1984-85).

⁴United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981).

modified remedy after another two years.⁵ Along with the Gautreaux,⁶ Mt. Laurel,⁷ and Yonkers⁸ cases, the Parma case represents a longstanding remedy aimed at eliminating a pattern and practice of municipal discrimination in housing. It raises the issue of how far courts and the federal judiciary in particular, are willing and able to go in order to address systematic patterns of housing segregation. This article reviews the original decision and its appeal, the implementation of the original remedy, and the more recent remedy and its prospects for success.

When the U.S. Department of Justice (DOJ) filed suit against the city of Parma in April 1973, for violating the Fair Housing Act,⁹ federal policy on housing discrimination was muddled. Most litigation under the Fair Housing Act was brought by claims of racial discrimination against private parties, for example, realtors, landlords, lenders, and insurers. The attempt of George Romney, then Secretary of the U.S. Department of Housing and Urban Development (HUD), to condition federal aid for community development to virtually all-white suburbs on their adoption of open housing policies had been squelched in the

⁵Tom Breckenridge, *Court OK's Parma Plan*, PLAIN DEALER, Nov. 16, 1996, at B1. The settlement recognized both Parma's compliance with several of the elements of the original order and kept a few elements in place, for example, prohibiting any ordinances intended to prevent the construction of subsidized housing.

⁶See *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736 (N.D. Ill. 1969) (racial discrimination in Chicago public housing). HUD became a co-defendant, leading to a metropolitan-wide remedy using HUD's Section 8 Rental Assistance Program. For an account of the litigation, see Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451 (1988). For evidence that black participants in the Gautreaux program improved their circumstances by moving from Chicago to its suburbs, see J.E. Rosenbaum, *Black Pioneers - Do Their Moves to the Suburbs Increase Economic Opportunity for Mothers and Children?* 2 HOUSING POL'Y DEBATE 1179 (1991).

⁷See *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. Sup. Ct. 1986) (upholding the New Jersey Fair Housing Act of 1985); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. Sup. Ct. 1975) (suburban exclusionary zoning in New Jersey). The courts of New Jersey have held that New Jersey municipalities, especially those which are experiencing growth, are constitutionally required to provide housing opportunities to all income groups and cannot use municipal land-use controls to arbitrarily restrict housing opportunities, with certain types of communities granted exemptions. As a result, after substantial political resistance to judicial remedies, the state of New Jersey assigned fair share housing targets to those suburban communities covered by the rulings and 1985 legislation designed to implement them. See DAVID L. KIRP, ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995); CHARLES M. HAAR, *SUBURBS UNDER SIEGE RACE, SPACE, AND AUDACIOUS JUDGES* (1996).

⁸*United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985). For an account of the legal battle over the city's resistance to implementation of the ordered remedies, see Note, *The Yonkers Case: Separation of Powers as a Yardstick for Determining Official Immunity*, 17 FORDHAM URB. L.J. 217 (1989) (discrimination in federally-subsidized housing, as well as public schools).

⁹494 F. Supp. at 1049.

summer of 1971, by the White House of President Richard Nixon, which was seeking the votes of the residents of these communities for his re-election in 1972.¹⁰ The politics surrounding the post-election decision of the Civil Rights Division of the DOJ to sue Parma were unclear.¹¹

Only five years after passage of the Fair Housing Act by Congress, in the wake of the assassination of Reverend Martin Luther King, Jr. in April 1968, the segregation of housing in all or predominantly white suburban enclaves had been recognized as a matter of national concern by the Kerner Commission, appointed in 1968 by President Lyndon Johnson to investigate the urban riots that had plagued the United States beginning in the summer of 1965.¹² Urban economist Anthony Downs outlined a comprehensive strategy to integrate the racially segregated suburbs in a series of lectures at Yale University in 1971, but he recognized the unwillingness of politicians and the federal government to mandate forced housing integration, acknowledging the resistance to forced busing ordered by federal courts to desegregate central city public schools, contributing to the white exodus from the central cities to the suburbs.¹³

In *Milliken v. Bradley*, the United States Supreme Court refused to endorse metropolitan-wide remedies in urban school desegregation cases.¹⁴ The Court required proof that the suburbs involved were found guilty of complicity in the racial segregation of central city schools.¹⁵ In *Freeman v. Pitts*, the United States Supreme Court ruled that federal courts could not impose inter-jurisdictional school desegregation remedies, in the face of white flight, to residentially segregated suburbs in the wake of a central city school desegregation order in Atlanta.¹⁶

II. UNITED STATES V. PARMA: THE FAIR HOUSING LAWSUIT (1973-1980)

In the case of *United States v. Parma*, perhaps the most critical decision in the litigation was assignment of the case to Frank Battisti, the Chief Judge of the

¹⁰See generally MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* (1976). Romney left HUD after President Nixon imposed a moratorium in January 1973 on HUD's housing subsidy programs.

¹¹P.J. COOPER, *United States v. City of Parma, Ohio: OPEN HOUSING CONFLICT IN A CLEVELAND SUBURB IN HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS* 59-61 (1988). See also Joel L. Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement*, 17 U.C. DAVIS L. REV. 445, 447, 468 & n.87, 473-75 (1984).

¹²NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* (1968).

¹³ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* (1973). Downs reiterated the need for such an urban policy in *NEW VISIONS FOR METROPOLITAN AMERICA* (1994).

¹⁴418 U.S. 717 (1974).

¹⁵See generally *id.*

¹⁶503 U.S. 467 (1992).

U.S. District Court for the Northern District of Ohio. Battisti was quite familiar with the issue of housing discrimination, having previously presided over cases aimed at forcing metropolitan Cleveland suburbs, including Parma, to accept public housing.¹⁷ Battisti had found the Cleveland Metropolitan Housing Authority (CMHA) guilty of racial discrimination and ordered it to desegregate all future projects.¹⁸ However, virtually all of CMHA's projects were located in the city of Cleveland because most suburbs were unwilling to accept public housing for the poor. In *Mahaley v. Cuyahoga Metropolitan Housing Authority*, Battisti ruled that refusal of suburbs to contract with HUD and CMHA to build public housing violated federal fair housing and civil rights legislation, as well as the Thirteenth and Fourteenth Amendments.¹⁹ However, his 1973 opinion was overruled by the Sixth Circuit.²⁰ In addition to these housing discrimination cases, Battisti presided over the desegregation of the city of Cleveland's public schools, which he ordered in 1976.²¹

In his 1980 opinion, Battisti found Parma guilty of violations of the Fair Housing Act on several grounds.²² First, he held Parma violated the Fair Housing Act through the actions and statements of elected city officials, including the defeat in the city council of a very mild open housing resolution following King's assassination in 1968; the rejection of a proposed federally subsidized housing project (for the elderly) based on stringent zoning and parking regulations; and the city's refusal to agree to document the racial integration of any future federally subsidized housing as a condition for receiving a Community Development Block Grant (CDBG), to which Parma was otherwise entitled under the Housing and Community Development Act of 1974.²³

Parma's attempt to argue its residential segregation was accidental due to suburban migration patterns was roundly rejected, as was its denial of the right of the federal government to sue it or Battisti to hear the case.²⁴ Battisti found Parma acted intentionally to exclude blacks from moving into the city, although the racial impact of its actions also violated the Fair Housing Act under the standard enunciated by the U.S. Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²⁵ In 1970, only forty-one of Parma's

¹⁷COOPER, *supra* note 11, at 48-52.

¹⁸*Mahaley v. Cuyahoga Metro. Hous. Auth.*, 355 F. Supp. 1245 (N.D. Ohio 1973).

¹⁹*Mahaley v. Cuyahoga Metro. Hous. Auth.*, 500 F.2d 1087 (6th Cir. 1974).

²⁰COOPER, *supra* note 11, at 51-55.

²¹*Reed v. Rhodes*, 422 F. Supp. 708 (N.D. Ohio 1976).

²²*Parma*, 494 F. Supp. at 1065, 1067.

²³*Id.*

²⁴*Id.* at 1052, 1060.

²⁵429 U.S. 252 (1977).

total population of 100,216 were black, a miniscule proportion (0.04 percent).²⁶ In 1980, Parma's black population had increased to 364, still only 0.40 percent of the total population of 92,548.²⁷

Greater Cleveland has long been regarded as one of the most racially segregated metropolitan areas in the United States. Both the city of Cleveland and the neighboring suburbs of Cuyahoga County remain mostly segregated in the 1990's.²⁸ In the 1960's, Cleveland was the center of major racial conflicts. These included the 1966 riot in Hough, the 1967 election of the late Carl Stokes as the first black mayor of a major American city, and the 1968 black nationalist shoot-out with police in Glenville. This period saw the continued decline in the city's population as many of its residents continued to leave for the suburbs, including Parma, whose population boomed in the 1950's and 1960's.²⁹

III. THE ORIGINAL REMEDY: 1980-1982

During the hearings on the DOJ's proposed remedy, Parma did not present its own suggested remedy. Instead, it argued against the federal government's recommendations.³⁰ In his remedial order, Battisti criticized the conduct of Parma's attorneys:

Not only were Parma's submissions not helpful to the Court, but the briefs filed by Parma quoted inapposite cases and employed racially incendiary language The Court has admonished the defendant's present lawyers, both in chambers and from the bench, not to traumatize and incite those who may be affected by the delicate and necessary steps that the Court must take to remediate the statutory violations which were found in Parma.³¹

Having noted the need for an extensive remedial plan in light of Parma's "long-standing policy of deliberate racial exclusion," Battisti cited the purpose of the Fair Housing Act. In his view, its primary objective is to replace "the ghetto[s] . . . by truly integrated and balanced living patterns," citing the words of then Senator Walter Mondale.³² This view is disputed by those who believe Congress intended the legislation to be limited to prevention of racial discrimination in housing and was not designed to serve as a basis for

²⁶U.S. DEPARTMENT OF COMMERCE, 1970 CENSUS OF POPULATION P-1 (1972).

²⁷U.S. DEPARTMENT OF COMMERCE, 1980 CENSUS OF POPULATION P-58 (1982).

²⁸Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980's: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23, 23 (1994).

²⁹W. DENNIS KEATING, *THE SUBURBAN RACIAL DILEMMA: HOUSING AND NEIGHBORHOODS* (1994).

³⁰494 F. Supp. at 1067.

³¹*Parma*, 504 F. Supp. at 916.

³²*Id.* at 917.

promoting racial integration in housing. There is little legislative history to resolve this critical difference of opinion.³³

Battisti did state he "should not order relief that is more intrusive on the governmental functions of Parma than is necessary to achieve Title VIII's goals."³⁴ Battisti's remedial order was essentially the same proposed by the DOJ, supported by its expert witness Paul Davidoff, an open housing advocate and director of Suburban Action. The remedial order contained the following elements:

1. An injunction against any future violations of the Fair Housing Act;
2. An educational program for Parma officials and employees calculated to make them aware of problems of housing discrimination and its remedies;
3. Enactment of a fair housing resolution by the city council;
4. An advertising program promoting Parma as an equal housing opportunity community;
5. A requirement that the opinions in the case be made available to Parma citizens upon request;
6. Limitations on Parma's zoning ordinances, so that they would not be applied to block low- and moderate-income housing projects;
7. A plan to develop low-income housing, either through a cooperation agreement with CMHA or by Parma's creation of its own public housing authority, with a goal of developing 133 new low-income housing units per year, with tenants drawn in part from CMHA's waiting list;
8. A requirement that Parma participate in HUD's Section 8 rental housing assistance program;
9. A requirement that Parma apply to HUD for the funds due to it under the CDBG Program;
10. Establishment of a Fair Housing Committee (FHC) of Parma citizens to: develop a fair housing outreach program; develop a municipal Housing Information and Referral Service to assist those interested in moving to Parma; develop a program to foster interest among developers in bringing low-income housing to Parma, including incentives; and conduct a survey of vacant land in Parma suitable for low-income housing development.

³³ Andrew Weise, *Neighborhood Diversity: Social Change, Ambiguity, and Fair Housing Since 1968*, 17 J. URB. AFF. 107, 121 (1995). See also Jean E. Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969).

³⁴ *Parma*, 504 F. Supp. at 917.

11. Establishment of an Evaluation Committee composed of outsiders to review the decisions of the FHC.³⁵

Battisti then added a requirement of his own: the appointment of a Special Master to oversee the implementation of the remedial order. This was unprecedented in fair housing litigation. Battisti ordered the appointment of local attorney Joseph Bartunek as Special Master.³⁶

Parma appealed Battisti's order and obtained a stay pending the appeal. On October 14, 1981, the Sixth Circuit Court of Appeals affirmed Battisti's order with two exceptions.³⁷ Parma's constitutional and procedural objections to the DOJ lawsuit and Battisti's order were rejected. However, the Sixth Circuit overruled the setting of a specific annual goal for the construction of new low-income housing units as premature and the appointment of a special master as overreaching and unnecessary.³⁸ The Sixth Circuit opined that the creation of the FHC and the Evaluation Committee was sufficient to oversee implementation of the order.³⁹ The stage was now set for the implementation of the remedial order. While there was no special master, Battisti retained Cleveland fair housing attorney Avery Friedman as *amicus curiae* during the implementation of the remedy.⁴⁰

IV. IMPLEMENTATION OF THE ORIGINAL REMEDY (1982-1996)

In late 1982, implementation began with the appointment of the FHC and the Evaluation Committee. During the initial stage, the city, with FHC approval, complied with several major elements of the order. Parma applied to HUD for CDBG funds and certification of administration of the Section 8 program, enacted a fair housing resolution, had the Regional Planning Commission conduct a survey of vacant sites and then purchased property options based on a site selection study, and arranged with the Cuyahoga Plan of Ohio, Cleveland's major metropolitan fair housing agency, to provide an educational program on fair housing for Parma officials and housing referral services.⁴¹ A major decision by Parma was not to contract with CMHA to develop public housing. Instead, Parma exercised its option to create its own public housing authority.⁴² CMHA was then a troubled agency, with growing

³⁵*Id.* at 918-23. See also COOPER, *supra* note 11, at 71-72.

³⁶*Id.* at 923-26 (Bartunek was appointed as a United States Magistrate in the Northern District of Ohio in 1986).

³⁷*Parma*, 661 F.2d at 578. See also J. Mark Powell, Note, *Fair Housing in the United States: A Legal Response to Municipal Intransigence*, U. ILL. L. REV. 279, 291-92 (1997).

³⁸*Parma*, 661 F.2d at 578.

³⁹*Id.*

⁴⁰COOPER, *supra* note 11, at 77.

⁴¹*Id.* at 74.

⁴²*Id.* at 75.

fiscal and management problems contributing to its poor reputation.⁴³ Its resident population and waiting list was predominantly black.⁴⁴

The first major controversy occurred when the city, DOJ and the Evaluation Committee did not agree over the content of Parma's proposed advertising nor did they agree upon where it would be published.⁴⁵ This disagreement was not resolved until 1987 and the first advertisements did not run until 1988.⁴⁶ Few blacks responded to this belated advertising campaign.⁴⁷ Parma did increase its black population through occupancy of its first public housing project, a sixty-unit development opened in 1987, and as a participant in the HUD Section 8 rental assistance program.⁴⁸ It must be noted that Parma's use of federal housing programs began during the Reagan administration's drastic cutbacks in HUD's future authority for new construction of subsidized housing. The federal housing subsidies used by Parma undoubtedly contributed to the small increase in its black population in the 1990 census - 632 out of a total population of 87,876.

When a 1985 January hearing produced little agreement over the extent of Parma's progress in compliance up to that point, Judge Battisti requested attorney Avery Friedman to report on the status of compliance with the remedy.⁴⁹ In his March 1985, report, Friedman criticized Parma for taking too narrow an approach.⁵⁰ Friedman made eight recommendations aimed at a more active policy.⁵¹ Parma reacted by attacking Friedman and his role in the implementation process, thus, perpetuating the conflict. In September 1987, Judge Battisti, in approving the long-delayed advertising campaign, criticized

⁴³*Id.*

⁴⁴*Id.*

⁴⁵COOPER, *supra* note 11, at 75.

⁴⁶KEATING, *supra* note 29, at 144-45.

⁴⁷I. Wilkerson, *A City Finds Its Racist Image Hard to Shed*, N.Y. TIMES, Nov. 30, 1988, at 1A.

⁴⁸KEATING, *supra* note 29, at 144-45.

⁴⁹COOPER, *supra* note 11, at 77-78.

⁵⁰*Id.*

⁵¹*Id.* Friedman recommended: 1) a professional marketing campaign to correct the Parma image; 2) meetings with minority groups and others who would be likely to actually convey the message to area minorities; 3) development of a housing information office in Parma; 4) enactment of a Parma Fair Housing law to handle complaints; 5) efforts to make builders and financial institutions more aware of Parma's new policies to encourage those who had been discouraged by their earlier encounters with the city; 6) community meetings to educate Parma citizens on the benefits of an open housing community; 7) development of construction incentives to encourage developers to consider Parma; and 8) provision of staff for the Evaluation Committee so that it could make a greater contribution to the effort. *Id.*

the pace of progress. Parma reacted by blaming Judge Battisti for the delay.⁵² The election of a new mayor - Michael Ries - two months later gave hope that the attitude of the city's administration might become more positive. Yet, in 1992, Friedman charged Parma with failing to change its image, citing its refusal to change its employee residency requirement even after a 1990 suit filed by the NAACP, charging racial discrimination in its policy.⁵³ In 1995, Parma changed this policy by allowing new city employees up to eighteen months to establish residency.⁵⁴

Up until the death of Judge Battisti in 1994, the overall record of progress regarding the implementation of the Parma remedy was decidedly mixed. In 1988, Parma enacted a fair housing ordinance.⁵⁵ The next year, however, it terminated its contract with the Cuyahoga Plan.⁵⁶ Other than new black residents occupying federally subsidized housing, there was little increase in Parma's black population. Friedman's recommendations that Parma take far more active measures to attract blacks, including additional housing incentives, had not been adopted. Following the sudden death of Parma Mayor Michael Ries in 1994, and the appointment of a new law director by new Mayor Gerald Boldt, the city sought to end the longstanding remedial order. These efforts finally bore fruit in November 1996, when Federal District Court Judge Kathleen O'Malley approved a new settlement order, sixteen years after Battisti's issuance of the original remedial order.⁵⁷

V. THE NEW REMEDY: 1996

The new agreement was borne out of a negotiated agreement between the DOJ and Parma. In effect, the role of Avery Friedman was ended. The key aspects of the new remedy are:

1. Parma is to establish a new housing counseling office to encourage blacks to move to Parma;
2. Parma is to prepare an affirmative marketing plan to attract minorities to the city;
3. Parma established a mortgage incentive program for eligible homebuyers;

⁵²KEATING, *supra* note 29, at 146. See also L. DeLater, *Judge Attacks Parma's Pace on Integration*, PLAIN DEALER, Sept. 11, 1987, at A1.

⁵³Michael O'Malley, *Lawyer Says Parma Still Discriminates*, PLAIN DEALER, Apr. 23, 1992, at B3. At the filing of the NAACP lawsuit, Parma had only one black employee out of approximately 500. See also KEATING, *supra* note 29, at 141.

⁵⁴Tom Breckenridge, *Parma Drops Employee Residency Requirement*, PLAIN DEALER, Nov. 16, 1995, at B2.

⁵⁵KEATING, *supra* note 29, at 147.

⁵⁶*Id.*

⁵⁷United States v. City of Parma, No. C73-439 (N.D. Ohio Nov. 15, 1996).

4. Parma will use federal funds for apartment renovations, with participating landlords agreeing to give prospective black tenants advance notice of vacancies through the housing counseling office.⁵⁸

Interestingly, Avery Friedman had recommended the first two requirements in his 1985 report to Judge Battisti.⁵⁹ Once the city certifies to the DOJ that all of the elements of the new remedy are operational, the order is to be terminated and the case dismissed two years later.⁶⁰

The first two elements of the new remedy present the greatest challenge. Given the scant black response to the 1988 advertising campaign, overcoming Parma's negative image to prospective black residents will require reversing longstanding perceptions. These were reinforced by the NAACP's employment discrimination lawsuit against the city and aggravated by an incident in 1996 when a newly arrived black family left after being harassed by white racists.⁶¹ In 1997, the city again contracted with the Cuyahoga Plan for it to operate a Parma Housing Counseling Office (PHCO) and to develop an affirmative marketing and housing counseling plan. The PHCO opened in March 1997, and conducted its first Home Buying Seminar in July 1997. As part of the marketing campaign, it has produced a video to promote Parma to minorities.

The Cuyahoga Plan has considerable experience to conduct this effort. Beginning in 1991, the Cuyahoga Plan has operated a similar housing service in several predominantly white east side Cleveland suburbs known as "Hillcrest." The Cuyahoga Plan assumed this role in the wake of the dissolution of the East Suburban Council for Open Communities (ESCOC) which initiated this 1985 effort. It was aimed at opening up additional housing choices to blacks moving to the eastern suburbs, where most have gravitated to a few communities with substantial black populations, most notably Cleveland Heights, University Heights and Shaker Heights.⁶² These three pro-integrative cities have long supported the Cuyahoga Plan financially and also provided financial support to ESCOC during its existence.⁶³ However, the suburban cities in the Hillcrest area did not publicly support ESCOC, despite its overtures. While ESCOC did enjoy some success in attracting black homebuyers and renters to Hillcrest, it was quite limited.⁶⁴

⁵⁸*Id.*

⁵⁹See generally COOPER, *supra* note 11.

⁶⁰*Id.*

⁶¹Tom Breckenridge, *Police Say Cross Matter Under Review*, PLAIN DEALER, July 6, 1996, at B1.

⁶²KEATING, *supra* note 29, at 180-87.

⁶³*Id.* at 171.

⁶⁴*Id.* at 186-87.

In Parma, the most important opportunity to make an impact in the housing market is through home ownership. In 1990, seventy-eight percent of Parma's 34,685 occupied housing units were owner-occupied. The median single-family home sale price in Parma in 1996 was \$95,000, compared to \$110,000 in the suburban Cuyahoga County. In 1996, there were 1,160 recorded sales of single-family homes in Parma.⁶⁵ Under the new remedy, Parma is committed to provide \$500,000 to fund a Down Payment Assistance Program (DPAP). The DPAP is to give preference to African-American homebuyers. They can receive up to \$10,000, provided they can afford a five percent down payment. The PHCO is to use this incentive program in conjunction with homebuyer seminars, outreach advertising, and home tours to attract black homebuyers to Parma. Minimally, this would subsidize fifty new minority homebuyers. Parma previously instituted a similar program for first time homebuyers in 1993. If eligible, they can receive a second mortgage up to \$10,000, which is forgiven if they occupy the house for at least fifteen years.

Both Cleveland Heights, including University Heights and Shaker Heights, have long had pro-integrative mortgage incentive programs. Through their municipal housing offices, they have used financial incentives to attract primarily white homebuyers to those neighborhoods with significant black populations in an effort to maintain racial diversity.⁶⁶ The ESCOC/Cuyahoga Plan program in Hillcrest, and a similar program sponsored by the Ohio Housing Finance Agency (OHFA) in Cuyahoga County, were aimed primarily at attracting black homebuyers to predominantly white neighborhoods to achieve the same goal.⁶⁷

These pro-integrative mortgage incentive programs were considered controversial. Opponents of "integration maintenance" objected to the use of racial preferences. Some black realtors objected to giving financial incentives to white homebuyers in order to persuade them to move into neighborhoods with a black presence.⁶⁸ The legality of pro-integrative mortgage incentive programs adopted voluntarily by municipalities and OHFA has not been directly challenged.⁶⁹ Outside of metropolitan Cleveland, this approach to promoting greater racial integration in housing has rarely been used. Even in an era of backlash against affirmative action, there can be no doubt that a court-ordered program like DPAP, with a racial preference, is a legitimate means to ending illegal prior racial discrimination by a municipality. A 1992 evaluation of four pro-integrative mortgage incentive programs in Cuyahoga County found that both black and white participants were satisfied with the

⁶⁵See U.S. DEPARTMENT OF COMMERCE, 1990 CENSUS OF POPULATION 184 (1991).

⁶⁶KEATING, *supra* note 29, at 202-04.

⁶⁷*Id.* at 204-05.

⁶⁸*Id.* at 204.

⁶⁹*Id.* at 235. Ohio's Attorney General issued an advisory opinion upholding its legality. S.A. Thomas, *Efforts to Integrate Housing: The Legality of Mortgage-Incentive Programs*, 66 N.Y.U. L. REV. 940 (1991).

programs and supportive. The incidence of racial discrimination experienced by the participants was relatively minor.⁷⁰

The legality of the court-ordered affirmative marketing effort being developed by the Cuyahoga Plan for Parma is also unquestioned. A similar race-conscious program, but one aimed at whites by the village of Park Forest, Illinois, was challenged as a result of the refusal of a real estate board to include such marketing in its multiple listings service, on the ground that it violated the Fair Housing Act.⁷¹ Park Forest's voluntary policy aimed at maintaining racial diversity in neighborhoods was upheld by the Seventh Circuit Court of Appeals on the ground that no blacks were denied access to housing.⁷² Here, there can be little doubt as to its legitimacy as a tool to ending prior racial discrimination and segregation in housing in Parma.

As for attracting renters to Parma, the city continues to have Section 8 rent subsidies available as long as HUD's funding of this program continues.⁷³ The new remedy provides for no additional direct subsidies that might attract black renters to Parma. Presumably, landlords will be attracted to the apartment renovation program, funded in the amount of \$500,000. Assuming normal vacancy turnover, this should offer opportunities for black renters to move into Parma apartments. To what extent landlords and black tenants will actually take advantage of this program remains to be seen. Oak Park, Illinois, a leader in pro-integrative municipal housing policy has also had a similar program which yielded positive results.⁷⁴

With the new Parma remedy not yet certified as fully operational as of November 1997, it is too early to reach any conclusions as to its success.⁷⁵ A major question for the future is just how to measure its success, particularly if the District Court, with the DOJ's approval, dismisses the new remedial order in 1999-2000 based upon Parma's compliance. Although not automatic, it certainly must be an expectation of the city of Parma.

⁷⁰KEATING, *supra* note 29, at 206-10.

⁷¹*Id.* at 233-35.

⁷²*South-Suburban Hous. Ctr. v. Greater South-Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991). See also Mark W. Zimmerman, *Opening the Door to Race-Based Real Estate Marketing: South-Suburban Housing Center v. Greater South-Suburban Board of Realtors*, 41 DEPAUL L. REV. 1271 (1992).

⁷³In February 1997, HUD Secretary Andrew Cuomo informed Congress that HUD needs an additional \$5.6 billion appropriation by October, 1997 to continue the Section 8 rental program at its present level. M. Janofsky, *Cuomo Says HUD Needs an Extra \$5.6 Billion*, N.Y. TIMES, Feb. 28, 1997, at 13A.

⁷⁴KEATING, *supra* note 29, at 213.

⁷⁵In September 1997, Parma received an \$8,331 fair housing grant from HUD to provide fair housing information, support new minority residents, publish a resource director, and create a community advisory council to hold a forum on race relations. Sabrina Eaton, *Cleveland, Parma Get Funds from HUD to Fight Bias*, PLAIN DEALER, Oct. 1, 1997, at B7.

The order contains no quantitative standards by which to measure its impact. The obvious quantitative standards would involve outcomes. These would include: the number of blacks counseled by PHCO; the number of blacks purchasing homes, including those participating in the DPAP; and the number of blacks who rented apartments as a result of the apartment renovation program. The city must file quarterly compliance reports with the DOJ reporting this data for those who receive PHCO services. During the implementation of the first remedial order, the Evaluation Committee filed monthly reports with the court specifying such data as the number and race/ethnicity of participants in Parma's public housing and Section 8 rental assistance housing programs; however, no specific goals were set, and the Sixth Circuit invalidated the annual construction goal for low-income housing.⁷⁶ Another quantitative test would be the increase in Parma's black residents, both homeowners and renters, as measured by the millennial year 2000 census although this data would not be available until after the possible dismissal of the case in two years.

In contrast to the initial Parma remedial order, the Federal District Court Judge in *United States v. Yonkers*, imposed more specific housing goals.⁷⁷ In addition to injunctive relief, the court ordered adoption of a fair housing resolution, establishment of a Fair Housing Office (FHO), and transfer of Yonker's Section 8 existing housing program to the Yonkers Municipal Housing Authority.⁷⁸ The court's order contained detailed guidelines as to the development of 200 new public housing units already approved by HUD.⁷⁹ The court also required the creation of an Affordable Housing Trust Fund initially financed with not less than twenty-five percent of Yonkers' CDBG allocation from HUD to assist in the development of additional housing to desegregate Yonkers. This could be used to provide incentives to private developers to include low-moderate income units in their projects, a policy known as "inclusionary housing."⁸⁰ Approximately one decade later, the Yonkers remedial order had the following results: the 200 units of new public housing have been occupied since 1991; thirty existing housing units had been subsidized to make them affordable; 142 new units of mixed-income housing have been approved; and more than 500 units of new and existing affordable housing are to be provided in the next five years.⁸¹ In contrast, under the original Parma remedial order, only sixty new units of low-income public

⁷⁶*Parma*, 661 F.2d at 562.

⁷⁷*United States v. Yonkers Bd. of Educ.*, 655 F. Supp. 1577 (S.D.N.Y. 1986).

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹Letter from Michael H. Sussman, NAACP Attorney, to Dennis Keating, Professor of Urban Studies and Law and Associate Dean, Levin College of Urban Affairs, Cleveland State University (May 15, 1997) (on file with author).

housing have been added to Parma's housing stock.⁸² There is no provision in the revised remedy for any additional new subsidized housing aimed at attracting minorities.

The alternative standard for compliance with the new remedial order presumably is a good faith effort. Assuming Parma does all that it agreed to do and the Cuyahoga Plan makes its best efforts to market Parma housing to blacks, whether for market rate or subsidized housing, then by this standard, compliance has been achieved and the dismissal of the case is justified. Certainly, the attitude of the current administration of Parma is a far cry from the administration that was found guilty by Judge Battisti and then challenged the legality of the original order and resisted some of its initial implementation. However, even with good faith efforts, the actual outcome may be a very small increase in the number of black Parma residents. Of course, if these numbers show signs of increasing significantly over time, this could be regarded as acceptable progress. This is particularly true when comparing Parma to its almost all white neighboring communities which have made no similar affirmative efforts to reduce racial segregation prior to and during this period.⁸³

VI. CONCLUSION

Whichever compliance standard is more appropriate, the results of twenty-four years of litigation and implementation of remedial orders to date suggest the limits of judicial intervention. While the first remedial order has marginally increased the number of minority residents and subsidized housing, the court did not attempt to increase federal housing assistance to Parma beyond what it could have normally expected. With regard to the unsubsidized housing market, the court did not order Parma to provide additional incentives to private developers, in contrast to the Yonkers and Mt. Laurel cases. The extent to which Parma is more racially diverse is very small as measured by its demographics as of the 1990 U.S. census.

Perhaps, most importantly, there are limits to what courts can do to change attitudes, both of white residents of Parma and non-Parma black residents. It will take much more than the Cuyahoga Plan's affirmative marketing efforts to change the latter. As to the former, there are few signs that community and religious leaders in Parma are publicly willing to join in pro-integrative housing efforts. This was a key to the adoption of these policies in the suburbs of Shaker Heights and Cleveland Heights during their racial transformation in the beginning in the mid-1950's (Shaker Heights) and late-1960's (Cleveland Heights).⁸⁴ Yet, without the intervention of DOJ and the federal court, there is no indication that Parma, or its neighboring suburban communities, would voluntarily adopt pro-integrative housing policies.

⁸²504 F. Supp. at 923-26.

⁸³KEATING, *supra* note 29, at 141.

⁸⁴See generally *id.*

The Fair Housing Act, amended and broadened in its coverage in 1988,⁸⁵ still offers one of the few hopes for attempting to use the legal system to trigger major changes in racially exclusionary suburban housing practices. However, DOJ lawsuits against predominantly white suburbs based on racially discriminatory patterns and practices have occurred in only a few instances since 1968.⁸⁶ With a majority of the United States population residing in metropolitan urban areas as of 1990, and in light of the resulting shift of political power to suburbs within these areas, it is unlikely the Clinton administration, or any future administration, would undertake a federal policy of widespread litigation against white suburbs. Absent overwhelming evidence of egregious intentional violations of the Fair Housing Act, as found in the cases of *Parma*⁸⁷ and *Yonkers*,⁸⁸ the federal courts will not be the vehicle for housing desegregation in suburban America.

While HUD has had a small-scale long-term demonstration underway since 1993 in several metropolitan areas to test the impact of a replication of the Gautreaux remedy in Chicago, i.e., allowing minorities eligible for public housing and Section 8 rental assistance to use federal subsidies to move to the suburbs, the results will not be known for several years. Assuming suburbs oppose such a program if it were to be proposed on a large scale, it is most unlikely the federal government would impose it or condition other federal housing and community development assistance on suburban acceptance of providing housing opportunities for lower-income minority renters. In the case of Mt. Laurel, almost 17,000 new units of housing have been made available in the state of New Jersey⁸⁹ to mostly moderate-income occupants previously unable to afford suburban market rate housing as of Spring 1995, but few minorities have benefited from this program, mandated by the New Jersey Supreme Court under the state constitution, which is financially supported by the state of New Jersey.⁹⁰ Given the modest results of these few longstanding

⁸⁵ See James A. Kushner, *The Fair Housing Amendments of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1988); Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745 (1993).

⁸⁶ See generally Selig, *supra* note 11. The Civil Rights Division of DOJ under the Reagan administration did not challenge exclusionary land use regulations. *Id.* at 504.

⁸⁷ *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980).

⁸⁸ *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985).

⁸⁹ This is called the Moving to Opportunity Program. Authorized by Congress in 1992, it is intended to allow the dispersion of the inner city poor in public and assisted housing in high poverty areas to private rental housing in suburban metropolitan areas. It is being attempted on a very small scale in a few major metropolitan areas.

⁹⁰ See N.B. WISH & S. EISENDORFER, *THE IMPACT OF THE MT. LAUREL INITIATIVES: AN ANALYSIS OF THE CHARACTERISTICS OF THE APPLICANTS AND OCCUPANTS* (1996). See also Martha Lamar, et al., *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197 (1988). Under the 1985 compromise legislation, suburban communities may buy out up to fifty percent of their fair share of low- and moderate-income housing by subsidizing it in central cities with a demonstrable need

judicial remedies in leading housing discrimination cases, the prospects for significant changes in racially segregated housing patterns in most of America's predominantly white suburbs through court-ordered actions remain bleak.⁹¹

for it. See Harold McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMPLE L. REV. 665 (1987).

⁹¹See generally DOWNS, *supra* note 13. For a proposal for a national fair share housing plan, see John C. Boger, *The Urban Crisis: The Kerner Comm'n Report Revisited; Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573 (1993). Instead of sanctions against non-complying municipalities, Bogner proposes to punish homeowners within these jurisdictions by terminating their federal tax deductions for mortgage interest payments and state and local taxes. *Id.* No proposal is more likely to be politically infeasible than threatening this sacrosanct tax benefit in a society where approximately two-thirds of its households are homeowners. *Id.*