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The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination

Michael B. de Leeuw

Fried, Frank, Harris, Shriver & Jacobson LLP

Megan K. Whyte

Fried, Frank, Harris, Shriver & Jacobson LLP

Dale Ho


Fried, Frank, Harris, Shriver & Jacobson LLP

Catherine Meza

Fried, Frank, Harris, Shriver & Jacobson LLP

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Alexis Karteron

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THE CURRENT STATE OF RESIDENTIAL SEGREGATION
AND HOUSING DISCRIMINATION
THE UNITED STATES' OBLIGATIONS UNDER THE INTERNATIONAL
CONVENTION ON THE ELIMINATION OF ALL FORMS OF
RACIAL DISCRIMINATION

*Michael B. de Leeuw**
*Megan K. Whyte***
*Dale Ho****
*Catherine Meza*****
*Alexis Karteron******

The United States government accepted a number of obligations related to housing when it ratified the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). For example, the United States government must ensure that all people enjoy the rights to housing and to own property, without distinction as to race; cease discriminatory actions, including those that are discriminatory in effect regardless of intent; and take affirmative steps to remedy past discrimination and eradicate segregation. This Article discusses the United States government's compliance with those obligations, as well as the importance of meaningful compliance in maintaining the United States' credibility on human rights issues.

In the context of those obligations, this Article evaluates the current state of housing discrimination and segregation in the United States and the significant problems the United States government must address to fulfill its obligations under CERD. For example, some programs and policies of the United States government, both historically and today, have contributed to the creation and perpetuation of highly segregated residential patterns across the United States. In addition, private acts of discrimination frequently confront African Americans and Latinos attempting to rent or purchase a home, or attempting to secure funding or insurance for a home purchase. The United States government must improve its enforcement of the nation's fair housing laws to improve its compliance with CERD and ensure that all residents, regardless of race, enjoy a right to fair housing. This Article concludes

* Partner, Fried, Frank, Harris, Shriver & Jacobson LLP; J.D., Rutgers School of Law—Newark; B.A., Montclair State University.

** Associate, Fried, Frank, Harris, Shriver & Jacobson LLP; J.D., University of Michigan Law School; A.B., Harvard College.

*** Associate, Fried, Frank, Harris, Shriver & Jacobson LLP; J.D., Yale Law School; A.B., Princeton University.

**** Associate, Fried, Frank, Harris, Shriver & Jacobson LLP; J.D., University of California, Berkeley, Boalt Hall School of Law; Ed.M., Harvard University; B.A., New York University.

***** Staff Attorney, NAACP Legal Defense and Educational Fund; J.D., Stanford Law School; A.B., Harvard College.

by directing a series of recommendations to specific arms of the government, specifically the Department of Housing and Urban Development, the Department of Justice, the United States Congress, the Internal Revenue Service, and state and local governments, to facilitate the United States government's compliance with CERD.

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INTRODUCTION

In 1966, only twelve years after the United States Supreme Court overturned *Plessy v. Ferguson*¹ by declaring that de jure segregation was no longer constitutional in *Brown v. Board of Education*,² the United States signed (though did not yet ratify) the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD” or “the Convention”).³ That convention “[r]esolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination.”⁴

CERD defines “racial discrimination” as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁵

Thus, CERD prohibits discriminatory effects, not just intentional discrimination. CERD also exempts affirmative action from its definition of racial discrimination, so long as such measures do not continue after their goals have been achieved.⁶

We are grateful for the substantial assistance of Philip Tegeler of the Poverty & Race Research Action Council, Sara Pratt on behalf of the National Fair Housing Alliance, Myron Orfield, John Goering, Gregory Squires, and all of the members of the CERD working group on housing discrimination and segregation. Thank you also to Marc Mechanic for his research assistance. This Article is based on a shadow report submitted by housing scholars and research and advocacy organizations to the Committee on the Elimination of Racial Discrimination during the meeting of its 72nd session in Geneva. That shadow report is available at <http://www.prrac.org/projects/cerd.php>. For a list of the individual and organizational signatories to that shadow report, see the Appendix to this Article.

1. 163 U.S. 537 (1896) (upholding the constitutionality of racial segregation under the doctrine of “separate but equal”).
2. 347 U.S. 483 (1954) (striking down laws that provided for de jure segregation).
3. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].
4. *Id.* pmbl.
5. *Id.* art. 1(1).
6. *Id.* art. 1(4) (“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination,

The provisions of CERD have been legally binding in the United States since the treaty was ratified in 1994.⁷ Many of the requirements imposed by CERD correspond to federal and state antidiscrimination laws in force in the United States, but some mandate that the United States government take greater responsibility for the role it plays—and has played—in creating and perpetuating racial discrimination and inequality. As it does with many of the international treaties it ratifies, the United States ratified CERD pursuant to reservations, understandings, and declarations (“RUDs”)⁸ that were intended to convince the Senate that the treaty would effect no change on domestic law.⁹ One of the RUDs declares that the treaty is non-self-executing,¹⁰ meaning that the provisions of CERD do not, by themselves, “give rise to domestically enforceable federal law.”¹¹ Although the RUDs also reject certain provisions that the United States government saw as infringing on other rights, such as those of free speech or privacy,¹² the obligations imposed by CERD still constitute “international law obligations on the part of the United States,” and the United States government’s agreement to “undertake” to comply with the provisions of CERD represents a “commitment . . . to take future action through [its] political branches” to comply with those obligations.¹³ This Article does not suggest that CERD is enforceable federal law but instead discusses how the United States government can better comply with the international law obligations it accepted by ratifying CERD. Enacting new legislation, or even improving enforcement of current fair housing

provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”)

7. Office of the United Nations High Commissioner for Human Rights, *International Convention on the Elimination of All Forms of Racial Discrimination*, New York, 7 March 1966, <http://www2.ohchr.org/english/bodies/raufication/2.htm> (last updated July 18, 2007) [hereinafter Ratification List].

8. *Id.*

9. See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 174–75 (1999).

10. Ratification List, *supra* note 7.

11. *Medellin v. Texas*, 170 L. Ed. 2d 190, 210 & n.2 (2008). The Supreme Court’s definition is consistent with other sources, which state that a non-self-executing treaty cannot be enforced through a private right of action in United States courts. See Sloss, *supra* note 9, at 151–52 (noting that lack of private right of action does not mean courts cannot directly apply the treaty); Anne Paxton Wagley, *Newly Ratified International Human Rights Treaties and the Fight Against Proposition 187*, 17 CHICANO-LATINO L. REV. 88, 100 (1995).

12. See Ratification List, *supra* note 7.

13. *Medellin*, 170 L. Ed. 2d at 210, 212. As noted in Part I.B, *infra*, many of the provisions of CERD require States parties to “undertake” to do certain things, for example, to “undertake to prevent, prohibit and eradicate all practices of [a segregative] nature,” CERD, *supra* note 3, art. 3, or to “undertake to prohibit and to eliminate racial discrimination in all its forms,” *id.* art. 5.

laws, are examples of affirmative steps the United States government could “undertake” to comply with those obligations.

This Article focuses on continuing racial discrimination relating to housing and the current state of residential segregation in the United States in the context of the obligations accepted by the United States government when it ratified CERD. Part I discusses the history of CERD, the obligations it imposes on the United States government related to housing, the importance of compliance for the United States, and the recent review of the government’s compliance with the treaty by the Committee on the Elimination of Racial Discrimination (“the Committee”). Part II provides a snapshot of residential segregation in the United States today. Part III demonstrates how the government’s policies have, in several instances, helped to create and perpetuate discrimination and segregation. Part IV explains how inadequate government enforcement of antidiscrimination laws perpetuates discrimination and segregation. Part V provides recommendations directed to specific arms of the government to facilitate the United States’ compliance with CERD and ensure that all residents enjoy the right to fair housing.

I. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

A. *History of CERD*

In 1960, a surge in anti-Semitic incidents in several different parts of the world prompted the General Assembly of the United Nations to adopt a draft resolution on “Manifestations of Racial Prejudice and National and Religious Intolerance.”¹⁴ A precursor to CERD, the resolution addressed the “continued existence and manifestations of racial prejudice and national and religious intolerance in different parts of the world” and encouraged international governments to rescind laws, as well as to enact legislation to combat intolerance and prohibit discrimination.¹⁵ While the General Assembly considered the draft resolution, along with the issues of racial prejudice and national and religious intolerance, delegations from

14. NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 1 (2d ed. 1980); see also Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT’L & COMP. L. Q. 996, 997 (1966) (“The chain of events which led to the preparation and eventual adoption of the Convention started as a reaction to an epidemic of swastika-painting and other ‘manifestations of anti-Semitism and other forms of racial and national hatred and religious and racial prejudices of a similar nature’ which occurred in many countries in the winter of 1959–1960.”).

15. LERNER, *supra* note 14, at 1; U.N. Econ. & Soc. Council [ECOSOC], Report on the Commission of Human Rights: Manifestations of Racial Prejudice and National and Religious Intolerance, B, U.N. Doc E/RES/826 (XXXII) (July 27, 1961).

African states (later joined by other states) proposed that the General Assembly undertake the preparation of an international convention on the elimination of all forms of racial discrimination.¹⁶ The Sub-Commission on the Prevention of Discrimination and Protection of Minorities began work on the proposed convention in January 1964.¹⁷

After forty-three meetings the General Assembly's Third Committee unanimously approved CERD and opened it for signature and ratification.¹⁸ Six days later, on December 21, 1965, the General Assembly unanimously approved the Convention.¹⁹ CERD embodied the world community's declaration of an international standard against racial discrimination and "drew its primary impetus from the desire of the United Nations to put an immediate end to discrimination against black and other nonwhite persons."²⁰ It has been described as "the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races."²¹ To date, 173 nations ("States parties") have ratified CERD,²² under which they assume a variety of obligations charging member states to condemn racism and to pursue appropriate measures to ensure both the elimination of racial discrimination and the promotion of understanding among all races.²³

The United States signed CERD in September 1966 and ratified the treaty in 1994.²⁴ In recognition of the international and domestic significance of the United States' participation in and compliance with CERD, Senator Claiborne Pell made the following observation during Senate proceedings to ratify CERD:

The convention is an important instrument in the international community's struggle to eliminate racial and ethnic discrimination. As a nation which has gone through its own

16. Schwelb, *supra* note 14, at 998.

17. Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 284 (1985).

18. Schwelb, *supra* note 14, at 999-1000.

19. *Id.* at 1000.

20. Meron, *supra* note 17, at 283-84. While the initial proposal of a resolution addressing racial discrimination was prompted by anti-Semitic sentiment, one scholar opines that "[r]evulsion from apartheid was possibly the main motiv[ating] force behind the adoption in 1965 of ICERD." MICHAEL BANTON, INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION 28 (1996).

21. Schwelb, *supra* note 14, at 1057.

22. Ratification List, *supra* note 7.

23. CERD, *supra* note 3, art. 2(1).

24. Ratification List, *supra* note 7. In 1978, the Carter administration presented CERD to the Senate; however, "domestic and international events at the end of 1979 prevented the [Foreign Relations] committee from moving to vote on it." 140 CONG. REC. S7634-02 (June 24, 1994) (statement of Sen. Pell). Because neither the Reagan nor the Bush administrations supported the ratification of the Convention, it was not presented to the Senate again until 1994. *Id.*

struggle to overcome segregation and discrimination, we are in a unique position to lead the international effort. Our position and the credibility of our leadership will be strengthened immeasurably by ratification of this convention—ratification, I might add, that is long overdue.²⁵

Having ratified CERD, the United States government is obligated to comply with its provisions. The government must take effective measures to amend, rescind, or nullify national and local laws and regulations that have the effect of creating or perpetuating racial discrimination, and must also take proactive measures to redress racial inequalities.²⁶

Over forty years after signing CERD and more than a decade after its ratification, racial disparities continue to exist in nearly every aspect of American society, including education, employment, and the criminal justice system. The current state of housing in the United States—which remains highly segregated—provides one of the most striking examples of the United States' continuing need to work toward meeting its obligations under CERD.

B. *Obligations Related to Housing Under CERD*

The United States government's obligations with respect to housing under CERD are similar to its duties under the Fair Housing Act ("the FHA" or "Act"),²⁷ as well as the closely linked Equal Credit Opportunity Act.²⁸ The FHA requires the federal government and all agencies and grantees involved in federally funded housing to "affirmatively further" fair housing.²⁹ It, most centrally, requires that the United States Department of Housing and Urban Development ("HUD") enforce the terms of the FHA as they relate to discrimination in private housing transactions and in credit markets in conjunction with the United States Department of Justice ("the DOJ").³⁰ The Act also directs the federal government to take affirmative steps to remedy private discrimination, to avoid

25. 140 CONG. REC. S7634-02 (June 24, 1994) (statement of Sen. Pell).

26. CERD, *supra* note 3, art. 2(1), art. 1(4).

27. 42 U.S.C. §§ 3601-3631 (2000).

28. 15 U.S.C. §§ 1691-1691f (1991). Section 1691(a) prohibits discrimination on the basis of race and other characteristics "with respect to any aspect of a credit transaction."

29. 42 U.S.C. § 3608(d) (2000).

30. See Exec. Order No. 12,892, 3 C.F.R. 849 (1995); see also 42 U.S.C. § 3608(a) (2000) ("The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development."); 15 U.S.C. § 1691e(k) (1991) (providing for notification to HUD of Equal Credit Opportunity Act complaints raising potential FHA violations).

governmental policies that perpetuate segregation, and to reverse historical patterns of segregation and discrimination.³¹

Analogously, under CERD, the United States has accepted the following obligations relevant to housing discrimination and segregation:

- First, to ensure the compliance of “all public authorities and public institutions, national and local” with the obligation not to engage in racial discrimination.³²

This obligation requires the federal government to consider not simply its own actions and policies but also those of state and local governments and other public institutions.

- Second, to “review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which,” regardless of intent, “have the effect of creating or perpetuating racial discrimination wherever it exists.”³³

This obligation requires the federal government to rectify or invalidate federal, state, and local policies and laws that have racially disparate impacts, not just those that were developed or passed with discriminatory intent.

- Third, to “particularly condemn racial segregation” and “undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”³⁴

This obligation requires the federal government to take an active role in dismantling the lingering effects of discrimination and segregation. In 1995, the Committee issued a detailed interpretation³⁵ of Article 3 explaining that the duty to eradicate segregation includes not only the obligation to cease active discrimination, but also the obligation to take affirmative steps to eliminate the lingering effects of past discrimination.³⁶ It recognized that, although conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a

31. See 42 U.S.C. § 3608(d) (2000).

32. CERD, *supra* note 3, art. 2(1)(a).

33. *Id.* art. 2(1)(c).

34. *Id.* art. 3.

35. The Committee “periodically issue[s] comments on the substantive provisions of each treaty. The General Comments serve a dual purpose of assisting state parties in fulfilling their reporting requirements, and in clarifying what information the Committee is seeking under a particular article.” Wagley, *supra* note 11, at 92–93.

36. U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation 19, Racial Segregation and Apartheid* (Forty-seventh session, 1995), para. 140, U.N. Doc. A/50/18 (Aug. 18, 1995), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 208 (2003).

condition of partial segregation may also arise as an intended or unintended consequence of the actions of private persons.

- Fourth, to “undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of” the right to own property alone as well as in association with others and the right to housing.³⁷

This obligation requires the federal government to seek to *eliminate*—not just prohibit—all discrimination related to housing and property ownership. The Committee has held that States parties must “take concrete action when confronted with private racial discrimination.”³⁸

- Fifth, CERD requires States parties to “assure to everyone within their jurisdiction effective protection and remedies” against racial discrimination that violates CERD, as well as the ability to seek damages for such discrimination.³⁹

This obligation requires the United States government to provide private citizens with means of redress for racial discrimination.

C. The Importance of the United States Government's Compliance with CERD

As commentators have observed, the United States' willingness to participate in international human rights conventions has a tremendous impact on the nation's credibility on human rights issues. Historically, the United States' ratification of human rights treaties has bolstered the United States' credibility on human rights in the international community.⁴⁰ In recent cases where the United States has refused to sign human rights conventions, that credibility has been damaged.⁴¹ While the United States' credibility in

37. CERD, *supra* note 3, art. 5(d)(v), art. 5(e)(iii).

38. Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 *BUFF. HUM. RTS. L. REV.* 21, 66–67 (2005) (citing U.N. Comm. on the Elimination of Racial Discrimination, *L.K. v. The Netherlands*, U.N. Doc. CERD/C/42/D/4/1991 (Mar. 16, 1993)).

39. CERD, *supra* note 3, art. 6.

40. See Jeffrey C. Goldman, Note, *Of Treaties and Torture: How the Supreme Court Can Restrain the Executive*, 55 *DUKE L.J.* 609, 628–29 (2005) (describing how ratification of the Convention Against Torture enhanced United States human rights credibility in the international community); see also Catherine Powell, *United States Human Rights Policy in the 21st Century in an Age of Multilateralism*, 46 *ST. LOUIS U. L.J.* 421, 427–28 (2002) (arguing that the United States' “efforts to advance human rights overseas would be more persuasive and therefore more effective if these efforts were informed by first-hand experience in applying international standards”).

41. See Stacey Mathews, *International Trafficking in Children: Will New U.S. Legislation Provide an Ending to the Story?*, 27 *HOUS. J. INT'L L.* 649, 667 (2005) (arguing that the

the international community rises and falls with each initiative that the United States endorses or fails to endorse, perhaps of greater importance is the United States government's ability to live up to the principles to which it has ostensibly committed itself. Compliance with international human rights conventions is essential, as it can render a convention's mandates "normative under customary law even for nonsignatory states."⁴² On the other hand, "cynical or haphazard signing and ratification of human rights conventions" is damaging to the human rights movement as a whole by producing a gap between "rhetorical successes" and "measurable successes in implementation of even the most basic of human rights standards."⁴³

When the United States fails to address adequately its human rights treaty obligations, it seriously undermines its own credibility on human rights issues in the international community. As noted by Judge Weinstein of the United States District Court for the Eastern District of New York:

This nation's credibility would be weakened by non-compliance with treaty obligations or with international norms. The United States seeks to impose international law norms—including, notably, those on terrorism—upon other nations. It would seem strange, then, if the government would seek to avoid enforcement of such norms within its own borders. . . . The United States cannot expect to reap the benefits of internationally recognized human rights—in the form of greater worldwide stability and respect for people—without being willing to adhere to them itself. As a moral leader of the world, the United States has obligated itself not to disregard rights uniformly recognized by other nations.⁴⁴

United States' failure to ratify the Convention on the Rights of the Child damages United States human rights credibility); see also Sister Mary Rose McGeady, *The International Need for U.S. Ratification of the U.N. Convention on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 253, 254–55 (1998) (discussing the United States' failure to ratify the Convention on the Rights of the Child); Sally Engle Merry, *Constructing a Global Law—Violence Against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 949 (2003) (discussing the United States' failure to ratify the Convention on the Elimination of All Forms of Discrimination against Women); Cheryl K. Moralez, *Establishing an International Criminal Court: Will it Work?*, 4 DEPAUL INT'L L.J. 135, 167 (2000) (discussing the United States' failure to ratify the Rome treaty); Sally Chaffin, *Challenging the United States Position on a United Nations Convention on Disability*, 15 TEMP. POL. & CRV. RTS. L. REV. 121, 137 (2005) (noting the United States' refusal to participate in discussions regarding the proposed United Nations Convention on rights of the disabled).

42. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 649 (1990).

43. David M. Smolin, *Conflict and Ideology in the International Campaign Against Child Labour*, 16 HOFSTRA LAB. & EMP. L.J. 383, 407 (1999).

44. *Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002), *rev'd on other grounds*, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

The United States should seek to maintain its credibility on human rights issues, because that credibility plays a vital “role in compelling adherence to . . . treaties related to human rights and humanitarian action, due to the fact that the United States publicly asserts that it is a strong advocate for and supporter of higher global standards for individual rights throughout the world.”⁴⁵

D. Review of the United States Government’s Compliance with CERD

The Committee on the Elimination of Racial Discrimination monitors the compliance of States parties with CERD. The Committee is comprised of eighteen independent experts,⁴⁶ one or two of whom are appointed as “rapporteurs” for each States party whose compliance with CERD is being reviewed. The rapporteurs are responsible for reviewing all materials of the States party to which they are assigned and presenting any shortcomings, deficiencies, or questions to the Committee.⁴⁷

Each States party is required to submit a biennial report to the Committee about the current status of the rights guaranteed by the treaty.⁴⁸ A States party’s report should, where relevant, discuss how the rights guaranteed by CERD are enjoyed differently by, for example, women⁴⁹ or non-citizens.⁵⁰ Non-governmental organizations (“NGOs”)

45. Jennifer R. White, Note, *IEEPA’s Override Authority: Potential for a Violation of the Geneva Conventions’ Right to Access for Humanitarian Organizations?*, 104 MICH. L. REV. 2019, 2053 (2006).

46. Office of the United Nations High Commissioner for Human Rights, Comm. on the Elimination of Racial Discrimination—*Members*, <http://www2.ohchr.org/english/bodies/cerd/members.htm> (last visited Feb. 19, 2008).

47. Office of the United Nations High Commissioner for Human Rights, Comm. on the Elimination of Racial Discrimination—*Working Methods*, <http://www2.ohchr.org/english/bodies/cerd/workingmethods.htm> (last visited Feb. 19, 2008).

48. Office of the United Nations High Commissioner for Human Rights, Comm. on the Elimination of Racial Discrimination, *Monitoring Racial Equality and Non-Discrimination*, <http://www2.ohchr.org/english/bodies/cerd/> (last visited Mar. 18, 2008) [hereinafter OHCHR CERD] (“States must report initially one year after acceding to the Convention and then every two years.”).

49. Noting “that racial discrimination does not always affect women and men equally or in the same way,” the Committee has requested that States parties “describe, as far as possible in quantitative and qualitative terms, factors affecting and difficulties experienced in ensuring the equal enjoyment by women, free from racial discrimination, of rights under the Convention.” U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation 25, Gender Related Dimensions of Racial Discrimination* (Fifty-sixth session, 2000), paras. 1, 6, U.N. Doc. A/55/18 (Mar. 20, 2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 214 (2003), available at <http://www1.umn.edu/humanrts/gencomm/genrexxv.htm>.

50. U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation 30, Discrimination Against Non Citizens* (2004), para. 5, U.N. Doc. CERD/C/64/

are invited to submit “shadow reports” to supplement the States party’s official report by providing additional information—and particularly deficiencies, omissions, and inaccuracies—for the Committee to consider.

The Committee then reviews the States party’s compliance at a meeting in Geneva.⁵¹ Representatives of the States party attend the meeting and answer the Committee’s questions, which can be “detailed and pointed.”⁵² The Committee then provides its “concluding observations,” which address its concerns and provide recommendations regarding the States party’s compliance with CERD.⁵³ The United States has submitted reports on only two occasions⁵⁴ since ratifying CERD in 1994—one in 2000 “bring[ing] together in a single document the initial, second and third periodic reports”⁵⁵ (“2000 Report”), and one in 2007 that “constitutes the fourth, fifth, and sixth periodic reports”⁵⁶ (“2007 Report”). After the United States government submitted the 2007 Report in April 2007, the Committee announced that it would review the United States government’s compliance with CERD during its 72nd Session in Geneva; that review took place February 21–22, 2008.⁵⁷ To provide the Committee with a fuller picture of racial discrimination and segregation in the United States, NGOs from throughout the United States wrote and submitted an unprecedented number of shadow reports—including the one on which this Article is based⁵⁸—covering a

Misc.11/rev.3 (Oct. 1, 2004), available at <http://www1.umn.edu/humanrts/gencomm/genrec30.html>.

51. OHCHR CERD, *supra* note 48.

52. Wagley, *supra* note 11, at 95.

53. OHCHR CERD, *supra* note 48.

54. The United States government is now being permitted to consolidate its periodic reports.

55. *Reports Submitted by States Parties Under Article 9 of the Convention*, at 1, delivered to the U.N. Comm. on the Elimination of Racial Discrimination (Sept. 2000), available at <http://www.state.gov/documents/organization/100306.pdf> [hereinafter *Initial Report*].

56. *Periodic Report of the United States of America to the U.N. Comm. on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination*, delivered to the U.N. Committee on the Elimination of Racial Discrimination (Apr. 2007), available at <http://www.state.gov/documents/organization/83517.pdf> [hereinafter *Periodic Report*].

57. See Office of the United Nations High Commissioner for Human Rights, Comm. on the Elimination of Racial Discrimination, 72d Session (Feb. 18—Mar. 7 2008): *Consideration of State Reports*, <http://www2.ohchr.org/english/bodies/cerd/cerds72.htm> (last visited Mar. 25, 2008).

58. MICHAEL B. DE LEEUW ET AL., RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES: VIOLATIONS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A RESPONSE TO THE 2007 PERIODIC REPORT OF THE UNITED STATES OF AMERICA (2008), available at <http://www.prrac.org/projects/cerd.php> or <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN27.pdf>. A coalition of forty-four scholars and non-profit organizations specializing in fair housing and lending issues submitted that shadow report to inform the

wide range of topics.⁵⁹ Based on its review of the 2007 Report and input from those NGOs, the Committee provided the United States government with a list of questions and issues to address in advance of the meeting in Geneva;⁶⁰ the United States government responded the day before the review in Geneva with a 112-page supplemental report.⁶¹

E. *Official Submissions by the United States Government*

The United States government provided two official submissions to the Committee: the 2007 Report in April 2007 and responses to questions asked by the Committee in February 2008.⁶² The 2007 Report submitted by the United States discussed housing discrimination issues primarily in two sections and largely ignored the issue of residential segregation altogether.⁶³ In five paragraphs under the heading “Examples of Enforcement Actions: Fair Housing and Lending,” the report listed federal laws governing fair housing, described certain actions by HUD and some of its offices, and provided examples of a small number of fair housing lawsuits brought by the DOJ, with special emphasis on those involving the Fair Housing Testing Program.⁶⁴ While the 2007 Report provided few

Committee about housing discrimination and residential segregation in the United States today.

59. See Office of the United Nations High Commissioner for Human Rights, *NGO Information Relating to United States of America (72d Session)*, available at <http://www2.ohchr.org/english/bodies/cerd/cerds72-ngos-usa.htm> (last visited Mar. 18, 2008); see also U.S. Human Rights Network, *U.S. NGO Submissions to the Committee for the Elimination of Racial Discrimination*, http://www.ushrnetwork.org/cerd_shadow_2008 (last visited Mar. 24, 2008).

60. U.N. Comm. on the Elimination of Racial Discrimination, Feb. 18–Mar. 7, 2008, *Questions Put by the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America*, U.N. Doc. CERD/C/USA/6, available at http://www2.ohchr.org/english/bodies/cerd/docs/72LOI_USA.pdf [hereinafter *Issue List*].

61. U.N. Comm. on the Elimination of Racial Discrimination, *Responses to Questions Put by the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America*, U.N. Doc. CERD/C/USA/6 (Feb. 20, 2008), available at <http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/wrusa72.pdf> [hereinafter *Issue List Response*].

62. Although the reports are submitted on behalf of the United States government as a whole, the United States Department of State is responsible for preparing the reports.

63. The 2007 Report was also written and submitted to the Committee prior to the United States Supreme Court’s decision in the Louisville and Seattle voluntary school integration cases, which affected how race may be considered when school districts attempt to ensure some level of integration in their schools. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738 (2007). Because that case further narrowed the government’s ability to respond to racial discrimination and to mitigate the effects of residential segregation, some of the 2007 Report’s information was outdated before the United States government’s compliance was reviewed.

64. *Periodic Report*, *supra* note 56, paras. 64–68.

specifics, it noted that “findings” from government reports “generally indicated that the treatment shown to the non-Hispanic White tester remained more favorable than that shown to the minority tester, further indicating that the problem of housing discrimination persists in many parts of the nation.”⁶⁵ Unfortunately, the 2007 Report failed to explain the extent of the favoritism, the manner in which it was shown, the breadth of the studies, the “parts of the nation” in which it remained a problem, the basis for its implicit assertion that housing discrimination was no longer a problem in other parts of the nation, or any steps the government was taking to rectify this admitted violation of CERD; nor did it cite any of the “several volumes” or “reports” on which those assertions were based.⁶⁶

In thirteen paragraphs under the heading “The Right to Housing,” the 2007 Report provided statistics, general information about certain programs and initiatives, and examples of isolated enforcement actions to bolster its claim that the “rights to housing and mortgage financing without discrimination are enjoyed in practice throughout the United States, and where violations of these rights occur, federal and state authorities prosecute the offenders.”⁶⁷ As described later in this Article, that assertion appears to be a significant understatement of the pervasiveness of discrimination and an overstatement of the government’s level of enforcement of fair housing laws. Although some enforcement does occur, even the government’s own studies show that the vast majority of housing discrimination violations remain unaddressed and even unreported.⁶⁸

Similarly, many of the United States government’s responses to the questions asked by the Committee in advance of the compliance review were short on specifics, long on generalities, and often were altogether non-responsive, particularly regarding issues of segregation and housing discrimination. There were no discussions of housing discrimination and the Fair Housing Act in response to many of the important questions raised by the Committee, for example, questions about whether civil rights statutes require claims of intentional discrimination⁶⁹ and requests for additional information about “pattern and practice” cases involving systemic discrimination.⁷⁰

Perhaps the United States government’s most significant omission was its failure to respond to the Committee’s request that it “provide detailed information on the measures adopted by the State party to reduce residential segregation based on racial and national origin, as well as its

65. *Id.* para. 65.

66. *See id.*

67. *Id.* paras. 243–55.

68. *See* Part IV.C, *infra*.

69. *See Issue List Response, supra* note 61, at 13–15.

70. *See id.* at 38–40.

negative consequences for the persons concerned.”⁷¹ The United States government’s response merely recited that it “shares the Committee’s concern about the concentration of racial, ethnic, and national minorities in poor residential neighborhoods” but failed to address in any significant way residential segregation (or “concentration”).⁷² Its response also included a list of federal laws and Executive Orders that prohibit racial discrimination, but it did not focus on residential segregation, which is what the Committee was interested in.⁷³ Indeed, the rest of its response discussed efforts to respond to private discrimination, but that discussion did not even focus on racial discrimination; of the five cases cited as examples of the government’s enforcement record, two did not involve any allegations of racial discrimination.⁷⁴

In sum, the United States government’s official submissions failed to provide a full account of the current state of segregation and housing discrimination in the United States. Indeed, the submissions essentially ignored the issue of residential segregation altogether despite CERD’s clear obligations and the Committee’s stated interest in the issue. The shadow report submitted to the Committee by housing scholars and research and advocacy organizations, on which this Article is based, attempted to supplement the United States government’s official submissions and provide a more accurate picture of the extent of residential segregation and racial discrimination in all aspects of housing in the United States.

F. *The Committee’s Review and Concluding Observations*

The Committee reviewed the United States government’s compliance in Geneva on February 21–22, 2008.⁷⁵ During its review, the Committee demanded additional responses to questions—including many specifically about segregation. Those questions were partly informed by the 2007 Report but drew heavily from the shadow reports submitted by NGOs.⁷⁶ Approximately 120 people affiliated with NGOs that submitted

71. *Issue List*, *supra* note 60, at para. 10.

72. *See Issue List Response*, *supra* note 61, at 42–45.

73. *Id.*

74. *See id.* at 43–44 (discussing *United States v. Luke*, SACV06-1109 (MLGx) (C.D. Cal. Jan. 4, 2008), available at <http://www.usdoj.gov/crt/housing/documents/lukesettle.pdf>, which involved discrimination on the basis of national origin, and *HUD v. Godlewski*, HUDALJ 07-034-FH (Dec. 27, 2007), available at <http://www.hud.gov/offices/oalj/cases/fha/pdf/godlewski.pdf>, which involved discrimination on the basis of familial status).

75. Office of the United Nations High Commissioner for Human Rights, Comm. on the Elimination of Racial Discrimination, 72d Session (Feb. 18—Mar. 7 2008): *Consideration of State Reports*, <http://www2.ohchr.org/english/bodies/cerd/cerds72.htm> (last visited Mar. 25, 2008).

76. *See* Eliane Engeler, *U.S. Denies Link Between Race and Rendition*, ASSOCIATED PRESS, Feb. 22, 2008, available at http://www.usatoday.com/news/washington/2008-02-22-us-rendition_N.htm.

shadow reports also traveled to Geneva to testify and advocate before the Committee.⁷⁷

Following its review, the Committee issued its concluding observations and recommendations for improving the United States government's compliance with CERD.⁷⁸ Specifically, the Committee noted "with satisfaction" work done by HUD,⁷⁹ as well as California's Housing Element Law,⁸⁰ which "requires local jurisdictions to strengthen provisions for addressing the housing needs of the homeless."⁸¹ However, the Committee also recommended that the United States government review the definition of racial discrimination in United States law to ensure the prohibition of practices and legislation that are discriminatory in effect.⁸² Further, the Committee concluded that the United States government should increase its efforts to assist people displaced by Hurricane Katrina with their housing needs.⁸³ Most importantly in the context of housing and segregation, the Committee stated:

The Committee is deeply concerned that racial, ethnic and national minorities, especially Latino and African American persons, are disproportionately concentrated in poor residential areas characterized by sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence. (Article 3)

The Committee urges the State party to intensify its efforts aimed at reducing the phenomenon of residential segregation based on racial, ethnic and national origin, as well as its negative consequences for the affected individuals and groups. In particular, the Committee recommends that the State party:

- (i) support the development of public housing complexes outside poor, racially segregated areas;

77. *Id.*

78. U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008), available at <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-USA-CO-6.pdf> [hereinafter *Concluding Observations*].

79. *Id.* para. 4.

80. *Id.* para. 9.

81. Cal. Dep't of Hous. & Community Dev., *Housing Elements*, <http://www.hcd.ca.gov/hpd/hrc/plan/he/> (last visited Mar. 24, 2008).

82. *Concluding Observations*, *supra* note 78, at para. 10.

83. *Id.* para. 31 ("The Committee recommends that the State party increase its efforts in order to facilitate the return of persons displaced by Hurricane Katrina to their homes, if feasible, or to guarantee access to adequate and affordable housing, where possible in their place of habitual residence.").

- (ii) eliminate the obstacles that limit affordable housing choice and mobility for beneficiaries of Section 8 Housing Choice Voucher Program; and
- (iii) ensure the effective implementation of legislation adopted at the federal and state levels to combat discrimination in housing, including the phenomenon of “steering” and other discriminatory practices carried out by private actors.⁸⁴

The Committee commended the United States government for the actions it has taken to combat racial discrimination and offered suggestions for concrete steps the United States government could take to improve its compliance with its obligations under CERD.

II. THE CURRENT STATE OF HOUSING SEGREGATION IN THE UNITED STATES

In its prior review of the United States government’s compliance with CERD, the Committee expressed concern “about persistent disparities in the enjoyment of, in particular, the right to adequate housing.”⁸⁵ Given the persistence and prevalence of housing segregation and discrimination throughout the United States, it is evident that the United States has not satisfactorily complied with its obligations under CERD, even those specifically highlighted by the Committee as areas of concern. According to the most recent estimates from the United States Census Bureau, Latinos constitute 14.8% of the United States population, while the non-Latino population is 66.4% white, 13.4% African American, 4.9% Asian, 1.5% American Indian or Alaska Native, and 0.34% Native Hawaiian and other Pacific Islander.⁸⁶ However, “[t]he average white person in metropolitan America[]

84. *Id.* para. 16 (emphasis removed).

85. U.N. Comm. on the Elimination of Racial Discrimination, *Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination: United States of America*, para. 398, U.N. Doc. A/56/18 (Aug. 13, 2001), available at <http://www1.umn.edu/humanrts/country/usa2001.html>.

86. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE, AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2006 (2006), available at <http://www.census.gov/popest/national/asrh/NC-EST2006-srh.html>; see also Press Release, U.S. Census Bureau, Minority Population Tops 100 Million (May 17, 2007), available at <http://www.census.gov/Press-Release/www/releases/archives/population/010048.html>.

lives in a neighborhood that is 80% white and only 7% black.”⁸⁷ In stark contrast, “[a] typical black individual lives in a neighborhood that is only 33% white and as much as 51% black,”⁸⁸ making African Americans the most residentially segregated group in the United States.⁸⁹

Overall, although segregation declined somewhat between 1980 and 2000, it remains pervasive and significantly correlated with race, and not simply with income differences. For African Americans and Latinos, relatively high incomes are no protection against segregation, as “[d]isparities between neighborhoods for blacks and Hispanics with incomes above \$60,000 are almost as large as the overall disparities, and they increased more substantially in the [1990s].”⁹⁰

Segregation has a plurality of causes, including private discrimination, historical and current government policies, income differentials, and preference.⁹¹ Although housing discrimination against African Americans and residential segregation improved slightly between 1980 and 2000,⁹²

87. JOHN LOGAN, LEWIS MUMFORD CTR. FOR COMPARATIVE URBAN & REG’L RESEARCH, *ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND 1* (2001), available at <http://www.s4.brown.edu/cen2000/WholePop/WPreport/MumfordReport.pdf>.

88. *Id.*

89. JOHN ICELAND ET AL., U.S. CENSUS BUREAU, *RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980–2000*, at 95 (2002).

90. JOHN LOGAN, LEWIS MUMFORD CTR. FOR COMPARATIVE URBAN & REG’L RESEARCH, *SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS AND HISPANICS IN METROPOLITAN AMERICA 2* (2002), available at http://www.s4.brown.edu/cen2000/SepUneq/SURreport/Separate_and_Unequal.pdf.

91. Preference is frequently cited as a primary cause of segregation. However, that claim oversimplifies the reality of housing choice in the United States. Housing choices are made against the backdrop of a racially and economically segregated market, and many people, whether due to income, discrimination, or other factors, have little to no meaningful choice in terms of where they live. White people in the United States have often chosen to live in white enclaves for a number of different reasons, some explicitly discriminatory and others not, see generally KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2005), and have defended those homogeneous neighborhoods vigorously. See, e.g., THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 210 (1996) (“In reaction to the economic and racial transformation of the city, Detroit’s whites began fashioning a politics of defensive localism that focused on threats to property and neighborhood.”). Even for people of color with the economic means to choose where to live, a decision to live in a neighborhood that is composed predominantly of people of color is often difficult; such a neighborhood “feels familiar, relaxed, and doesn’t require any conscious effort to exist,” but often “bear[s] burdens and costs that predominantly white [communities] do not,” such as inadequate public schools. SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 130, 135 (2004).

92. See John Iceland, *Racial and Ethnic Residential Segregation and the Role of Socioeconomic Status, 1980–2000*, in *FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT, HOUSING AND FAIRNESS* 107, 117 (John M. Goering ed., 2007).

racial steering⁹³ continues at high levels, and racial isolation within America's cities⁹⁴ and schools⁹⁵ increased during that same period.

At the same time, the United States is rapidly becoming more racially and ethnically diverse than ever before. The group among whom this shift is most evident is children, as America's child population is more racially and ethnically diverse than its adult population.⁹⁶ This shift is particularly apparent "[i]n nearly one-third of the nation's largest metropolitan areas, [where] at least half of all people under age 15 are racial and ethnic minorities."⁹⁷ In combination with growing "exurban" communities at the periphery of metropolitan areas, mainly due to White migration,⁹⁸ the profile of metropolitan areas is changing rapidly. Thus, local communities are grappling with the best ways to encourage and support integration. The United States government's role in creating and perpetuating the discrimination that has led to the current situation makes its compliance with CERD critically important.

III. GOVERNMENT POLICIES CONTRIBUTE TO AND PROMOTE RESIDENTIAL SEGREGATION

Article 2(1)(a) of the Convention requires that States parties "engage in no act or practice of racial discrimination against persons, groups of persons or institutions." Historically, according to many scholars, the government's policies and practices have helped to create and perpetuate the highly racially segregated residential patterns that exist today. As the United States admitted in its 2000 Report, "[f]or many years, the federal government itself was responsible for promoting racial discrimination in housing and residential segregation."⁹⁹ Indeed, before 1900, nothing resembling the modern racially identifiable ghetto existed in northern

93. Steering is the practice of "directing prospective home buyers interested in equivalent properties to different areas according to their race." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 94 (1979).

94. See NANCY McARDLE & GUY STUART, CIVIL RIGHTS PROJECT, RACE, PLACE & SEGREGATION: REDRAWING THE COLOR LINE IN OUR NATION'S METROS (2002) (collection of four housing studies on changing racial demographics in Boston, Massachusetts, Chicago, Illinois, and San Diego, California from 1990 through 2000), available at http://www.civilrightsproject.ucla.edu/research/metro/three_metros.php.

95. See ERICA FRANKENBERG ET AL., CIVIL RIGHTS PROJECT, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM 6 (2003) ("During the 1990s, the proportion of black students in majority white schools . . . decreased by 13 percentage points, to a lower level than any year since 1968.").

96. WILLIAM H. FREY, BROOKINGS INST., DIVERSITY SPREADS OUT: METROPOLITAN SHIFTS IN HISPANIC, ASIAN AND BLACK POPULATIONS SINCE 2000, at 1 (2006).

97. *Id.* at 17.

98. *Id.* at 13-14.

99. *Initial Report*, *supra* note 55, at 49.

cities.¹⁰⁰ Legally enforced segregation outside of the South was a product of the twentieth century, and gradually developed as a result of “violence, collective antiblack action, racially restrictive covenants, and discriminatory real estate practices.”¹⁰¹ In addition, state action that systematically limited development of minority neighborhoods and excluded minorities from white neighborhoods promoted the creation of what came to be known as the racially isolated American ghetto.

Beginning in 1934, the federal government, through the Federal Housing Administration’s (“Administration”) mortgage insurance programs, transformed the American housing market from one that was effectively inaccessible to people outside the upper-middle and upper classes to a broad based one—but for whites only.¹⁰² The Administration, in combination with New Deal-era selective credit programs, had a huge impact on the American housing market, functioning to insure private lenders against loss, standardize appraisal practices, and popularize the use of long-term, amortized mortgages.¹⁰³ These programs were also explicitly discriminatory and denied benefits in accordance with race-based rules.¹⁰⁴

African Americans were also systematically excluded from GI Bill loan programs, which were administered through the Veterans Administration (“VA”) and guaranteed mortgages for five million homes throughout the United States, because banks refused to approve loans for African Americans.¹⁰⁵ Both the VA and the Administration “endorsed the use of race-restrictive covenants until 1950” and explicitly refused to underwrite

100. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 20 (1993).

101. *Id.* at 42; see also James H. Carr & Nandinee K. Kutty, *The New Imperative for Equality, in SEGREGATION: THE RISING COSTS FOR AMERICA* 3, 5 (James H. Carr & Nandinee K. Kutty eds., 2008) (“The hypersegregation and isolation that characterize a majority of African American communities in the United States are a twentieth century phenomenon—not the direct extension of slavery. . . . [R]emarkable progress [in racial integration at the end of the nineteenth century] was stalled and tragically reversed with a series of private actions, reinforced and institutionalized by public laws, judicial mandates, and regulatory guidelines.”).

102. See KENNETH T. JACKSON, *CRABGRASS FRONTIER* 190–218 (1985); IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* 115–41 (2005).

103. See JACKSON, *supra* note 102, at 204; David M.P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America, in THE NEW SUBURBAN HISTORY* 11, 16 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006).

104. See JACKSON, *supra* note 102, at 207–09 (citing an example from the Administration’s Underwriting Manual describing the “risks posed by the commingling of ‘inharmomious racial groups’”); Arnold R. Hirsch, “Containment” on the Home Front: Race and Federal Housing Policy from the New Deal to the Cold War, 26 *J. URB. HIST.* 158, 162 (2000); CASHIN, *supra* note 91, at 111 (noting that the underwriting manual “maintained that it was ‘necessary that properties shall continue to be occupied by the same social and racial classes’” and “instructed appraisers to predict ‘the probability of the location being invaded by . . . incompatible racial and social groups’”).

105. See KATZNELSON, *supra* note 102, at 115, 139–40.

loans that would “introduc[e] ‘incompatible’ racial groups into white residential enclaves.”¹⁰⁶ Financing almost half of all suburban homes in the 1950s and 1960s, the Administration and VA employed racially discriminatory programs to facilitate the development of the suburbs.¹⁰⁷

Limited enforcement of Title VI and Section 109 statutory obligations¹⁰⁸ has led to static patterns of racial segregation. Women of color are disproportionately harmed by segregation in government-subsidized housing because, across all HUD programs, 79% of households are headed by women, 42% are headed by women with children, and 58% of residents are people of color.¹⁰⁹

Current scholarship indicates that existing government programs continue to contribute to the residential concentration of poor people of color, albeit without the explicit design of earlier programs. These programs sometimes have the effect of perpetuating existing patterns of residential segregation, and thus must be examined and modified in light of the States party’s obligations under Article 2(1)(c) of the Convention. The following sections focus on some of these programs and practices.

A. Public Housing

Public housing policies have contributed significantly to the establishment and entrenchment of residential segregation and concentrated poverty throughout the United States. Most public housing built from the 1950s to the 1970s was comprised of large, densely populated “projects,” often consisting of high-rise buildings located in poor, racially segregated communities.¹¹⁰ Housing authorities often yielded to public and political pressure not to locate public housing or its tenants in white neighborhoods.¹¹¹ Over time, the demographics of cities and public housing have

106. Freund, *supra* note 103, at 16.

107. See JACKSON, *supra* note 102, at 215.

108. Title VI of the Civil Rights Act of 1964 and Section 109 of title I of the Housing and Community Development Act of 1974 both prohibit discrimination in any program or activity funded in whole or in part with federal financial assistance. See 42 U.S.C. § 2000d (2006); 42 U.S.C. § 5309(a) (2006). The statutes also provide the government with authority to review and require compliance. See 42 U.S.C. § 2000d-1 (2000); 42 U.S.C. § 5309(b), (c) (2006).

109. See OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP’T OF HOUS. & URBAN DEV., DATASET: A PICTURE OF SUBSIDIZED HOUSEHOLDS—2000, <http://www.huduser.org/picture2000/index.html> (last visited Feb. 19, 2008).

110. ROD SOLOMON, BROOKINGS INST., PUBLIC HOUSING REFORM AND VOUCHER SUCCESS: PROGRESS AND CHALLENGES 2 (2005). See generally Robert Gray & Steven Tursky, *Location and Racial/Ethnic Occupancy Patterns for HUD-Subsidized Family Housing in Ten Metropolitan Areas*, in HOUSING DESEGREGATION AND FEDERAL POLICY 235 (John M. Goering ed., 1986).

111. See, e.g., Walker v. HUD, 734 F. Supp. 1289, 1294 (N.D. Tex. 1989); Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907, 913–14 (N.D. Ill. 1969).

also changed, with fewer whites and more African Americans living in public housing.¹¹²

The federal government and individual housing authorities have played an active role in forming the policies that have concentrated poverty in racially segregated public housing. Many cities established separate public housing for African American and white residents, whether explicitly or not.¹¹³ In 1989, a court found the “primary purpose of [Dallas’s] public housing program was to prevent blacks from moving into white areas of th[e] city,” and that the city deliberately took actions designed to create and maintain segregation through its public housing.¹¹⁴ Similarly, Chicago public housing officials admitted to a policy of racial segregation and the imposition of racial quotas in its housing projects.¹¹⁵ Not until 1985 were “[e]fforts to desegregate the nation’s public housing stock . . . extended to the entire nation.”¹¹⁶

HUD has admitted to constructing public housing in already segregated neighborhoods, and to being “part of the problem” and “complicit in creating isolated, segregated, large-scale public housing.”¹¹⁷ The agency had long employed a deliberate policy of locating public housing residents in neighborhoods where their presence would not disturb the prevailing racial pattern.¹¹⁸ Indeed, HUD, along with a number of individual local housing authorities, persistently resisted integration, and their policies regarding site selection, tenant selection, and tenant assignment ensured the continuation of racially identifiable public housing in racially concentrated neighborhoods.¹¹⁹

Today, public housing remains highly segregated and is located largely in areas of concentrated poverty. People of color constitute 69% of public housing residents; 46% are African American and 20% are

112. See, e.g., *Thompson v. HUD*, 348 F. Supp. 2d 398, 406 (D. Md. 2005); *Walker*, 734 F. Supp. at 1296; *Gautreaux*, 296 F. Supp. at 909.

113. See, e.g., *NAACP v. HUD*, 817 F.2d 149, 151 (1st Cir. 1987) (Boston); *Thompson*, 348 F. Supp. 2d at 406 (Baltimore); *Walker*, 734 F. Supp. at 1294, 1296 (Dallas); *Gautreaux*, 296 F. Supp. at 909 (Chicago). For a discussion of the development of segregated public housing in Chicago as an example, see ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940–1960* (1983).

114. *Walker*, 734 F. Supp. at 1293.

115. *Gautreaux*, 296 F. Supp. at 909.

116. John M. Goering, *Introduction to HOUSING DESEGREGATION AND FEDERAL POLICY*, *supra* note 110, at 198.

117. *Thompson*, 348 F. Supp. 2d at 467 (“In 1997, HUD’s Proposed Deconcentration Rule acknowledged that ‘for the first 25 years of [the United States Housing Act of 1937], the Federal government permitted, if not encouraged, segregation by race in public housing developments.’”).

118. *Id.* at 468.

119. *Id.* at 469 (quoting HUD official’s admission); *Walker*, 734 F. Supp. at 1299–1300 (noting Dallas’ thirty-year illegal assignment of tenants); *Gautreaux*, 296 F. Supp. at 909, 912–13 (noting discriminatory racial quotas and site selection procedures).

Hispanic.¹²⁰ Public housing projects are located in census tracts in which, on average, people of color constitute 58% of the population and 29% of the population is below the poverty level.¹²¹ Only 8% of households living in public housing have yearly incomes above \$20,000.¹²² The levels of segregation for African Americans are even higher in family public housing; in 1990, 55% of the African American households in family projects were in census tracts with populations that were more than 70% African American.¹²³

Racial discrimination and segregation in public housing particularly affect women of color. According to HUD data from 2000, 77% of households living in public housing are headed by women, and 40% are headed by women with children.¹²⁴ Girls living in public housing also face specific risks because of their gender that are often more prevalent in areas of high poverty concentration, including harassment, domestic violence, sexual assault, pressure to become sexually active at a young age, and fear of victimization and exploitation.¹²⁵

In sum, the current state of public housing, particularly in light of its history, demonstrates that significant problems still exist which the United States government must address in order to comply with its obligations under CERD.

B. *The Section 8 Housing Choice Voucher Program*

The Section 8 Housing Choice Voucher Program is a tenant-based rental voucher program administered by HUD, under which local public housing authorities ("PHAs") issue more than 1.4 million housing vouchers nationwide to income-qualified households, who then find privately-owned housing units to rent.¹²⁶ Large numbers of Section 8 program participants, as well as those eligible for Section 8 assistance, are people of color. In 2000, 61% of Section 8 voucher holders were people of color; 41% of voucher holders were African American and 16% were

120. OFFICE OF POLICY DEV. & RESEARCH, *supra* note 109.

121. *Id.*

122. *Id.*

123. JOHN GOERING ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., *THE LOCATION AND RACIAL COMPOSITION OF PUBLIC HOUSING IN THE UNITED STATES* 24, 27 tbl.11 (1994).

124. OFFICE OF POLICY DEV. & RESEARCH, *supra* note 109.

125. Susan J. Popkin et al., *Girls in the 'Hood: Evidence on the Impact of Safety, POVERTY & RACE*, Sept.-Oct. 2006, at 3.

126. U.S. Dep't of Hous. & Urban Dev., *About the Housing Choice Vouchers Program*, <http://www.hud.gov/offices/pih/programs/hcv/about/index.cfm> (last visited Feb. 19, 2008); see also DEBORAH J. DEVINE ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., *HOUSING CHOICE VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANTS AND NEIGHBORHOOD WELFARE* 90, 120 n.65 (2003), available at http://www.huduser.org/Publications/pdf/Location_Paper.pdf.

Hispanic.¹²⁷ Although intended to increase mobility and affordable housing choices for very low-income households, the Section 8 program, as administered, often falls short of its goal to promote the mobility of program participants and instead sometimes perpetuates segregation.

In principle, families with Section 8 vouchers have many housing options, as they must find their own apartments and may use their vouchers in jurisdictions across the country.¹²⁸ In practice, however, voucher holders frequently encounter difficulty moving to more affluent neighborhoods, where landlords often refuse to rent to Section 8 voucher-holders.¹²⁹ Discrimination against Section 8 recipients is illegal in many states and cities,¹³⁰ but landlords need not accept any particular individual rental applicant, and a study of Section 8 voucher-holders' experiences in Chicago found that "discrimination against Section 8 holders appears to be disturbingly common."¹³¹ This discrimination disproportionately harms women of color, because 84% of households using Section 8 vouchers are headed by women, and 56% are headed by women with children.¹³²

The Section 8 program has the potential to help ameliorate residential segregation.¹³³ However, recent policy changes have prevented Section

127. OFFICE OF POLICY DEV. & RESEARCH, *supra* note 109.

128. U.S. Dep't of Housing & Urban Development, *Tenant Based Vouchers*, <http://www.hud.gov/offices/pih/programs/hcv/tenant.cfm> (last visited Feb. 19, 2008).

129. SUSAN J. POPKIN & MARY K. CUNNINGHAM, URBAN INST., CHAC SECTION 8 PROGRAM: BARRIERS TO SUCCESSFUL LEASING UP 4-5 (1999) (citing STEPHEN D. KENNEDY & MERYL FINKEL, U.S. DEP'T OF HOUS. & URBAN DEV., SECTION 8 RENTAL VOUCHER AND RENTAL CERTIFICATE UTILIZATION STUDY: FINAL REPORT (1994)).

130. Examples of jurisdictions that prohibit discrimination against Section 8 voucher recipients include: Connecticut, CONN. GEN. STAT. ANN. § 46a-64c (2004); Massachusetts, MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (1999); New Jersey, *see* Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1114 (N.J. 1999); Washington, D.C., D.C. CODE § 2-1402.21(e) (2007); and Chicago, Illinois, CHI., ILL., FAIR HOUS. ORDINANCE § 5-08-030 (1990). Despite having the country's largest Section 8 program, New York City does not prohibit discrimination against Section 8 voucher holders. *See* Manny Hernandez, *Bias Is Seen as Landlords Bar Vouchers*, N.Y. TIMES, Oct. 30, 2007, at A1.

131. POPKIN & CUNNINGHAM, *supra* note 129, at 23; *see also* Hernandez, *supra* note 130 (describing discrimination against voucher recipients in New York City).

132. OFFICE OF POLICY DEV. & RESEARCH, *supra* note 109.

133. For example, the Section 8 program offers the possibility of implementing a nationwide, comprehensive mobility program. Alex Polikoff, *A Vision for the Future: Bringing Gautreaux to Scale*, in KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE RESEARCH PROGRAM 137, 141 (Philip Tegele et al. eds., 2005) (proposing a nationwide "Gautreaux-type" program). The Gautreaux Assisted Housing Program, a judicially mandated program that resulted from the United States Supreme Court's *Gautreaux* decision, *Hills v. Gautreaux*, 425 U.S. 284 (1976), provided public housing-eligible families with Section 8 vouchers to pay for private rental apartments in neighborhoods in which no more than 30% of the residents were African American. *See* *Gautreaux v. Landrieu*, 523 F. Supp. 665 (N.D. Ill. 1981) (HUD consent decree). Participants received assistance finding housing and counseling. *Id.* "Between 1976

8 from achieving this potential and have set back gains attributable to the program. In 2002, the federal government eliminated funding for housing mobility programs, which provided counseling to voucher recipients seeking to move into lower-poverty areas.¹³⁴ In 2003, HUD began to restrict housing choice by limiting the standards that permitted families to use Section 8 vouchers to move into lower-poverty areas with higher rents.¹³⁵ In 2004, HUD retroactively cut voucher funding, which encouraged some PHAs to adopt policies that further prevented families from moving to higher-rent areas.¹³⁶ At the same time, it limited the mobility of Section 8 voucher recipients by permitting PHAs to restrict the portability of vouchers across jurisdictions if that portability would result in financial harm to the PHA.¹³⁷ The United States government's failure to ensure that the Section 8 program fulfills its potential to provide integrated housing options to low-income individuals, free from discrimination, is yet another example of its lack of compliance with CERD.

C. *The Low Income Housing Tax Credit*

The Low Income Housing Tax Credit ("LIHTC")¹³⁸ is another important government program whose implementation perpetuates existing patterns of residential segregation. The LIHTC provides federal tax credits to investors who acquire, rehabilitate, or construct affordable rental property targeted to low-income tenants.¹³⁹ Indeed, the LIHTC has been the

and 1998 . . . the Gautreaux Assisted Housing Program helped more than 25,000 voluntary participants move to more than 100 communities throughout the [Chicago] metropolitan area" that offered improved life opportunities. Business and Professional People for the Public Interest, *Public Housing—Gautreaux Litigation—What is Gautreaux?* (on file with author), available at <http://www.bpichicago.org/GtxLit-WhatisGtx.php> (last visited Mar. 18, 2008). The Gautreaux Program came to an end in 1998, after HUD satisfied its court-ordered obligation to provide desegregated housing opportunities to 7,100 families. *Id.*

134. Philip Tegeler, *New Directions for U.S. Housing Policy: The Unmet Potential of Two Large Housing Programs*, in *THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION 97–98* (William L. Taylor et al. eds., 2007), available at http://www.cccr.org/downloads/civil_rights2.pdf.

135. *Id.*

136. *Id.*

137. *Id.*

138. 26 U.S.C. § 42 (2005). The LIHTC was created by the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

139. CARISSA CLIMACO ET AL., *ABT ASSOCS., UPDATING THE LOW-INCOME HOUSING TAX CREDIT (LIHTC) DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2003*, at 2 (2006). The LIHTC produced an estimated 1.5 million rental housing units between the start of the program in 1987 and 2005, surpassing the size of the public housing program. JILL KHADDURI ET AL., *ABT ASSOCS., ARE STATES USING THE LOW INCOME HOUSING TAX CREDIT TO ENABLE FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY AND RACIALLY INTEGRATED NEIGHBORHOODS?*, at 1 (2006).

“principal mechanism for supporting the production of new and rehabilitated rental housing for low-income households” since it began in 1987.¹⁴⁰ Since 1999, the LIHTC has supported the development of 100,000 units of affordable housing per year.¹⁴¹

LIHTC developments must comply with federal rules, but no explicit fair housing standards govern the administration of the tax credit.¹⁴² Generally, HUD site and neighborhood guidelines prohibit building new low-income housing in racially and economically isolated neighborhoods.¹⁴³ Yet, those rules, which were created to prevent racial segregation in HUD-administered programs, have not been formally applied in the administration of the LIHTC.¹⁴⁴ Instead, the LIHTC actually provides an incentive to develop affordable housing in “qualified census tract[s],” which are often the poorest census tracts in a jurisdiction.¹⁴⁵ Accordingly, the LIHTC is not being implemented to “affirmatively further” fair housing.¹⁴⁶

Instead, the LIHTC has replicated the public housing trend of concentrating developments in highly segregated, poor neighborhoods throughout the United States.¹⁴⁷ A recent report indicates that “[o]nly a few states place more than half their LIHTC family housing in census tracts with minority population rates less than half the rate for the

140. CLIMACO ET AL., *supra* note 139, at 2.

141. *Id.* at ii.

142. *Id.* at 2.

143. See 24 C.F.R. § 983.6(b)(3)(iii), (iv) (in effect through Nov. 2005).

144. Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 197, 198 (Xavier de Souza Briggs ed., 2005).

145. 26 U.S.C. § 42(d)(5)(c)(ii)(I) (2005). The LIHTC provides incentives for developments proposed in neighborhoods where at least 50% of the households have incomes below 60% of the area’s median family incomes, which are the neighborhoods most likely to have a high concentration of low-income people of color. LANCE FREEMAN, *CTR. ON URBAN & METRO. POLICY, SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990s*, at 4 (2004), available at http://www.brookings.edu/urban/pubs/20040405_Freeman.pdf; see also GREATER MILWAUKEE HUMAN RIGHTS COALITION, *LOCAL IMPLEMENTATION: MILWAUKEE, WISCONSIN: RESPONSE TO THE PERIODIC REPORT OF THE UNITED STATES TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION* para. 55 (2008), available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN34.doc> [hereinafter GREATER MILWAUKEE HUMAN RIGHTS COALITION SHADOW REPORT] (noting that criteria for awarding tax credits of “local support” put forth by the agency which administers the LIHTC program in Wisconsin serves to encourage community discrimination against minority and low-income populations).

146. Florence Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1025–26 (1998).

147. See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1781 (2005) (noting LIHTC units are “more likely than other rental units to be located in census tracts where more than 60 percent of households would qualify to live in a tax credit unit”).

metropolitan area.”¹⁴⁸ In addition, 33.1% of LIHTC units in central city locations are in high-poverty neighborhoods, compared with only 20.8% of rental units overall.¹⁴⁹ Thus, the implementation of the LIHTC demonstrates the United States government’s failure to comply with its obligations under CERD.

D. Zoning

Zoning is another government practice that impacts many jurisdictions and neighborhoods in the United States. Although zoning restrictions are enacted by local governments and are not controlled by the federal government, Article 2(1)(a) of the Convention renders States parties responsible for the compliance of “all public authorities and public institutions, national and local” with the obligation not to engage in discrimination on the basis of race. Thus, the United States government has an obligation to ensure that zoning laws and ordinances throughout the country do not discriminate against people of color or perpetuate segregation.

Zoning power delegated by state governments gives local governments indirect control over who may live within their boundaries¹⁵⁰ and has often been used to exclude people of color and the poor and to perpetuate segregation.¹⁵¹ There is a “long-known connection between low-density-only zoning and racial exclusion,”¹⁵² and many municipalities have low-density-only zoning that tends to exclude African Americans and Latinos from some neighborhoods or even entire municipalities by effectively reducing the rental housing available.¹⁵³

As one study that used data from over 1,000 jurisdictions in the 25 largest metropolitan areas in the United States revealed, low-density zoning significantly limits the development of rental housing, and therefore the number of African American and Latino residents who can move into

148. KHADDURI ET AL., *supra* note 139, at 22. The LIHTC statute requires that each state’s plan give preference to “projects serving the lowest income tenants . . . for the longest period of time.” 26 U.S.C. § 42(m)(1)(B)(ii) (2002).

149. CLIMACO ET AL., *supra* note 139, at 43.

150. Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLANNING ASS’N 125, 140 (2000).

151. ROLF PENDALL ET AL., *FROM TRADITIONAL TO REFORMED: A REVIEW OF THE LAND USE REGULATIONS IN THE NATION’S 50 LARGEST METROPOLITAN AREAS 3* (2006) (noting that zoning has long been used to separate people by race and by class); *see, e.g.*, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (upholding zoning ordinance that barred construction of multi-family housing, effectively barring African American families from moving to neighborhood); *Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down ordinance that barred sale of lot to person of color if majority of residences on lot’s block were occupied by whites).

152. Pendall, *supra* note 150, at 135.

153. *Id.* at 126, 135; PENDALL ET AL., *supra* note 151, at 6, 12–14.

municipalities and counties.¹⁵⁴ Moreover, municipalities with the most traditional land use regulations create fewer housing opportunities for lower income and minority residents, as compared to localities that employ comprehensive growth planning schemes.¹⁵⁵

In other contexts, particularly in Southern states, small towns that expand their borders frequently exclude long-standing communities of color at the towns' fringes.¹⁵⁶ Such exclusion creates minority enclaves with inferior or no access to basic public services such as water, sewer, or police protection that are enjoyed by white residents.¹⁵⁷ In more egregious cases, even when towns exercise regulatory power over these enclaves, residents frequently are not town citizens and cannot vote in municipal elections.¹⁵⁸ In a similar effort to exclude immigrants, a number of municipalities have recently enacted zoning ordinances that prohibit members of extended families from living together.¹⁵⁹

The Fair Housing Act prohibits zoning rules that have the effect of discriminating on the basis of race without a legitimate nondiscriminatory justification.¹⁶⁰ However, court challenges to exclusionary zoning practices are restricted because individuals have standing to challenge the

154. Pendall, *supra* note 150, at 126.

155. PENDALL ET AL., *supra* note 151, at 31.

156. Charles S. Aiken, *Race as a Factor in Municipal Underbounding*, 77 ANNALS ASS'N AM. GEOGRAPHERS 564, 564-79 (1987) (using term "municipal underbounding" to describe pattern of African American communities left outside of borders of small Southern towns); Daniel T. Lichter et al., *Municipal Underbounding? Annexation and Racial Exclusion in Small Southern Towns*, 72 RURAL SOC. 47 (2007) (finding white communities are less likely to annex African American communities, regardless of size).

157. See, e.g., James Dao, *Ohio Town's Water at Last Runs Past a Color Line*, N.Y. TIMES, Feb. 17, 2004, at A2 (describing Zanesville, Ohio's denial of water to an African American community for more than fifty years, even though community existed less than one mile from public water lines and city provided water to surrounding neighborhoods); Lee Romney, *Poor Neighborhoods Left Behind*, L.A. TIMES, Sept. 18, 2005, at B1 (describing exclusion of four Latino neighborhoods from the city of Modesto, California).

158. See U.N.C. CTR. FOR CIVIL RIGHTS, *INVISIBLE FENCES: MUNICIPAL UNDERBOUNDING IN SOUTHERN MOORE COUNTY* (2006), available at <http://www.law.unc.edu/documents/civilrights/briefs/invisiblefencesreport.pdf> (documenting history of three African American communities outside city limits but within extraterritorial jurisdiction of three cities in Moore County, North Carolina); Shaila Dewan, *In County Made Rich by Golf, Some Enclaves Are Left Behind*, N.Y. TIMES, June 7, 2005, at A1.

159. See, e.g., Nick Miroff, *Culpeper Officials Targeting Illegal Immigrants*, WASH. POST, Sept. 21, 2006, at T10.

160. See 42 U.S.C. § 3604(a) (2000); see also *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (per curiam); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974).

practices only if there is a substantial probability they could live in the municipality if not for the challenged practice.¹⁶¹

Inclusionary zoning, on the other hand, has been an important tool for creating more affordable housing opportunities in many jurisdictions.¹⁶² Intended to provide lower-income people with more housing choices, inclusionary zoning ordinances go “beyond voluntary incentives and require[] that a small percentage of units (typically 10 percent) in every market rate housing development be kept affordable to moderate-income families.”¹⁶³

Some state governments have successfully required municipalities to provide more fair housing opportunities than they otherwise would. For example, the California Housing Element Law “mandates that local governments adequately plan to meet the existing and projected housing needs of all economic segments of the community.”¹⁶⁴ Similarly, in New Jersey, each municipality must provide for its “fair share of the present and prospective regional need” for low-income housing.¹⁶⁵ Although New Jersey’s wealthy suburbs have been able to evade some of their low-income housing obligations by paying poorer urban areas to build or rehabilitate that housing through “regional contribution agreements,”¹⁶⁶ momentum is building throughout the state to eliminate the use of these agreements.¹⁶⁷

In order to improve compliance with CERD, the United States government must encourage state and local governments to ensure that

161. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 252 (1977); *Simon v. E. Ky. Welfare Rights Org. (EKWRO)*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975).

162. See Meg Kiely, *Boston's Policy Gives Developers Choice*, 2 NHC AFFORDABLE HOUS. POL'Y REV., Jan. 2002, at 26, 26–28 (describing inclusionary development policy in Boston, Massachusetts); Robert W. Burchell & Catherine C. Galley, *Inclusionary Zoning: Pros and Cons*, NEW CENTURY HOUS., Oct. 2000, at 3, 3–5 (discussing successful inclusionary zoning programs in numerous localities, including Montgomery County, Maryland).

163. Clark Ziegler, *Introduction*, 2 NHC AFFORDABLE HOUS. POL'Y REV., Jan. 2002, at 1, 1–2.

164. See Cal. Dep't of Hous. & Community Dev., *Housing Elements*, <http://www.hcd.ca.gov/hpd/hrc/plan/he/> (last visited Mar. 24, 2008).

165. *S. Burlington County NAACP v. Mt. Laurel*, 33 A.2d 713, 724 (N.J. 1975).

166. See generally DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* 112–64 (1995). Regional contribution agreements are governed by statute. N.J. Stat. Ann. § 52:27D-312 (2007).

167. See generally David Rusk, *Can Faith Move Mountain-less New Jersey?* (Jan. 31, 2008) (unpublished draft manuscript, on file with author). A growing number of municipalities have rejected proposed regional contribution agreements, some even passing resolutions opposing their use. See *id.* (discussing, among others, Haddonfield, Pennsauken, Montclair, and Maplewood). Significant housing reform legislation that would eliminate the use of regional contribution agreements is pending before the Assembly. See A.B. 500, 213th Leg. (N.J. 2008); see also Tom Hester, *Affordable Housing Overhaul Is in Play*, STAR-LEDGER, Mar. 13, 2008.

zoning practices are not discriminatory and do not perpetuate segregation.

E. *The Link Between School Segregation and Residential Segregation*

Just as segregated housing patterns often lead to segregated schools, there is evidence that integration in schools can, in turn, lead to greater residential integration. As a result, integrated schools are an important tool for mitigating and eliminating residential segregation.¹⁶⁸ Unfortunately, the United States Supreme Court recently limited the ability of local school boards to take race into account in making school assigning decisions as part of an overall attempt to integrate public schools.¹⁶⁹

School desegregation programs have had a positive impact on residential integration.¹⁷⁰ During the 1970s, cities that had undergone metropolitan school desegregation experienced “markedly greater rates” of housing desegregation than did other cities.¹⁷¹ Between 1970 and 1990, residential integration occurred at twice the national average in communities with metropolitan school desegregation programs.¹⁷² A recent study of fifteen metropolitan regions shows that comprehensive school desegregation programs are strongly correlated with stable residential integration.¹⁷³ The United States Supreme Court has also noted that the location

168. Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY 135 (John a. Powell et al. eds., 2001); see also Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama, and Charlotte, North Carolina*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 164, 180 (John Charles Boger & Gary Orfield eds., 2005).

169. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. ____, 127 S. Ct. 2738 (2007). In his dissent, Justice Breyer notes the correlation between school segregation and residential segregation. He maintains that there is an “interest in continuing to combat the remnants of segregation caused in whole or in part by these school-related policies” where such policies “have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes.” *Id.* at 2820 (Breyer, J., dissenting).

170. See DIANA PEARCE, CTR. FOR NAT’L POL’Y REV., BREAKING DOWN BARRIERS: NEW EVIDENCE ON THE IMPACT OF METROPOLITAN SCHOOL DESEGREGATION ON HOUSING PATTERNS 3 (1980) (citing evidence of increased housing integration in places with metropolitan desegregation programs).

171. *Id.* at 26–27.

172. Frankenberg, *supra* note 168, at 180; G. Orfield, *Metropolitan School Desegregation*, *supra* note 168, at 135.

173. INST. ON RACE & POVERTY, MINORITY SUBURBANIZATION, STABLE INTEGRATION, AND ECONOMIC OPPORTUNITY IN FIFTEEN METROPOLITAN REGIONS 27–29 (2006), available at http://www.irpumn.org/uls/resources/projects/Minority_Suburbanization_full_report_032406.pdf; see also PEARCE, *supra* note 170, at 51–52 (finding school desegregation supports stable, integrated communities by increasing available housing opportunities and associating benefits with integrated neighborhoods).

of schools may influence patterns of residential development in metropolitan areas and may have an important impact on the composition of inner-city neighborhoods.¹⁷⁴

Levels of school segregation are high in the United States, particularly for low-income African Americans. In 2002–2003, only 28% of all white public school students (K–12) attended high-poverty schools (defined as schools where 40% or more of the students were eligible for free or reduced price lunches—a proxy for poverty).¹⁷⁵ In contrast, 71% of all African American public school students and 73% of all Latino public school students attended high-poverty schools during the same period.¹⁷⁶ Meanwhile, 1.4 million African American students (1 of every 6) and nearly 1 million Latino students (1 of every 9) attend schools where 99% to 100% of the students are people of color.¹⁷⁷

While there is evidence that integrated schools promote stable integrated neighborhoods, the converse is also true: segregated schools promote segregated neighborhoods.¹⁷⁸ Prior to its recent decision in the Seattle and Louisville voluntary school integration cases, the Supreme Court had recognized the benefits of racially integrated schools in and of themselves.¹⁷⁹ The United States Supreme Court's recent decision unfortunately presents a significant obstacle for integrating schools and remedying residential segregation.¹⁸⁰

Meaningful school integration, where all children in a school district attend integrated schools no matter where they live, eliminates an incentive for whites to move to white enclaves.¹⁸¹ Fully integrated schools open all areas of a community to parents, who can live anywhere in the district

174. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20–21 (1971).

175. GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 19, tbl.7 (2005).

176. *Id.* These figures also exclude millions of private school students, who are disproportionately white. The most recent data from the United States Department of Education shows that, of 5,122,772 private school students nationwide, 76.2% are non-Hispanic whites, even though non-Hispanic whites comprise only 59% of children in the United States. See U.S. DEP'T OF EDUC., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2003–2004 PRIVATE SCHOOL UNIVERSE STUDY 13 tbl.7, 19 tbl.13 (2006); CHILD TRENDS DATABANK, RACIAL AND ETHNIC COMPOSITION OF THE CHILD POPULATION 5 (2006).

177. ORFIELD & LEE, *supra* note 175, at 12–13.

178. See generally Frankenberg, *supra* note 168.

179. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472–74 (1982).

180. See generally *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738 (2007).

181. Frankenberg, *supra* note 168, at 180; PEARCE, *supra* note 170, at 41; see also CASHIN, *supra* note 91, at 169 (“Parenthood contributes to white separatism. . . . The most risk-free alternative in a society that is not fundamentally committed to bringing every child or every person along is to opt for those neighborhoods and schools that offer the best opportunities one can afford. Unfortunately those places tend to be the most homogeneous—indeed, the whitest and wealthiest of places.”)

and know that their children will not be racially isolated in any school they attend.¹⁸²

Recognizing the importance of schools in many real estate decisions, advertisements for homes in districts with segregated schools list the names of schools, if they are predominantly white, from two to ten times more frequently than do advertisements for homes in districts with integrated schools.¹⁸³ In districts with truly integrated schools, home advertisements mention schools much less often and focus instead on things like the distance to offices, stores, and recreational facilities.¹⁸⁴ By including in advertisements the names of schools where the student bodies are predominantly white, real estate agents subtly reinforce the notion that the ability to attend segregated schools is an important—and desirable—feature of property.¹⁸⁵ The separate administration of school and housing desegregation and enforcement decisions severely limits the ability of national, state, and local officials to address this conjoined problem.

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In sum, numerous programs and policies of the United States government have contributed to persistent residential segregation, in contravention of the States party's obligation under Article 2(1)(c) of the Convention to review and modify government policies which perpetuate or maintain patterns of racial discrimination. To comply with CERD, the United States government must take affirmative steps to eradicate the lingering effects of past discrimination, to promote residential integration, and to further fair housing.

IV. THE UNITED STATES GOVERNMENT HAS NOT RESPONDED ADEQUATELY TO PRIVATE ACTS OF DISCRIMINATION

The government alone is not responsible for the current state of residential segregation in the United States. However, under Article 2(1)(d) of the Convention, States parties are also obligated to take affirmative measures through "all appropriate means" to prohibit and end racial discrimination by non-governmental actors. The United States government's response to racial discrimination by private actors has been severely inadequate. Studies, including those performed by and on behalf of HUD, show that African Americans and Latinos frequently encounter discrimination when searching for housing at all stages: they receive inferior service upon entering a realtor's office, they are told that fewer homes are

182. Frankenberg, *supra* note 168, at 180; PEARCE, *supra* note 170, at 4, 40–41.

183. G. Orfield, *Metropolitan School Desegregation*, *supra* note 168, at 135; PEARCE, *supra* note 170, at 9, 14–18.

184. G. Orfield, *Metropolitan School Desegregation*, *supra* note 168, at 135; PEARCE, *supra* note 170, at 12, 14.

185. PEARCE, *supra* note 170, at 18.

available, and they are shown fewer homes than whites are.¹⁸⁶ HUD's Housing Discrimination Study 2000 ("HDS 2000"),¹⁸⁷ which is referenced in the 2007 Report,¹⁸⁸ is the most recent comprehensive study of housing discrimination in the United States. It indicates that housing discrimination remains a serious problem for people of color, with some illegal discriminatory practices actually on the upswing. Despite some evidence of declines for African Americans, the levels of unequal treatment remain high in violation of the United States government's obligations under CERD.

A. Steering

Steering by real estate agents is a common discriminatory practice, impacting both whites and people of color at all income levels.¹⁸⁹ The United States Supreme Court has defined steering as a "practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups."¹⁹⁰ Even though steering violates the Fair Housing Act,¹⁹¹ it continues to be a major form of unfair,

186. See generally JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST 19–49 (1995).

187. HDS 2000 was conducted in three phases, measuring discrimination against African Americans and Latinos, Asians and Pacific Islanders, and Native Americans. See MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 (2002) (African Americans and Latinos); MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE II HDS 2000 (2002) (Asians and Pacific Islanders); MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE III HDS 2000 (2003) (Native Americans).

188. *Periodic Report*, *supra* note 56, at para. 65.

189. See, e.g., NAT'L FAIR HOUS. ALLIANCE, HOUSING SEGREGATION BACKGROUND REPORT: LONG ISLAND, NEW YORK 6–9 (2006) (on file with authors); NAT'L FAIR HOUS. ALLIANCE, HOUSING SEGREGATION BACKGROUND REPORT: WESTCHESTER, NEW YORK 3–6 (2006) (on file with authors); George Galster & Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. AM. PLAN. ASS'N 251, 260 (2005). For example, in 2007, the Metropolitan Milwaukee Fair Housing Council, Inc. filed a housing discrimination lawsuit against a local owner of apartment buildings after African American testers were consistently told that there were no apartments available and white testers were informed that there were available units. GREATER MILWAUKEE HUMAN RIGHTS COALITION SHADOW REPORT, *supra* note 145, at para. 57.

190. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366 n.1 (1982).

191. See 42 U.S.C. § 3604(a) (2000) (prohibiting practices that "otherwise make unavailable" housing on basis of race); see also *Havens Realty Corp.*, 455 U.S. at 370; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115, n.32 (1979); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 13:5 (2006).

unequal treatment that training of realtors has not eliminated.¹⁹² As a result of steering, people of color buying homes are directed to disproportionately African American and/or Latino neighborhoods, and white homebuyers are directed to disproportionately white neighborhoods, thus reinforcing patterns of residential segregation.¹⁹³

The prevalence of steering has been determined through testing, a process in which two applicants, generally one white and one a person of color, with similar qualifications apply for the same residence in order to determine whether either applicant receives differential treatment.¹⁹⁴ Evidenced in 12% to 15% of tests, steering remains a stubbornly persistent practice that has increased since 1989.¹⁹⁵ HDS 2000 concluded that, overall, “[w]hite homebuyers were significantly more likely than comparable blacks to be recommended and shown homes in more predominantly white neighborhoods.”¹⁹⁶ Even the interactions of real estate agents with people of color and whites tend to be very different. For example,

agents typically accept the initial request as an accurate portrayal of a white’s preferences but adjust the initial request made by a black to conform to their preconceptions. In the case of houses with visible problems, agents refuse to accept the initial request as a sign that whites want such a house, but have no trouble making this inference for blacks.¹⁹⁷

Some examples of steering by real estate agents reported in HDS 2000 include the following statements, which also demonstrate the agents’ awareness that their actions are illegal:

- “[The area] has a questionable ethnic mix that you might not like. I could probably lose my license for saying this!”
- “[The area] is different from here; it’s multicultural. . . . I’m not allowed to steer you, but there are some areas that you wouldn’t want to live in.”

192. See TURNER ET AL., HDS 2000 PHASE I, *supra* note 187, at 6–16; Galster & Godfrey, *supra* note 189, at 260.

193. YINGER, *supra* note 186, at 51–61.

194. See Memorandum from Carolyn Y. Peoples, Assistant Secretary for Fair Housing and Equal Opportunity to All FHEO Field Office Staff and Office of Enforcement and Programs Staff (Apr. 10, 2003), available at <http://www.hud.gov/offices/fheo/library/testing.pdf>.

195. TURNER ET AL., HDS 2000 PHASE I, *supra* note 187, at 6–16.

196. *Id.* at 3–11.

197. Jan Ondrich et al., *Now You See It, Now You Don’t: Why Do Real Estate Agents Withhold Available Houses from Black Customers?*, 85 REV. OF ECON. & STAT. 854, 872 (2003); see also Bo Zhao et al., *Why Do Real Estate Brokers Continue to Discriminate? Evidence from the 2000 Housing Discrimination Study*, 59 J. URB. ECON. 394 (2006).

- “There are a lot of Latinos living there. . . . I’m not supposed to be telling you that, but you have a daughter and I like you.”
- “It’s against the law for me to be saying so, but I could steer you toward some neighborhoods and away from some others.”
- “I would not send you to this area. I’m not supposed to say this but I’m probably old enough to be your father.” When tester asked why, the agent said tentatively, “Because it’s primarily an ethnic neighborhood and I wouldn’t send you there.”¹⁹⁸

HDS 2000 indicated that in home sales markets, whites consistently received favored treatment over African Americans 17% of the time, and over Latinos approximately 20% of the time.¹⁹⁹ Non-racial explanations for these patterns of differential treatment were explored and rejected.²⁰⁰ In addition, HDS 2000 found that discrimination against Latinos seeking rentals had increased since 1989.²⁰¹ Under CERD the United States government has an obligation to address the issue of steering.

B. Discriminatory and Predatory Lending in the Mortgage Industry

African Americans and Latinos have the lowest homeownership rates in the United States—less than 50%, as compared to 76% for whites.²⁰² Home equity is the largest pool of wealth for most American families, so disparities in homeownership are a major component of persistent racial inequality.²⁰³ These discrepancies appear to be due in large measure to discrimination in mortgage lending, with private lenders denying mortgages to potential African American and Latino homebuyers at

198. See Galster & Godfrey, *supra* note 189, at 262. Similar forms of discrimination occur in the rental market. See generally Seok Joon Choi et al., *Do Rental Agents Discriminate Against Minority Customers? Evidence from the 2000 Housing Discrimination Study*, 14 J. HOUS. ECON. 1 (2005).

199. TURNER ET AL., HDS 2000 PHASE I, *supra* note 187, at 4-7, 4-12.

200. *Id.* at 5-1 to 5-16.

201. *Id.* at iii-iv exhibit ES-1.

202. Delvin Davis, *Here Today, Gone Tomorrow: The Impact of Subprime Foreclosures on African American and Latino Communities*, POVERTY & RACE, May-June 2007, available at http://www.prrac.org/full_text.php?text_id=1131&item_id=10533&newsletter_id=93&header=Housing.

203. Despite some narrowing of income disparities in recent years, large disparities in wealth remain between whites and African Americans. See generally THOMAS SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* (2003).

disproportionate rates.²⁰⁴ Some studies indicate that large differences in mortgage rejection rates based on race occur because “[l]oan officers were far more likely to overlook flaws in the credit scores of white applicants or to arrange creative financing for them than they were in the case of black applicants.”²⁰⁵

More pointedly, a HUD study that used testers posing as first-time homebuyers in Chicago and Los Angeles indicated that African American and Latino homebuyers faced “a significant risk of receiving less favorable treatment than comparable whites” when visiting mainstream mortgage lending institutions to make pre-application inquiries.²⁰⁶ Among the most serious forms of discrimination discerned by the study were differential estimates of home price and total loan amount based on race.²⁰⁷

Furthermore, disparities in the homeowners insurance available to people of color contribute to more declinations of coverage among people of color and limit opportunities for integration. Neighborhoods composed predominantly of people of color are often excluded from the best homeowners insurance coverage.²⁰⁸ As a federal appellate court explained, procuring insurance is critical to the home purchasing process: “No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable.”²⁰⁹ Examples of insurance discrimination include providing inattentive service to people of color, offering policies with different terms to members of different racial groups, requiring inspections only in non-white neighborhoods, and requiring credit checks only from people of color.²¹⁰

In addition, statistics indicate that when people of color obtain loans, they are more likely than whites to receive higher cost loans and sub-prime loans.²¹¹ In 2006, 53.7% of African Americans, 46.6% of Latinos,

204. STEPHEN ROSS & JOHN YINGER, *THE COLOR OF CREDIT* 5–8 (2003); see, e.g., GREATER MILWAUKEE HUMAN RIGHTS COALITION SHADOW REPORT, *supra* note 145, at para. 59 (noting that Milwaukee has the largest mortgage loan denial rate disparity of the 50 largest metropolitan areas in the United States; non-Hispanic whites in Milwaukee County experienced a 36.3% loan denial rate in 2006, while non-Hispanic blacks experienced a 58.1% loan denial rate).

205. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 139 (1995).

206. MARGERY AUSTIN TURNER ET AL., *URBAN INST., ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS* iii (2002).

207. *Id.* at 37.

208. See Shanna L. Smith & Cathy Cloud, *Documenting Discrimination by Homeowners Insurance Companies Through Testing*, in *INSURANCE REDLINING* 97–117 (Gregory D. Squires ed., 1997).

209. NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992).

210. See Gregory D. Squires, *Racial Profiling, Insurance Style: Insurance Redlining and the Uneven Development of Metropolitan Areas*, 26 J. URB. AFF. 391, 398 (2003).

211. Subprime lending is the practice of making loans to borrowers who do not qualify for market interest rates because of their credit history; such loans are made on less favorable terms than are standard for prime loans. Allen Fishbein & Harold Bunce,

and only 17.7% of whites received high-priced loans.²¹² In areas where the population is no more than 20% white, 46.6% of borrowers received high-priced loans, compared to only 21.7% of borrowers in communities where whites made up at least 90% of the population.²¹³ After controlling for various borrower characteristics, such as income and loan amount, these racial gaps are reduced but still statistically significant,²¹⁴ with people of color tending to receive the most expensive subprime loans.²¹⁵ These disparities are actually worse at higher income levels.²¹⁶

Predatory lenders are particularly active in communities of color²¹⁷ and intentionally seek out borrowers who cannot meet the terms of their

Subprime Market Growth and Predatory Lending, in HOUSING POLICY IN THE NEW MILLENNIUM: CONFERENCE PROCEEDINGS 273 (U.S. Dep't of Hous. & Urban Dev. ed., 2001), available at <http://www.huduser.org/Publications/pdf/brd/13Fishbein.pdf>.

212. Robert B. Avery et al., *The 2006 HMDA Data*, 93 FED. RES. BULL. A73, A95, A96 tbl.11 (2007).

213. *Id.* at A100 tbl.14.

214. *Id.* at A98; see also WILLIAM C. APGAR, JR. & CHRISTOPHER E. HERBERT, ABT ASSOCS., SUBPRIME LENDING AND ALTERNATIVE FINANCIAL SERVICES PROVIDERS: A LITERATURE REVIEW AND EMPIRICAL ANALYSIS vi, 113–16 (2005), available at http://www.abtassociates.com/reports/final_abt_subprime_Feb_17.pdf (citing multiple studies showing higher incidence of subprime lending in minority neighborhoods, even after controlling for neighborhood credit scores); Vikas Bajaj & Ford Fessenden, *What's Behind the Race Gap?*, N.Y. TIMES, Nov. 4, 2007, at 16 (reporting that, in 2006, African Americans were 2.3 times more likely, and Hispanics twice as likely, to receive high-cost loans than whites, even after adjusting for loan amount and borrower income); Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 101, at 92–93 (“Subprime lending is concentrated in predominantly minority neighborhoods. A study of seven cities by economists at the Federal Reserve Board and Wharton found that the likelihood of receiving a subprime home loan increased as the percentage of blacks in a census tracts increased, after controlling for credit risk at the census tract level.”).

215. Overall, people of color are over 30% more likely to receive a higher-rate subprime loan than are similarly situated white borrowers. DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3, 8–9, 19 (2006), available at http://www.responsiblelending.org/pdfs/rr011-Unfair_Lending-0506.pdf (examining more than 177,000 subprime loans); see also ANTHONY PENNINGTON-CROSS ET AL., RESEARCH INST. FOR HOUS. AM., CREDIT RISK AND MORTGAGE LENDING: WHO USES SUBPRIME AND WHY? 13, 16 (2000), available at http://www.housingamerica.org/Publications/48519_RIHA00-03.pdf.

216. ASS'N OF CMTY. ORGS. FOR REFORM NOW (ACORN), FORECLOSURE EXPOSURE: A STUDY OF RACIAL AND INCOME DISPARITIES IN HOME MORTGAGE LENDING IN 172 AMERICAN CITIES 1 (2007), available at <http://acorn.org/fileadmin/HMDA/2007/HMDAreport2007.pdf>; see also Fishbein & Bunce, *supra* note 211, at 275; CALVIN BRADFORD, CTR. FOR CMTY. CHANGE, RISK OR RACE? RACIAL DISPARITIES IN THE SUBPRIME REFINANCE MARKET 3–8 (2002), available at http://www.knowledgeplex.org/kp/report/report/relfiles/ccc_0729_risk.pdf (finding that racial disparities within subprime refinance market increase with borrower income).

217. See ACORN, *supra* note 216, at 22–23; BRADFORD, *supra* note 216, at 77.

loans, leading to default and foreclosure.²¹⁸ Predatory lenders also steer borrowers who would otherwise qualify for standard loans towards subprime loans with less favorable terms, sometimes by applying pricing criteria and discretionary charges inconsistently across racial lines.²¹⁹ Since 2005, more than half of all borrowers issued subprime loans could have qualified for lower-cost mortgages with more favorable terms.²²⁰ These practices persist even though the targeting of neighborhoods of color with loans featuring unfair terms constitutes a violation of the Fair Housing Act.²²¹

Beyond the substantial impact on individual borrowers,²²² predatory subprime lending results in significant costs to communities of color. Subprime loans are more likely than prime loans to end in foreclosure, and subprime foreclosures have been disproportionately concentrated in low-income and predominantly African American neighborhoods.²²³ Foreclosures, in turn, depress property values²²⁴ and can result in vacancies, which attract crime,²²⁵ drive up insurance rates, and further depress the

218. Fishbein & Bunce, *supra* note 211, at 273, 278–81.

219. BOCIAN ET AL., *supra* note 215, at 20–22.

220. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL ST. J., Dec. 3, 2007 (citing recent analysis showing that 55% of subprime loans issued in 2005 went to borrowers with credit scores high enough to qualify for conventional loans with far better terms; this figure rose to 61% by the end of 2006); *see also* BOCIAN ET AL., *supra* note 215, at 7 (citing FANNIE MAE FOUND., FINANCIAL SERVICES IN DISTRESSED COMMUNITIES (2001); FREDDIE MAC, AUTOMATED UNDERWRITING (1996)) (discussing estimates by Federal National Mortgage Association and Federal Home Mortgage Corporation). These estimates are confirmed by the leading national secondary mortgage market institutions. *See* KEN ZIMMERMAN ET AL., N.J. INST. FOR SOC. JUSTICE, PREDATORY LENDING IN NEW JERSEY: THE RISING THREAT TO LOW-INCOME HOMEOWNERS I (2002), available at http://www.njisj.org/reports/predatory_lending.pdf.

221. *See* 42 U.S.C. § 3604(b) (2000); *see also* Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000); Honorable v. Easy Life Real Estate Sys., 100 F. Supp. 2d 885, 887, 892 (N.D. Ill. 2000).

222. Predatory mortgage lending costs families in the United States about \$9.1 billion each year. WEI LI & KEITH S. ERNST, CTR. FOR RESPONSIBLE LENDING, THE BEST VALUE IN THE SUBPRIME MARKET: STATE PREDATORY LENDING REFORMS 2 (2006), available at http://www.responsiblelending.org/pdfs/tr010-State_Effects-0206.pdf.

223. *See* Fishbein & Bunce, *supra* note 211, at 277; BRADFORD, *supra* note 216, at 78.

224. A single foreclosure results in an estimated .9% decline in nearby property values. *See* ALMAS SAYEED, CTR. FOR AM. PROGRESS, FROM BOOM TO BUST: HELPING FAMILIES PREPARE FOR THE RISE IN SUBPRIME MORTGAGE FORECLOSURES 6 (2007), available at http://www.americanprogress.org/issues/2007/03/pdf/foreclosure_paper.pdf.

225. A recent study found that a 2.8% increase in the foreclosure rate corresponds to an increase of neighborhood violent crime of 6.7%. *See* Jay Bookman, *Foreclosure Damage Spreads Out*, TIMES HERALD-RECORD, Sept. 8, 2007; *see also* Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 16 HOUS. STUDIES 851, 851–66 (2006).

value of other homes in the neighborhood, reducing local tax revenue for funding essential services such as roads and schools.²²⁶

These lending issues are particularly pertinent given the recent explosion in subprime lending in the United States. Between 1994 and 2005, the annual dollar volume of subprime lending grew from \$35 billion to more than \$600 billion, representing an increase from 5% to 20% of home-loan originations.²²⁷ Subprime loans account for an estimated 13% of all mortgages currently outstanding, representing approximately \$1.28 trillion.²²⁸

The number of foreclosures in the United States has also been rising during the last few years. In 2006, there were 1.2 million foreclosures nationwide, an increase of 42% from 2005.²²⁹ During 2007, the total number of foreclosure filings was 2,203,295, almost twice the number from 2006.²³⁰ Two million foreclosures amounts to roughly one in every 62 American households, an annual rate not seen since the Great Depression.²³¹ A high percentage of recent foreclosures are in the subprime market,²³² and communities of color have been hit particularly hard.²³³ With 10% of African Americans and 8% of Latinos at risk of losing their homes, the current foreclosure crisis “could mean the largest loss of wealth for African American and Latino families in the nation’s history.”²³⁴

226. ACORN, *supra* note 216, at 6–7.

227. Robert B. Avery et al., *Higher-Priced Home Lending and the 2005 HMDA Data*, 84 FED. RES. BULL. A123, A125 (2006).

228. Justin Lahrhart, *Why Investors Still Get Caught in Subprime Trap*, WALL ST. J., Feb. 22, 2007, at 61.

229. Nelson D. Schwartz, *Can the Mortgage Crisis Swallow a Town?*, N.Y. TIMES, Sept. 2, 2007, § 3, at 1.

230. *Foreclosure Rate Almost Doubled in 2007: Report*, REUTERS, Jan. 29, 2008.

231. Schwartz, *supra* note 229.

232. For example, subprime mortgages accounted for more than half of the of the roughly 310,000 foreclosure proceedings initiated in the fourth quarter of 2006. See Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Federal Reserve Bank of Chicago’s 43rd Annual Conference on Bank Structure and Competition, Chicago, Illinois (May 17, 2007), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20070517a.htm>. The Center for Responsible Lending estimates that 2.2 million families have lost or will lose their homes as a result of abusive subprime loans, constituting one in every five subprime loans made in 2005 and 2006. See *Legislative Proposals on Reforming Mortgage Practices: Hearing Before the H. Financial Servs. Comm.*, 110th Cong. (2007) (statement of Michael Calhoun, President, Center for Responsible Lending), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/htcalhoun102407.pdf [hereinafter Statement of Michael Calhoun]. New foreclosures on subprime adjustable rate loans in the second quarter of 2007 were 90% higher than in the previous year. *Id.*

233. APGAR & HERBERT, *supra* note 214, at vii; see also Carr & Kutty, *supra* note 101, at 13 (“The disproportionate impact of predatory lending on African American households is already clear; black homeownership is falling rapidly.”).

234. Davis, *supra* note 202.

According to scholars, much of the excessive growth in subprime lending over the past ten years can be traced to the federal government's deregulation of the mortgage industry.²³⁵ Many institutions making subprime loans, including mortgage companies and subsidiaries of national banks, are largely unregulated by federal authorities.²³⁶ At present, the federal government has not established uniform standards for regulating mortgage lending institutions.²³⁷ Moreover, the federal government's failure to regulate the secondary mortgage market "lies at the heart of today's mortgage meltdown."²³⁸ Traditionally, the interests of borrowers and lenders have been aligned: if borrowers are unable to repay their debts, lenders generally do not make any money. However, the growth of the secondary mortgage market has enabled mortgage lenders to bundle their loans with other mortgages into securities, which are then sold on a secondary market. This securitization of mortgage lending has de-coupled the interests of borrowers and lenders, reducing the incentive for lenders to ensure that borrowers are capable of repaying their loans.²³⁹

The federal government has made a modest effort to expand access to mortgage refinancing through the Federal Housing Administration,²⁴⁰ but these efforts are relatively minor. Moreover, beyond holding congressional hearings, the federal government has taken no new efforts to curb predatory lending or to combat the targeting of communities of color by predatory lenders. Despite the current financial crisis, the market is not self-correcting, as "future abuses are inevitable" without government reforms.²⁴¹ To comply with CERD, the United States government must address discrimination and predatory lending in the mortgage industry and attempt to ameliorate the effects of the subprime and foreclosure crises that are disproportionately affecting communities of color.

235. Robert Kuttner, *What's Behind the Sub-Prime Disaster*, AM. PROSPECT, Aug. 29, 2007, http://www.prospect.org/cs/articles?article=whats_behind_the_subprime_disaster.

236. *Id.*

237. NAT'L ASS'N OF MORTGAGE BROKERS, *WATTERS v. WACHOVIA BANK: BANK MORTGAGE LENDERS REMAIN EXEMPT FROM STATE REGULATION* (2007), available at [http://www.namb.org/Images/namb/GovernmentAffairs/Word_From_Washington/WFW%2007-06%20\(Watters%20v.%20%20Wachovia%20Bank\).pdf](http://www.namb.org/Images/namb/GovernmentAffairs/Word_From_Washington/WFW%2007-06%20(Watters%20v.%20%20Wachovia%20Bank).pdf).

238. Statement of Michael Calhoun, *supra* note 232, at 6.

239. *Id.*

240. Steven R. Weisman, *Bush Will Offer Relief for Some on Home Loans*, N.Y. TIMES, Aug. 31, 2007, at A1. Proposed changes to the federal mortgage insurance program will offer relief to approximately 80,000 more homeowners, a very small number considering the current wave of foreclosures. Additionally, although recent legislation approved by a Committee of the United States House of Representatives will provide some relief by reducing tax burdens imposed on victims of foreclosure, such legislation will obviously not do anything to help homeowners who are trying to avoid foreclosure. *U.S. House Panel Backs Tax Relief on Mortgage Debt*, REUTERS, Sept. 26, 2007.

241. Statement of Michael Calhoun, *supra* note 232, at 9.

*C. Ineffective and Slow Enforcement Fails to Address
Discrimination Comprehensively*

Based on HUD's own data, it is estimated that the United States has approximately 3.7 million fair housing violations annually, and that approximately 2 million involve racial discrimination.²⁴² But in 2006, HUD processed fewer than 11,000 total complaints, encompassing those based on family status, disability, religion, color, race, sex, and national origin discrimination.²⁴³ Thus, less than one-half of 1% of the estimated fair housing violations that occur in the United States result in formal complaints processed by HUD. Of the fair housing complaints received each year, approximately 40% allege racial discrimination.²⁴⁴

A study by the Government Accounting Office ("GAO") evaluated how HUD and state and local enforcement agencies that investigate fair housing complaints treated callers with potential complaints and found significant evidence of poor performance.²⁴⁵ For example, approximately 30% of complainants "noted that it was either somewhat or very difficult to reach a live person the first time they contacted a fair housing agency."²⁴⁶ In addition, more than one-third said they "had difficulty contacting staff after the initial contact."²⁴⁷ Staff at half of the agencies required complainants to fill out an intake form prior to initiation of any investigation, a process that "could take a week or more—during which the caller could lose a housing opportunity."²⁴⁸ One test caller who stressed that her situation was urgent was nevertheless told that "filing a complaint was a 'slow process' and that her complaint would not be acted on for some time" regardless of how the intake information was received.²⁴⁹ The GAO informed HUD that "[t]he time it takes to receive the form can delay the enforcement process, potentially resulting not only

242. NAT'L FAIR HOUS. ALLIANCE, *THE CRISIS OF HOUSING SEGREGATION: 2007 FAIR HOUSING TRENDS REPORT* 26 (2007) (citing 2004 Fair Housing Trends Report which reported findings from HDS 2000 study).

243. News Release, U.S. Dep't of Hous. & Urban Dev., *Housing Discrimination Complaints at an All-time High* (Apr. 3, 2007), available at <http://www.hud.gov/news/release.cfm?content=pr07-032.cfm>.

244. See U.S. GAO, *FAIR HOUSING: OPPORTUNITIES TO IMPROVE HUD'S OVERSIGHT AND MANAGEMENT OF THE ENFORCEMENT PROCESS*, GAO-04-463, at 73 tbl.7 (2004) [hereinafter GAO 2004].

245. See generally U.S. GAO, *FAIR HOUSING: HUD NEEDS BETTER ASSURANCE THAT INTAKE AND INVESTIGATION PROCESSES ARE CONSISTENTLY THOROUGH*, GAO-06-79 (2005) [hereinafter GAO 2005].

246. *Id.* at 2, 16.

247. *Id.*

248. *Id.* at 17.

249. *Id.*

in the loss of a housing opportunity but also in complainants becoming frustrated with the process and deciding not to pursue their complaint.”²⁵⁰

Large numbers of complaints that are received by HUD are closed without an investigation to determine whether discrimination has occurred. The GAO could not determine why, out of a sample of 2,000 complaints that appeared at intake to involve a potential fair housing violation, only 306 became filed or “perfected” complaints.²⁵¹ Of the total number of complaints filed with HUD, more than 14% of investigations are closed “administratively,” and thus without resolution.²⁵²

In recent years, HUD has found discrimination in remarkably few cases. In nearly half of all cases that are investigated, the agency decides there is no reasonable cause to believe that discrimination has occurred.²⁵³ HUD found reasonable cause to proceed in only 34 cases in fiscal year 2006, down from 88 cases in fiscal year 2001.²⁵⁴ Only 3.3% of all cases filed between 1989 and 2003 resulted in a reasonable cause determination being issued.²⁵⁵ There are, then, only a miniscule number of cases where HUD has investigated and found that discrimination occurred.²⁵⁶ State and local agencies have a somewhat better track record than HUD and have found discrimination, or reasonable cause, in 7% of their cases.²⁵⁷

Another measure of effectiveness in enforcing the law is whether agencies investigate cases promptly. Although Congress instructed HUD to investigate cases within 100 days unless it is infeasible to do so,²⁵⁸ in 2001, only 17% of cases were investigated on time by HUD.²⁵⁹ HUD’s Report to Congress for 2006 reported that 1,172 complaints took more than 100 days for HUD to investigate and that 3,940 complaints being handled by state and local agencies took more than 100 days.²⁶⁰ HUD has taken, on average, over 470 days to close cases.²⁶¹

250. *Id.* at 21–22.

251. *Id.* at 25.

252. GAO 2004, *supra* note 244, at 75 tbl.10.

253. *Id.* at 33.

254. NAT’L FAIR HOUS. ALLIANCE, *THE CRISIS OF HOUSING SEGREGATION*, *supra* note 242, at 32.

255. Michael H. Schill, *Implementing the Federal Fair Housing Act: The Adjudication of Complaints*, in *FRAGILE RIGHTS WITHIN CITIES*, *supra* note 92, at 143, 154, 156 tbl.7.3.

256. See GAO 2004, *supra* note 244, at 34 (“A determination of reasonable cause accounted for the smallest share of outcomes, around 5 percent of all completed investigations.”).

257. *Id.* at 36.

258. See 42 U.S.C. § 3610(a)(1)(B)(iv) (2000).

259. GAO 2004, *supra* note 244, at 37–38. This proportion rose to roughly 50% of the cases in 2003 after a major but temporary initiative. *Id.* at 38.

260. U.S. DEP’T OF HOUS. & URBAN DEV., *THE STATE OF FAIR HOUSING: FY2006 ANNUAL REPORT ON FAIR HOUSING* 33, 55 (2007).

261. John Goering, *The Effectiveness of Fair Housing Programs and Policy Options*, in *FRAGILE RIGHTS WITHIN CITIES*, *supra* note 92, at 253, 261–62.

HUD has failed to educate and inform United States residents about their rights and opportunities for redress under the Fair Housing Act. Based on data from HUD-commissioned studies, public knowledge of fair housing laws did not improve between 2000 and 2005 despite some efforts by HUD to increase public awareness.²⁶² More importantly, more than 80% of people who thought that they were the victims of housing discrimination did nothing about it.²⁶³ However, those with more knowledge of federal fair housing laws were over two-and-one-half times more likely than those with little awareness to do something about perceived discrimination.²⁶⁴

HUD provides virtually no educational materials for the general public about fair housing issues, and materials prepared by its grantees are not distributed nationally or made available by HUD for replication by other groups. Contrary to the Fair Housing Act,²⁶⁵ HUD also failed to fund a national fair housing media campaign in fiscal years 2005 or 2006 and failed to provide funding to underwrite previous successful media campaigns.²⁶⁶

Key partners in fair housing enforcement activities are private fair housing groups involved in HUD's Fair Housing Initiatives Project ("FHIP"). Those groups are not government agencies but are funded by HUD to conduct enforcement and education activities throughout the country. Such groups routinely process at least two-thirds of the nation's fair housing complaints,²⁶⁷ but FHIP is woefully underfunded. Although pending legislation calls for appropriating \$52 million per year for FHIP,²⁶⁸ Congressional appropriations for the FHIP program have dropped from a high in 1995 of \$25 million to \$18.1 million in 2007.²⁶⁹

262. MARTIN D. ABRAVANEL, URBAN INST., *DO WE KNOW MORE NOW? TRENDS IN PUBLIC KNOWLEDGE, SUPPORT AND USE OF FAIR HOUSING LAW* 19 (2006); *see also* Martin D. Abravanel, *Paradoxes in the Fair Housing Attitudes of the American Public, 2001–2005*, in *FRAGILE RIGHTS WITHIN CITIES*, *supra* note 92, at 81, 95–97.

263. Abravanel, *supra* note 262, at 88 & tbl.4.2; MARTIN D. ABRAVANEL & MARY K. CUNNINGHAM, URBAN INST., *HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS* 25 (2002); *accord* ABRAVANEL, *supra* note 262, at 35–36. Further, "[a]lmost two of every five people in this situation believed there was no point to responding, that it would not have solved the problem or, in some instances, that it could have made the problem worse." ABRAVANEL & CUNNINGHAM, *supra*, at 27; *accord* ABRAVANEL, *supra* note 262, at 36–37.

264. ABRAVANEL & CUNNINGHAM, *supra* note 263, at 26–27.

265. *See* 42 U.S.C. § 3616a(d) (2000) (requiring HUD to "establish a national education and outreach program" that includes "public service announcements, both audio and video" and "television, radio and print advertisements").

266. *See, e.g.*, U.S. Dep't of Hous. & Urban Dev., *Fair Housing Ad Campaign*, <http://www.hud.gov/offices/fheo/adcampaign.cfm> (last visited Feb. 26, 2008).

267. GAO 2004, *supra* note 244, at 75 tbl.10.

268. Housing Fairness Act of 2007, S. 1733, 110th Cong. (2007).

269. U.S. DEP'T OF HOUS. & URBAN DEV., *THE STATE OF FAIR HOUSING*, *supra* note 260, at 2.

HUD's fiscal year 2007 budget lacked funding to create new groups, continue a national media campaign to increase public awareness of fair housing rights and responsibilities, or sustain existing groups, even well-qualified, previously funded groups.²⁷⁰

HUD's Office of Fair Housing and Equal Opportunity ("FHEO"), the department that is responsible for processing fair housing complaints, has been particularly susceptible to shifting goals and fluctuating funding following partisan changes in Congress and the White House.²⁷¹ The level of resources allocated to FHEO, adjusted for inflation, has steadily declined from an all-time high of \$49.38 million in 1994, and although Congress has increased FHEO appropriations since 2000, these increases have not kept pace with inflation.²⁷² The number of full-time staff positions has also declined, from a high of 750 in 1994²⁷³ to 598 in 2006.²⁷⁴ Understaffing and underfunding in FHEO are significant problems, because fair housing enforcement is a staff-based activity involving investigations, interviews, data collection, and analysis.²⁷⁵ As FHEO's staff levels have fluctuated and well-qualified staff have left or retired, fewer complaints have been processed, delays in resolving cases have increased, and fewer reasonable cause determinations have been made, while new staff have lacked the skills necessary to conduct thorough investigations and settlement amounts have declined.²⁷⁶

The DOJ has the authority to initiate enforcement actions based on its own investigations. Despite the long history of housing discrimination in the United States, the DOJ did not implement a Fair Housing Testing

270. See NAT'L FAIR HOUS. ALLIANCE, FHIP FACT SHEET 1-3, <http://www.nationalfairhousing.org/resources/publicPolicy/articles/NFHA%20policy%20agenda.pdf>.

271. See Mara S. Sidney, *National Fair Housing Policy and Its (Perverse) Effects on Local Advocacy*, in FRAGILE RIGHTS WITHIN CITIES, *supra* note 92, at 203, 224-25.

272. U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: 2005, at 39 (Sept. 2004), available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr12962005draft.pdf>.

273. NAT'L COUNCIL ON DISABILITY, RECONSTRUCTING FAIR HOUSING 207-08 (2001), available at <http://www.ncd.gov/newsroom/publications/2001/pdf/fairhousing.pdf>.

274. U.S. DEP'T OF HOUS. & URBAN DEV., THE STATE OF FAIR HOUSING, *supra* note 260, at 15.

275. NAT'L COUNCIL ON DISABILITY, *supra* note 273, at 206. Experts estimate that a minimum of 750 full-time staff at FHEO are necessary to deal with the current number of complaints received by HUD. See *Fighting Discrimination Against the Disabled and Minorities Through Fair Housing Enforcement: Hearing Before the H. Subcomm. on Oversight and Investigations, and Subcomm. on Housing and Community Opportunity*, 107th Cong. 63, 73 (2002) (statement of Sara Pratt, Nat'l Council on Disability), available at http://commdocs.house.gov/committees/bank/hba82683.000/hba82683_of.htm.

276. NAT'L COUNCIL ON DISABILITY, *supra* note 273, at 210; see also Schill, *supra* note 255, at 147-49 (discussing reports concluding HUD enforcement was "plagued by delay and relatively low rates of reasonable-cause findings").

Program until 1992,²⁷⁷ and it still brings relatively few cases based on the results of testing.²⁷⁸ Although the DOJ filed a total of 15 cases during 1999 and 2000 based on the results of its testing program, the DOJ has filed only 16 such cases from 2001 through 2006.²⁷⁹ The United States' 2007 Report states that the Civil Rights Division of the DOJ "increased the number of fair housing tests conducted by 38 percent compared to fiscal year 2005,"²⁸⁰ but it does not state the total number of fair housing tests conducted, where those tests occurred, the current and proposed levels of funding, the number of housing complaints alleging racial discrimination the DOJ received, or what forms and level of discrimination have been found in those cases investigated.

The DOJ brought only 31 housing and civil enforcement cases in fiscal year 2006,²⁸¹ of which a mere eight involved claims of racial discrimination, down from 53 cases in fiscal year 2001²⁸² and a peak of 194 in 1994.²⁸³ These numbers are clearly insufficient in light of HUD's estimate that over 2 million fair housing violations involving race occur annually and indicate that the United States government must do more to comply with its obligations under CERD.²⁸⁴

V. RECOMMENDATIONS TO FACILITATE THE UNITED STATES GOVERNMENT'S COMPLIANCE WITH CERD

This Part describes recommendations directed to different arms of the government to improve the United States' compliance with CERD. These recommendations were offered to the Committee by housing scholars and research and advocacy organizations in the shadow report on which this Article is based.

277. U.S. Dep't of Justice, Hous. & Civil Enforcement Section, *Testing Program*, http://www.usdoj.gov/crt/housing/housing_testing.htm (last visited Feb. 26, 2008).

278. See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1426 (1998).

279. *Civil Rights Division Oversight: Hearing Before the S. Judiciary Comm.*, 110th Cong. (2007) (statement of Wade Henderson, President and CEO, Leadership Conference on Civil Rights), available at http://judiciary.senate.gov/testimony.cfm?id=2837&wit_id=6546 [hereinafter Statement of Wade Henderson].

280. *Periodic Report*, *supra* note 56, para. 67.

281. *Id.*

282. Statement of Wade Henderson, *supra* note 279.

283. *Initial Report*, *supra* note 55, at 50.

284. See NAT'L FAIR HOUS. ALLIANCE, *THE CRISIS OF HOUSING SEGREGATION*, *supra* note 242, at 26.

A. *Recommendations for the Department of Housing and Urban Development*

HUD is required to administer its public housing programs in ways that affirmatively further fair housing and encourage greater residential integration. To improve the United States government's compliance with CERD, HUD should:

- *Encourage and support the development of public and assisted housing outside of areas currently occupied predominantly by people of color.* To ensure that new government assisted housing is not concentrated in segregated areas, HUD should adopt guidelines to encourage applications for developing low income housing in integrated areas, and reject plans for the redevelopment of public and assisted housing in integrated areas that would reduce the total number of existing affordable housing units in integrated areas.²⁸⁵ Other viable public and assisted housing should also be preserved, in light of the severe housing shortages facing low income families in the United States.²⁸⁶
- *Right to return.* Some housing advocates have stressed the importance of providing residents with a right to return to the site of a redeveloped public housing community. HUD should support this right.

As the only federally administered program that provides directly for housing mobility, Section 8 has the potential to encourage racial integration. HUD should support voluntary choices by families to move from high-poverty areas to lower-poverty areas; it should also facilitate movement to more integrated communities. To improve the United States government's compliance with CERD, HUD should:

- *Strengthen the portability of vouchers.* HUD should eliminate financial penalties imposed on public housing authorities when families move from one jurisdiction to another. HUD should also abandon rules adopted in 2003 and 2004 that limit Section 8 moves into lower-poverty,

285. POVERTY & RACE RESEARCH ACTION COUNCIL, STATEMENT OF FAIR HOUSING AND CIVIL RIGHTS ADVOCATES ON HOPE VI REAUTHORIZATION 2 (2007); see also Thompson v. U.S. Dep't of Hous. & Urban Dev., No. 95 Civ. 00309 (MJG) (D. Md. Mar. 10, 2006), at 36-38 (testimony of Dr. Jill Khadduri) [hereinafter Khadduri Report].

286. See generally HOMELESSNESS AND AFFORDABLE HOUSING: RESPONSE TO THE PERIODIC REPORT OF THE UNITED STATES TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2008), available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN28.doc>, which is consistent with the principles set out in the present report.

higher-rent areas.²⁸⁷ Finally, HUD should direct public housing authorities in less segregated jurisdictions to absorb into their own voucher programs any voucher recipients seeking to move into such jurisdictions from neighboring areas with higher levels of segregation.²⁸⁸

- *Implement and fund a nationwide mobility and counseling program based on the successful Gautreaux Assisted Housing Program in Chicago.* Such a program should provide voluntary participants with assistance finding housing, as well as carefully designed counseling programs. For example, HUD could reinstate front-end mobility counseling, abandoned in 2002, which advises families how they might use their vouchers to move into low-poverty areas. Second, HUD should combine front-end mobility counseling with additional post-move counseling to assist relocating families in accessing opportunities in their new neighborhoods.²⁸⁹ Such counseling should be connected to essential services that have been successful in helping individuals find and retain jobs: job-placement programs, foundation and church-supported transportation assistance programs, and childcare assistance.²⁹⁰

HUD must substantially improve its system for dealing with complaints of housing discrimination. To improve the United States government's compliance with CERD, Congress and HUD should:

- *Increase the funding and staffing levels for HUD's Office of Fair Housing and Equal Opportunity.* Funding for FHEO has not kept pace with inflation, and staff levels within the office are well below the minimum level recommended by experts. Funding and staffing levels for FHEO must be increased so that it can investigate and resolve complaints efficiently and effectively.
- *Redesign education and outreach programs to address systemic shortcomings in all prior education programs and implement national fair housing media campaigns.* HUD must redesign its efforts to make citizens aware of their rights and

287. See Tegeler, *New Directions for U.S. Housing Policy*, *supra* note 134, at 99.

288. See POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 285, at 2; Khaduri Report, *supra* note 285, at 34–35.

289. Philip Tegeler, *Connecting Families to Opportunity: The Next Generation of Housing Mobility Policy* (citing Xavier de Souza Briggs & Margery Austin Turner, *Assisted Housing Mobility and the Success of Low-Income Minority Families: Lessons for Policy, Practice, and Future Research*, 1 NW J.L. & SOC. POL'Y 25, 40 (2006)), in *ALL THINGS BEING EQUAL: INSTIGATING OPPORTUNITY IN AN INEQUITABLE TIME* 3–5 (Brian Smedley & Alan Jenkins eds., 2007).

290. *Id.*

opportunities for redress under the FHA if HUD's complaint system is to function effectively.

- *Increase funding for its Fair Housing Initiatives Program to at least \$52 million annually.* Private fair housing enforcement groups are currently processing more complaints and conducting more investigations than HUD is, but inadequate funding is available for them to process so many complaints. Funding for FHIP should be increased significantly, to at least the \$52 million appropriation in pending legislation.²⁹¹
- *Consider establishing a new, independent agency to conduct fair housing enforcement activities.* That agency would, among other things, operate the FHIP program, develop new national education and outreach materials, and investigate individual and systemic complaints. Given the poor performance of HUD in accepting and investigating complaints, creation of a new enforcement agency should be part of the public policy agenda of the United States.

B. Recommendations for the Department of Justice

As the principal legal authority tasked with enforcing federal fair housing laws, the DOJ should do more to combat illegal discrimination by private actors in the housing market. To improve the United States government's compliance with CERD, the DOJ should:

- *Increase resources dedicated to investigating and prosecuting steering.* The 2007 Report highlights the DOJ's efforts to increase testing for discrimination, but such enhanced efforts must result in concerted action. The DOJ must greatly increase the number of race-based housing and civil enforcement cases it files to ensure that the violations discovered through the testing program are remedied.
- *Investigate and prosecute cases of lending discrimination.* The DOJ should prosecute cases against mortgage lenders who engage in discriminatory practices. The federal government is better situated than are private individuals to litigate discriminatory lending cases, which are typically class actions that require complicated statistical analyses

291. See Housing Fairness Act of 2007, S. 1733, 110th Cong. (2007).

to account for the many variables used in making loan determinations.²⁹²

C. Recommendations for the United States Congress

As currently administered, the Low Income Housing Tax Credit is not expressly required to comply with federal fair housing policy, and its implementation perpetuates residential segregation. To improve the United States government's compliance with CERD, Congress should:

- *Incorporate explicit fair housing standards into the LIHTC statute.* Congress should encourage project siting that furthers fair housing goals and create incentives that promote economic and racial diversity. Examples include the prioritization of developments in areas with low crime rates and well-resourced, low-poverty schools, and the establishment of set-asides for voucher recipients in new LIHTC developments in high-opportunity neighborhoods.²⁹³
- *Direct the Internal Revenue Service and HUD to collect data regarding applicants and residents in LIHTC developments.* Those mandates should include the collection and reporting of racial and economic data about project residents and applicants.²⁹⁴

The federal government must address the targeting of communities of color by predatory lenders. To that end, and to improve the United States government's compliance with CERD, Congress should:

- *Enact robust anti-predatory lending legislation.* Congress should adopt several reforms to curtail discrimination in the mortgage market and to prevent predatory lending, including, but not limited to: uniform pricing standards

292. See Selmi, *supra* note 278, at 1425. An example of a successful mortgage discrimination case brought by the federal government is *United States v. Decatur Federal Savings & Loan Ass'n*, No. 92 Civ. 2198 (N.D. Ga. Sept. 17, 1992). In *Decatur Federal*, the DOJ determined that, although the defendant bank had operated since 1927 in Atlanta, a city with a large African American population, 97% of its mortgage loans were made in majority white census tracts; after conducting a market-share analysis, the DOJ determined that these severe racial imbalances were statistically significant and could not be explained by socioeconomic differences between white and African American neighborhoods. See Richard Ritter, *The Decatur Federal Case: A Summary Report*, in MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY 447-48 (John Goering & Ron Wienk eds., 1996). The complex analyses that were involved in bringing that action demonstrate the need for federal resources to prosecute lending discrimination cases successfully.

293. Tegeler, *New Directions for U.S. Housing Policy*, *supra* note 134, at 100-01.

294. Such recordkeeping is routine for HUD-administered projects but is not yet followed in the LIHTC program. See CLIMACO ET AL., *supra* note 139; see also Tegeler, *New Directions for U.S. Housing Policy*, *supra* note 134, at 100.

for all mortgage lending institutions,²⁹⁵ licensing and registration requirements for mortgage brokers; a prohibition on financial incentives for brokers to steer borrowers towards subprime loans; the establishment of a duty of care owed by mortgage originators to borrowers; a requirement that creditors make a determination based on verifiable documentation that applicants have an ability to repay their loans; the elimination of prepayment penalties for subprime loans;²⁹⁶ and a requirement that subprime lenders recommend that applicants avail themselves of mortgage counseling.²⁹⁷ However, Congressional remedies should not preempt more stringent state government regulations.²⁹⁸ Furthermore, Congress should strengthen proposed legislation by establishing more potent remedies for violations of the duty of care and the prohibition on steering, and by creating assignee liability for mortgages sold on the secondary market, to realign the interests of borrowers and debt holders.²⁹⁹

D. Recommendations for State and Local Governments

Integrated schools lead to more integrated neighborhoods. To that end, and to improve the United States government's compliance with CERD, state and local governments should:

- *Pursue alternative means to promote school integration.* “[R]esearch . . . strongly shows that graduates of desegregated high schools are more likely to live in integrated communities than those who do not, and are more likely to have cross-race friendships later in life.”³⁰⁰ The United States Supreme Court's recent decision regarding school integration restricted, but did not prohibit, school districts from using voluntary integration plans or other narrowly-

295. BOCIAN ET AL., *supra* note 215, at 24.

296. See Statement of Michael Calhoun, *supra* note 232, at 10–17.

297. Programs that advise borrowers as they choose between mortgages have been “the most effective tool for helping minority and lower-income families become successful homeowners.” ACORN, *supra* note 216, at 12.

298. *Id.*

299. See Statement of Michael Calhoun, *supra* note 232, at 7–8, 17.

300. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1175 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007); see also Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 551–52 (1994) (reviewing studies finding students in integrated schools more likely to have cross-racial social relationships later in life and concluding “interracial contact in elementary or secondary school can help blacks overcome perpetual segregation”).

tailored, race conscious measures to create racially diverse schools. Therefore, districts should find creative ways to maintain integrated schools, including strategic site selection of new schools and the drawing of attendance zones with consideration of neighborhood demographics.³⁰¹

- *Participate in voluntary interdistrict transfer programs.* Voluntary interdistrict transfer programs are school integration plans that take into account where a student resides, as well as a number of individual student characteristics, including race, in determining eligibility and placement.³⁰² When linked with greater housing choice, implementation of voluntary interdistrict transfer programs can be an effective strategy for achieving greater integration.³⁰³

Exclusionary zoning creates and maintains patterns of residential segregation. Therefore, to improve the United States government's compliance with CERD, state and local governments should:

- *Curb exclusionary zoning.* State governments should impose state-wide limits on local land use laws that exclude affordable housing, and encourage local governments to prohibit the use of zoning laws to exclude traditional victims of discrimination and people who are not United States citizens.³⁰⁴
- *Adopt inclusionary zoning ordinances.* States should mandate that municipalities adopt zoning ordinances that require a certain amount of affordable housing in new developments to provide more racially and economically integrated affordable housing opportunities.

301. See *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2791–92 (Kennedy, J., concurring in part and concurring in the judgment).

302. NAACP Legal Defense Fund (LDF) & Civil Rights Project/Proyecto Derechos Civiles (CRP), *Still Looking to the Future: Voluntary K-12 School Integration; A Manual for Parents, Educators and Advocates* 58 (2008), available at http://www.naacpldf.org/content/pdf/voluntary/Still_Looking_to_the_Future_Voluntary_K-12_School_Integration;_A_Manual_for_Parents,_Educators_and_Advocates.pdf.

303. See Myron Orfield & Nicholas Wallace, *Expanding Educational Opportunity Through School and Housing Choice*, 37 CURA REPORTER 19, 24–26 (Summer 2007).

304. See U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation 30, Discrimination Against Non Citizens* (2004), para. 32, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004), available at <http://www1.umn.edu/humanrts/gencomm/genrec30.html> (“Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices.”).

CONCLUSION

Fair housing is not a purely domestic imperative. Under CERD, ensuring access to housing on a fair and equitable basis, regardless of race or ethnicity, is an international treaty obligation. Moreover, the United States' compliance with that obligation is essential to its international credibility on human rights issues.

In its concluding observations, the CERD Committee commended the United States government for notable actions it has taken to combat racial discrimination, and acknowledged some positive developments with respect to housing.³⁰⁵ However, the Committee also observed that the United States can and should do more to ensure compliance with CERD. Specifically, the Committee expressed that it is "deeply concerned" that high levels of segregation persist in the United States, noting that people of color continue to be disproportionately "concentrated in poor residential areas characterized by sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence."³⁰⁶

Housing scholars have concluded that the current state of residential segregation and its attendant effects are perpetuated by acts of private discrimination and by governmental programs and policies that allow the development of low-income housing primarily in higher poverty areas and communities and fall short of their goal of providing low-income individuals with greater mobility. Indeed, the Committee urged the United States government to reevaluate certain existing policies, recommending that the United States government support the development of public housing outside of underprivileged, racially segregated areas, while also eliminating obstacles that limit the mobility of recipients of Section 8 vouchers.³⁰⁷ The Committee also urged the United States government to take more affirmative measures to ensure the effective enforcement of federal and state laws to combat discriminatory practices by private actors in the housing market.³⁰⁸ Those recommendations appear to be informed, at least in part, by the shadow report submitted to the Committee by housing scholars and research and advocacy organizations.

Given the persistence of racial disparities in access to housing and residential segregation, the United States government should take a more active approach to ending housing discrimination and segregation, and should improve its enforcement of existing fair housing and lending laws. The United States still has significant work to do in order to improve compliance with CERD, maintain its international credibility regarding human rights, and ensure that all residents, regardless of race, enjoy a right to fair housing.

305. *Concluding Observations, supra* note 78, at paras. 3–9.

306. *Id.* at para. 16.

307. *Id.*

308. *Id.*

APPENDIX: SIGNATORIES TO THE SHADOW REPORT SUBMITTED
TO THE CERD COMMITTEE*

Poverty & Race Research Action Council, Washington, DC
National Fair Housing Alliance, Washington, DC
National Low Income Housing Coalition, Washington, DC
NAACP Legal Defense & Educational Fund, Inc., New York, NY
Lawyers' Committee for Civil Rights Under Law, Washington, DC
National Law Center on Homelessness & Poverty, Washington, DC
Center for Responsible Lending, Durham, NC
Center for Social Inclusion, New York, NY
Kirwan Institute for the Study of Race & Ethnicity, Columbus, OH
Human Rights Center, University of Minnesota Law School,
Minneapolis, MN
Institute on Race & Poverty, University of Minnesota Law School,
Minneapolis, MN
Center for Civil Rights, University of North Carolina Law School,
Chapel Hill, NC
ACLU of Maryland Fair Housing Project, Baltimore, MD
Inclusive Communities Project, Dallas, TX
New Jersey Regional Coalition, Cherry Hill, NJ
Fair Share Housing Center, Cherry Hill, NJ

Michelle Adams, Benjamin N. Cardozo School of Law
William Apgar, Harvard University
Hilary Botein, Baruch College, City University of New York
Sheryll Cashin, Georgetown University Law Center
Camille Z. Charles, University of Pennsylvania
Richard T. Ford, Stanford Law School
Lance Freeman, Columbia University
David Freund, University of Maryland
George C. Galster, Wayne State University
John Goering, City University of New York, Baruch College &
Graduate Center
Arnold R. Hirsch, University of New Orleans
Dennis Keating, Colleges of Urban Affairs and Law, Cleveland State
University
Xavier de Souza Briggs, Massachusetts Institute of Technology
James A. Kushner, Southwestern Law School
John R. Logan, Brown University
Peter Marcuse, Columbia University

* The individuals and institutions listed here are signatories to the shadow report on which this Article is based, and not to this Article. That report may be found at <http://www.prrac.org/projects/cerd.php>.

Douglas S. Massey, Princeton University
Henry W. McGee, Jr., University of California, Los Angeles School
of Law
Myron Orfield, University of Minnesota Law School
John M. Payne, Rutgers School of Law, Newark
john a. powell, Ohio State University, Moritz College of Law
Florence Wagman Roisman, Indiana University School of Law—
Indianapolis
James E. Rosenbaum, Northwestern University
Stephen L. Ross, University of Connecticut
Leonard Rubinowitz, Northwestern University School of Law
Peter W. Salsich, Jr., Saint Louis University School of Law
Gregory D. Squires, George Washington University
Thomas J. Sugrue, University of Pennsylvania