

FIFTY YEARS OF STRUGGLE:

Successes and Setbacks Since the Release of the Report of the National Advisory Commission on Civil Disorders and Enactment of the 1968 Fair Housing Act

James H. Carr, Michela Zonta, and Steven P. Hornburg



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About the National Association of Real Estate Brokers

NAREB was founded in Tampa, Florida, in 1947 as an equal opportunity and civil rights advocacy organization for African American real estate professionals, consumers, and communities in the United States. Our purpose remains the same today, but we are more focused on economic opportunity than civil rights. Although composed principally of African Americans, the REALTIST® organization embraces all qualified real estate practitioners who are committed to achieving our vision, which is “Democracy in Housing.”

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INTRODUCTION: 50 YEARS OF STRUGGLE

“We all require and want respect, man or woman, black or white. It's our basic human right.”

— Aretha Franklin

March 25, 1942-August 16, 2018

This year commemorates the 50th anniversary of the passage of the 1968 Fair Housing Act and the release of the *Report of the National Advisory Commission on Civil Disorders*, more popularly known as the Kerner Report. The history of the social and political forces that led to these milestones provides an important foundation for better understanding the economic successes and setbacks experienced by Black Americans over the past half-century.

Politicians and members of the public often express confusion as to why Black homeownership, for example, continues to lag so far behind homeownership for non-Hispanic Whites in America when housing discrimination was outlawed decades ago. Not widely known, however, is that the political compromises required to pass the Fair Housing Act included removing any meaningful enforcement language from that legislation. As the discussion below indicates, despite multiple amendments to that legislation over the years, weaknesses remain with respect to the 1968 Act's ability to create a housing market free of discrimination. Further, the Kerner Report's recommendations on a range of issues, including police brutality, employment, and education were never fully implemented. Many promising programs, such as affirmative action, were curbed, and their potential diminished, through unfavorable court decisions and legislation.

Today, many economic and social gains for Blacks achieved during the 1970s are eroding while other early successes have already been wiped out. In addition, Blacks throughout many of our largest cities face increasing economic marginalization at a time when the economies of those cities are more robust than any time over the past 50 years. Take, for example, Detroit, which had a population of nearly 2 million in 1950. Nearly 70 years later, although



the U.S. population has more than doubled, Detroit's population has declined by 65 percent. Blacks were prohibited from accessing jobs and housing in the Detroit suburbs as economic opportunities flowed away from the city and into the suburbs. The result for Blacks trapped in the city was increasing concentrated poverty, hyper-segregation, poor education, high crime, and widespread hopelessness.

Today, for example, Detroit is undergoing an impressive economic recovery. Ironically, long-term Black residents are not benefitting meaningfully from it. The city's priority is to attract and maintain highly educated residents and higher-income households, rather than to improve the economic well-being of existing residents. Those more highly educated and skilled residents are primarily non-Hispanic Whites.

Detroit is not alone in employing this revitalization strategy. One need only to walk through the downtowns of many of our nation's largest cities that are home to the largest shares of Black population to witness a substantial level of gentrification that is failing to equitably benefit Blacks.

Nationally, legislators and regulators frequently express empathy for the vulnerable economic state of Blacks in the United States but fail to pursue the significant legislative and regulatory actions that could result in meaningful Black economic progress. In the housing market, many federal policies continue to disproportionately harm the interests of Black households and communities by basing loan qualifications on financial endowments or characteristics that Blacks do not possess as a direct result of decades of discrimination against Blacks.

Below is a more detailed discussion of the Kerner Report and 1968 Act and the strengths and shortcomings of those important events and actions to improve the economic well-being of Black Americans.

REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS

This year marks the 50th anniversary of the release of the *Report of the National Advisory Commission on Civil Disorders*,¹ popularly known as the Kerner Report. The Commission's report earned its nickname from the name of one of its key authors, Illinois Democratic governor Otto Kerner. Kerner was among the 11 members of the National Advisory Commission on Civil Disorders, appointed in July 1967 by then-President Lyndon B. Johnson and charged with the task of investigating the causes of and recommending solutions for the ongoing racial unrest across urban America.



Political Backdrop for Formation of the Commission

Between 1965 and 1968, race-related violence exploded in more than 100 cities, due to decades-long discrimination against Blacks. The toll was devastating: nearly 200 people were killed, thousands injured, and property damage totaled \$1 billion.² In Detroit alone, where the rioting lasted for five days, 43 people were killed, and property damage amounted to more than \$100 million.³

The Commission spent seven months researching and documenting the conditions of Black inner-city neighborhoods in cities where racial unrest had erupted and came to a series of stark conclusions. The Commission bluntly stated:

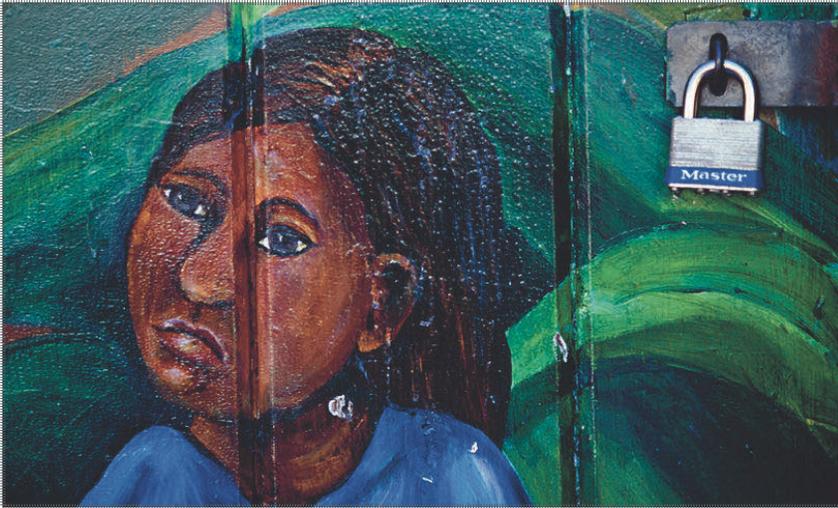
“White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II. Among the ingredients of this mixture are:

Pervasive discrimination and segregation in employment, education and housing, which have resulted in the continuing exclusion of great numbers of Negroes from the benefits of economic progress.

¹ U.S. National Advisory Commission on Civil Disorder, *The Kerner Report*. New York: Pantheon Books, 1968.

² U.S. News. Race Troubles: 109 U.S. Cities Faced Violence in 1967. July 12, 2017.

³ Bates, Karen Grigsby. Report Updates Landmark 1968 Racism Study, Finds More Poverty And Segregation. NPR. February 27, 2018.



Black in-migration and white exodus, which have produced the massive and growing concentrations of impoverished Negroes in our major cities, creating a growing crisis of deteriorating facilities and services and unmet human needs.

The black ghettos where segregation and poverty converge on the young to destroy opportunity and enforce failure. Crime, drug addiction, dependency on welfare, and bitterness and resentment against society in general and white society in particular are the result.”

The Kerner Report denounced the structural barriers confronting Black communities. Specifically, it pointed to 12 critical grievances at the root of racial unrest, chief among them police brutality, high rates of unemployment and underemployment, and the lack of adequate housing in Black communities.

The Kerner Report also listed inadequate education and recreation resources, ineffective political structures, disrespectful white authorities, a discriminatory judicial system, inadequate federal programs and municipal services, discriminatory credit and consumer practices, and inadequate welfare programs. It concluded that:

“...white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.” and famously declared that “Our nation is moving toward two societies, one black, one white—separate and unequal.”⁴

Commission Recommendations

Several recommendations were advanced in the Kerner Report’s findings to prevent further unrest and racial polarization. The recommendations centered on the importance of opening opportunities to Blacks, whose economic mobility and access to jobs, education, and housing had been restricted by decades of racial segregation and discrimination. According to the Commission, only aggressive federal measures could prevent any future racial unrest.

Those federal measures would include massive spending for housing and education and the expansion of the safety net through a boost of welfare programs. The authors argued for more jobs, job training, and behavioral counseling programs along with flexible work schedules. They also emphasized the importance of residential mobility programs and transportation resources, from and to work, to improve access to jobs for Blacks locked in jobless inner cities.

Several reforms and legislative actions, most notably the 1968 Fair Housing Act, emerged soon after the publication of the Kerner Report and in response to the civil rights movement’s efforts to achieve equal opportunities for people

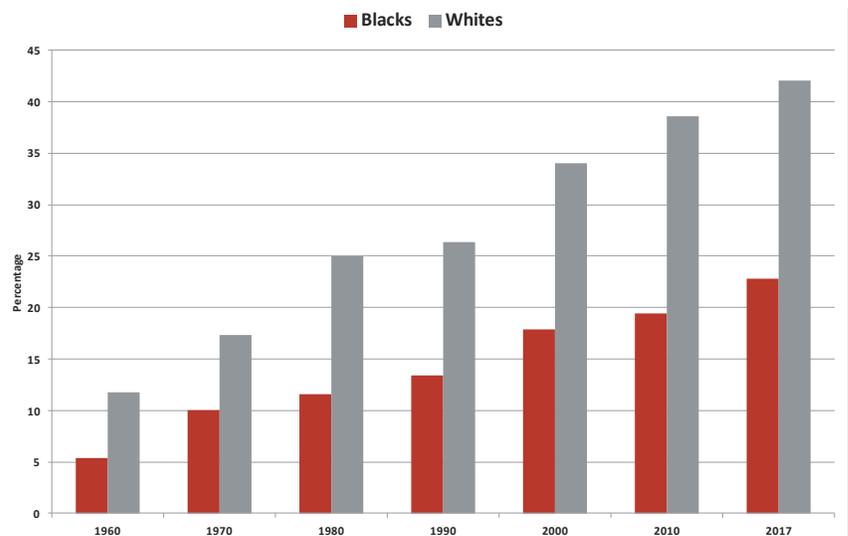
⁴ *The Kerner Report. op. cit., 1.*

of color. Although the Kerner report called for significant spending, the federal effort to redress past harms to Blacks never materialized. Moreover, many immediately-enacted federal programs that were having a positive impact on Blacks' economic mobility were prematurely terminated, despite—or because of—their early signs of success.

Immediate and Longer-Term Impacts

Fifty years after the publication of the Kerner Report, our nation is still grappling with many of the same issues discussed by the Commission. Although economic and political gains have been made, including greater political participation by Blacks, significant economic gains remain elusive, including equality in access to quality education, employment, and health care.

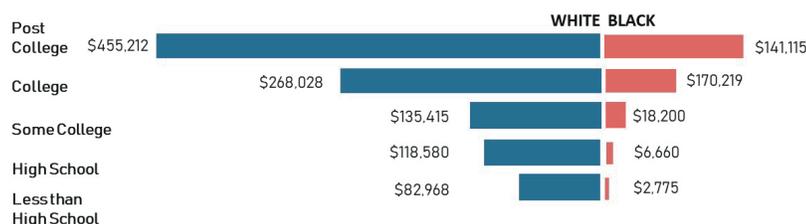
Exhibit 1. Percentage of Persons 25 to 29 Years Old with a Bachelor's or Higher Degree



Data source: National Center for Education Statistics, "Digest of Education Statistics," Table 104.20. Percentage of persons 25 to 29 years old with selected levels of educational attainment, by race/ethnicity and sex: Selected years, 1920 through 2017, available at nces.ed.gov/programs/digest/d17/tables/dt17_104.20.asp.

Access to education for Blacks, for example, has improved since the 1960s. Significant gaps in educational attainment, however, persist between Blacks and non-Hispanic Whites (Exhibit 1). The percentage of African Americans 25 to 29 years of age with college degrees has increased from 5.4 percent in 1960 to nearly 23 percent in 2017. But this gain pales in comparison to gains for non-Hispanic Whites in the same age group, who are still twice as likely to hold college degrees.

Exhibit 2. Median Household Net Worth by Race and Education



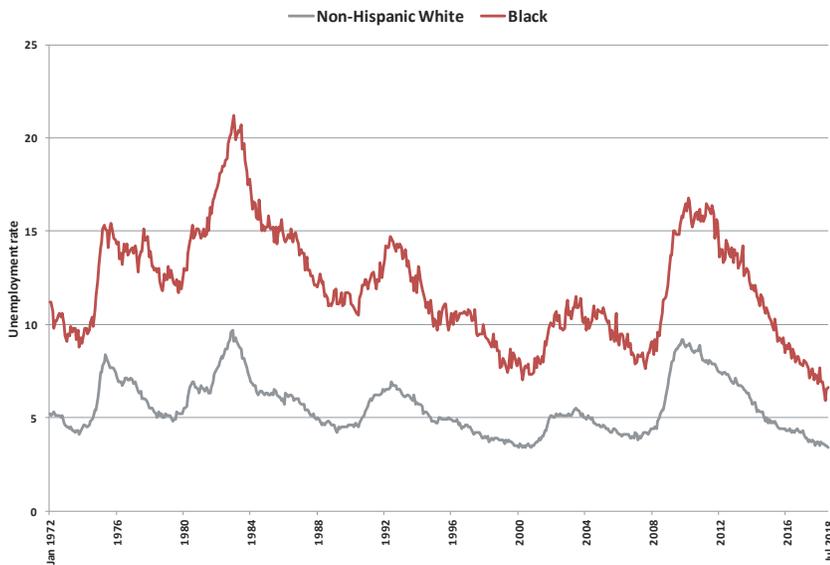
Source: Darity, William Jr., Darrick Hamilton, Mark Paul, Alan Aja, Anne Price, Antonio Moore, and Caterina Chiopris. *What We Get Wrong About Closing the Racial Wealth Gap*. Insight Center for Community Economic Development. April 2018. Authors' calculations, Survey on Income and Program Participation (SIPP) 2014.

Similarly, the unemployment rate for Blacks continues to be twice as high as the unemployment rate among non-Hispanic Whites (Exhibit 3). In July 2018, 6.6 percent of Blacks 16 years of age and over were unemployed compared to 3.4 percent of non-Hispanic Whites. This gap has remained consistent throughout the economic cycles of the past 50 years.

In some areas, such as wealth and income inequality, things have become worse over the past 30 years.⁵

⁵ Stiglitz, Joseph, E. "Economic Justice in America.: Fifty Years after the Kerner Report." www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Economic%20Justice%20in%20America.pdf

Exhibit 3. Unemployment Rate



Data Source: Bureau of Labor Statistics, “Labor Force Statistics from the Current Population Survey,” available at [beta.bls.gov/dataQuery/find?fq=survey:\[ln\]&s=popularity:D](https://beta.bls.gov/dataQuery/find?fq=survey:[ln]&s=popularity:D), last accessed August 2018.

As discussed in the Fair Housing section below, unlike all other races, the total gains in Black homeownership since 1968 have been lost. Further, although the corporate glass ceiling has been broken, as more Blacks are now able to make it into executive suites in many Fortune 500 companies, the wage gap between Blacks and Non-Hispanic Whites remains stubbornly high, even after controlling for educational attainment. After a modest improvement in the late 1990s, when the earnings of Blacks represented about 65 percent the earnings of Whites—up from about 55 percent in 1967—the typical Black worker now earns 60 cents for every dollar earned by the typical White worker.⁶

Continuing Inequality

Wealth inequality has grown over the past several decades and shows no signs of improving in the foreseeable future.

Recent data from the *Survey of Income and Program Participation (2014)* shows that “black households hold less than *seven cents on the dollar* [emphasis added] compared to white households. The white household living near the poverty line typically has about \$18,000 in wealth, while black households in similar economic straits typically have a median wealth near zero...At the other end of America’s economic spectrum, black households constitute less than 2 percent of those in the top one percent of the nation’s wealth distribution; white households constitute more than 96 percent of the wealthiest Americans.”⁷

Further, audit studies on discrimination in hiring⁸ and housing⁹ have repeatedly shown that Blacks are still at a disadvantage compared to similarly situated Non-Hispanic Whites. Despite the promises of the fair housing movement and subsequent policies addressing residential segregation and poverty concentration, housing discrimination continues to sustain economic segregation along with profound racial disparities in the quality of education.

6 Pew Research Center, “On Views of Race and Inequality, Blacks and Whites Are Worlds Apart,” June 27, 2016.

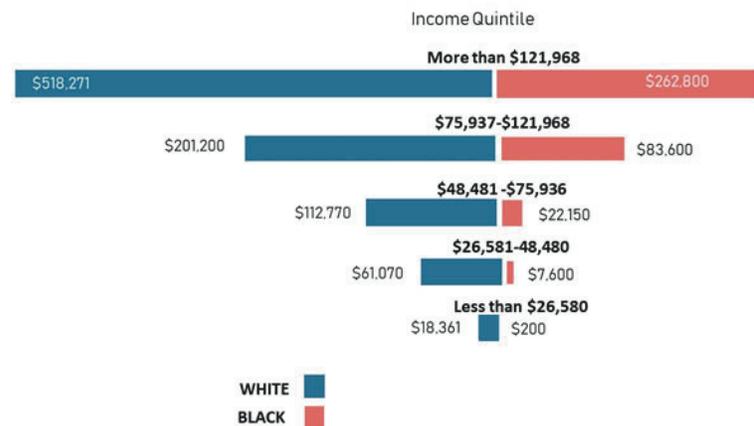
7 Stiglitz, *op. cit.*

8 Quillian, L., Pager, D., Hexel, O. & Midtbøen, A. H. (2017). Meta-analysis of field experiments shows no change in racial discrimination in hiring over time. *Proceedings of the National Academy of Sciences of the United States of America*, 114(41), 10870–10875. doi.org/10.1073/pnas.1706255114.

9 Katrin Auspurg, Andreas Schneck & Thomas Hinz (2018) Closed doors everywhere? A meta-analysis of field experiments on ethnic discrimination in rental housing markets, *Journal of Ethnic and Migration Studies*, DOI:10.1080/1369183X.2018.1489223.

Economic shifts and institutional changes have also played a role in neutralizing the advancement of racial equality advocated by the Kerner Commission, contributing to the shrinking of the middle class, increasing income inequality, and the widening of the wealth gap. For example, as manufacturing jobs have disappeared, and unions have weakened, many Black workers who had historically filled manufacturing jobs found themselves increasingly isolated in pockets of unemployment.¹⁰ In addition, as jobs continue moving to the suburbs and Black workers remain living in the central cities, a spatial mismatch between jobs and workers is profoundly impacting Blacks and their access to economic opportunities.¹¹

Exhibit 4. Median Household Net Worth by Race and Household Income Quintile



Source: Darity, William Jr., Darrick Hamilton, Mark Paul, Alan Aja, Anne Price, Antonio Moore, and Caterina Chiopris. *What We Get Wrong About Closing the Racial Wealth Gap*. Insight Center for Community Economic Development. April 2018. Authors' calculations, Survey on Income and Program Participation (SIPP) 2014.

Racial segregation and income inequality have fueled harmful predatory and discriminatory lending practices. Black communities have been prime targets for unscrupulous lenders, whose practices fueled the financial crisis of 2008.¹² The recent Great Recession and the foreclosure crisis have further exacerbated the socioeconomic disadvantage of Black communities.

The Kerner Report's findings continue to resonate today as the neighborhoods where Blacks remain concentrated still feature severe disinvestment, segregation, unemployment, and persistent punitive criminal justice policies. This situation is passed down from parents to children, making racial inequality a multigenerational phenomenon.¹³

Below is a more thorough examination of the 1968 Fair Housing Act. That law represents an example of how even in an area of major legislative action to remove discrimination from an area of economic activity, equality between Blacks and non-Hispanic Whites remains a fleeting dream.

¹⁰ Sugrue, Thomas. *The Origins of the Urban Crisis*. Princeton University Press. 2014.

¹¹ Ihlanfeldt, KR and D. Sjoquist. 1998. "The Spatial Mismatch Hypothesis: A Review of Recent Studies and Their Implications for Welfare Reform." *Housing Policy Debate* 9 (4): 849–892. doi:10.1080/10511482.1998.9521321.

¹² Burd-Sharps, S. and R. Rasch. 2015. "Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations." Social Science Research Council.

¹³ Sharkey, P. 2013. *Stuck in Place. Urban Neighborhoods and the End of Progress Toward Racial Equality*. Chicago: The University of Chicago Press.

THE 1968 FAIR HOUSING ACT



Origins of the 1968 Fair Housing Act

The origins of the 1968 Act,¹⁴ which became law during the zenith of the civil rights movement, can be traced back at least 40 years previously. In response to earlier Supreme Court rulings prohibiting zoning ordinances that segregated housing on a racial or religious basis,¹⁵ racially restrictive covenants were used widely by the 1940s to prohibit the purchase, lease, or occupation of a piece of property by a group of people, usually Blacks.¹⁶

In the 1947 report *To Secure These Rights*,¹⁷ the President's Committee on Civil Rights recommended "The enact-

ment by the states of laws outlawing restrictive covenants; [and] [r]enewed court attack, with intervention by the Department of Justice, upon restrictive covenants." *Shelley v. Kraemer*,¹⁸ a 1948 Supreme Court decision, held that state courts cannot enforce racially restrictive covenants, while not deciding such covenants were facially illegal.

The next two decades saw an increasingly active civil rights movement centered on access to public facilities, predominantly in the South, where Jim Crow laws were pervasive. In 1955, in Montgomery, Alabama, Rosa Parks' refusal to give up her bus seat led to the Montgomery Bus Boycott, a seminal event in the civil rights movement.

Subsequent actions such as sit-ins and the Freedom Rides were mounted to integrate lunch counters, movie houses, and buses in several cities, culminating in passage of the Civil Rights Act of 1964¹⁹ and the Voting Rights Act of 1965²⁰

14 Title VIII of Public Law 90-284, enacted April 11, 1968.

15 For instance, U.S. Supreme Court. *Buchanan v. Warley*, 245 U.S. 60 (1917)

16 Ware, Leland B., "New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act." 7 Admin. L.J. Am. U. 1993-94, 65.

17 President's Committee on Civil Rights, "To Secure These Rights: The Report of the President's Committee on Civil Rights." Washington, D.C.: GPO, 1947.

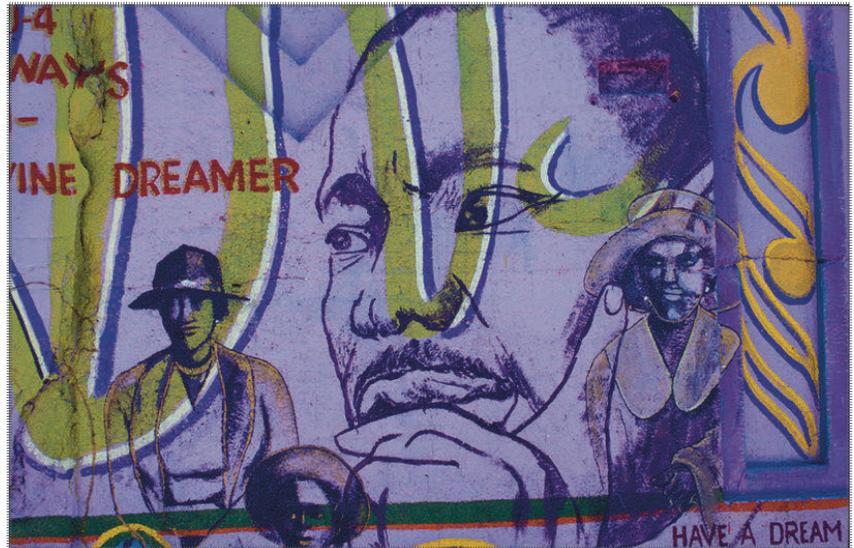
18 U.S. Supreme Court. *Shelley v. Kraemer*, 334 U.S. 1 (1948)

19 Public Law 88-352, enacted July 2, 1964.

20 Public Law 89-110, enacted January 4, 1965.

and subsequent campaigns to organize and register Blacks to vote. The mid-1960s saw an extension of these campaigns in Northern cities, notably the Chicago open housing movement, led by Dr. Martin Luther King Jr., James Bevel, and Al Raby.²¹

Violent Southern reactions to organizing and registering black voters led to further Congressional debate on protecting civil rights workers and extending civil rights further.²² In response, in 1966, President Lyndon Johnson proposed the first fair housing legislation, a universal ban on discrimination in the sale and rental of housing. This passed the House of Representatives as part of a broader bill to protect civil rights workers but was killed by a Senate filibuster.



For the next two years, negotiations continued without success, with fair housing a major sticking point, even though many states and localities already had enacted laws prohibiting discrimination in privately owned housing. In 1967, responding to growing civil unrest, President Johnson appointed the National Advisory Commission on Civil Disorders.²³

The resulting Kerner Report,²⁴ released in February 1968, recommended a “...national, comprehensive and enforceable open occupancy law.” Roughly one month later, Dr. King was assassinated, providing the final catalyst to break the Congressional deadlock and enact the first national fair housing legislation, the Fair Housing Act of 1968.

The 1968 Act became law on April 11, 1968, as Title VIII of the Civil Rights Act of 1968.²⁵ As the first national open housing legislation, it prohibited discrimination based on “race, color, religion, or national origin” in the sale or rental of housing, the financing of housing, or the provision of brokerage services. The statute applied to both public and private housing and was enforceable by the Department of Housing and Urban Development (HUD) (through

21 Bernstein, David, “The Longest March,” Chicago Magazine, July 25, 2016. (www.chicagomag.com/Chicago-Magazine/August-2016/Martin-Luther-King-Chicago-Freedom-Movement)

22 Discussion of the lead up to and enactment of the Fair Housing Act of 1968 is based principally on the detailed and excellent first-person history outlined by a key participant in Hon. Charles McC. Mathias, Jr. and Marion Morris, “Fair Housing Legislation: Not an Easy Row to Hoe.” *Cityscape: A Journal of Policy Development and Research* Volume 4, Number 3: 1999, 21-33.

23 Lyndon B. Johnson, “Remarks Upon Signing Order Establishing the National Advisory Commission on Civil Disorders,” July 29, 1967. (www.presidency.ucsb.edu/ws/?pid=28369)

24 National Advisory Commission on Civil Disorders. 1968. “The Formation of Racial Ghettos.” *Report of the National Advisory Commission on Civil Disorders*. This report is popularly known as the Kerner Report.

25 Title VIII of Public Law 90-284, enacted April 11, 1968.



conciliation), the Department of Justice (DOJ) (for cases involving a “pattern and practice” of discrimination), and individuals (who can file suit in federal court if conciliation fails).

Weaknesses of the 1968 Fair Housing Act

A product of compromise, the 1968 Act had limited coverage.²⁶ Its protection was limited to race, color, religion, or national origin, leaving out other vulnerable populations. The original act also contained a compromise known as the “Mrs. Murphy Exemption,” which removed a home from coverage if the dwelling had fewer than five rental units

and the owner lived in one of those units. A similar exemption was included for sellers of single-family homes not using a real estate broker, and religious institutions. However, a contemporaneous Supreme Court decision issued in June 1968 extended the application of Section 1982 of the Civil Rights Act of 1866 to prohibit racial discrimination even among private parties.²⁷

The final title of the 1968 Act also lacked clear legislative history due to rushed negotiations and drafting after the Kerner Report’s release and Dr. King’s assassination, with no committee hearings or reports to guide subsequent interpretation in litigation. Thus, issues of the breadth of application and of standing had to be litigated with little guidance from Congressional intent.²⁸ The first major test came with the 1972 Supreme Case *Trafficante v. Metropolitan Life Insurance Co*²⁹ that held the 1968 Act had a broad application. *Trafficante* also led the way, followed by a number of other cases, in affirming a broad interpretation of standing of plaintiffs under the Act’s “aggrieved persons” definition.

The most profound impact on the federal government’s ability to fight housing discrimination was the 1968 Act’s enforcement provisions. The original bill, sponsored by Senator Walter Mondale, gave HUD the power to investigate discrimination complaints, hold evidentiary hearings, and issue “cease and desist” orders. Ultimately, after several filibusters, HUD’s enforcement powers were scaled back to investigation and voluntary conciliation only.

If voluntary conciliation failed, complainants could file a private lawsuit seeking actual damages, injunctive relief, punitive damages (capped at \$1,000), and legal fees if the complainant could not afford an attorney. In addition, the 1968 Act required the HUD Secretary to refer cases to state or local agencies with fair housing laws “substantially equivalent” to the federal provisions.

²⁶ Mathias, Jr. and Morris, “Fair Housing Legislation,” *op. cit.*

²⁷ U.S. Supreme Court. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

²⁸ Mathias, Jr. and Morris, “Fair Housing Legislation,” *op. cit.*

²⁹ U.S. Supreme Court. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

DOJ could still pursue “pattern and practice” cases, although subsequent experience demonstrated the political and legal difficulty of aggressively pursuing such litigation. However, DOJ was only allowed to seek restraining orders or injunctions, but not fines. In sum, a home seeker under time constraints could not be guaranteed a timely—or any—resolution, even with obvious cases of discrimination.³⁰

Perhaps the most glaring omission of landmark legislation enacted to promote fair and equal access to housing was the lack of a prohibition against discrimination in mortgage lending.



“Although the Act banned racial discrimination in the sale and rental of housing, it took no action to stop discrimination in mortgage lending. It was not until Congress passed the Equal Credit Opportunity act in 1974 that discrimination against black individuals was prohibited and it was not until 1977 that it passed the Community Reinvestment Act to outlaw discrimination against black neighborhoods, thus eliminating the legal basis for the practice of redlining.”³¹

The 1988 Fair Housing Act Amendments and Beyond

After the passage of the 1968 Act, the first significant amendment was the addition of gender as a protected class in the 1974 Housing and Community Development Act.³² However, two major studies in the 1970s (i.e., a 1970 New York-area study³³ and the 1977 HUD Housing Market Practices Survey [HMPS]³⁴) found ongoing housing discrimination despite the new federal protections. These studies helped fuel additional legislative efforts to address what were widely perceived as woefully inadequate enforcement provisions of the 1968 Act.³⁵

30 Mathias, Jr. and Morris, “Fair Housing Legislation,” *op. cit.*

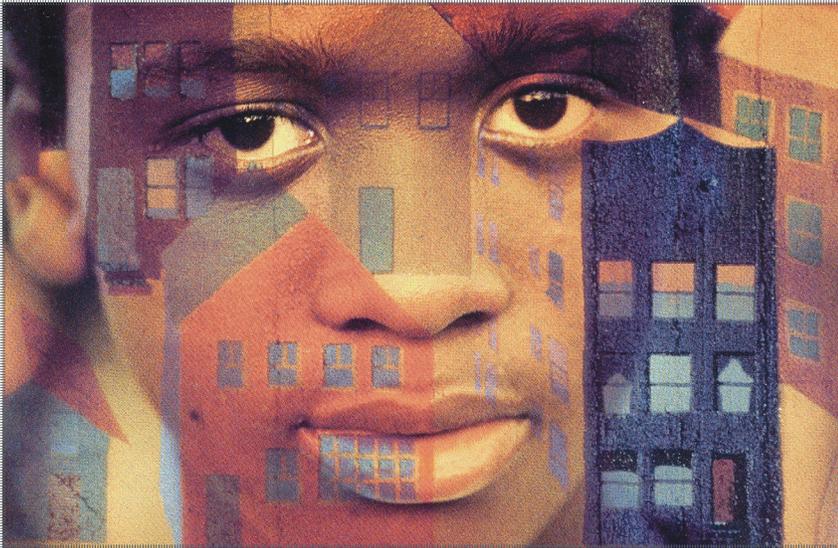
31 Massey, D. S. (2015). “The Legacy of the 1968 Fair Housing Act.” *Sociological Forum (Randolph, N.J.)*, 30(Suppl 1), 571–588. doi.org/10.1111/socf.12178 (citing Lief Beth J, Goering Susan. *The Implementation of the Federal Mandate for Fair Housing*. In: Tobin Gary A., editor. *Divided Neighborhoods: Changing Patterns of Racial Segregation*. Newbury Park, Ca: Sage Publications; 1987. 227–267.)

32 Housing and Community Development Act of 1974, Public Law 93-383, enacted August 22, 1974.

33 Yinger, John, National Committee Against Discrimination in Housing. 1970. *Jobs and Housing: A Study of Employment and Housing Opportunities for Racial Minorities in the Suburban Areas of the New York Metropolitan Area, Interim Report*. New York.

34 Wienk, Ronald E., Clifford E. Reid, John C. Simonson, and Frederick J. Eggers. 1979. *Measuring Discrimination in American Housing Markets: The Housing Market Practices Survey*. Washington, DC: U.S. Department of Housing and Urban Development.

35 Yinger, John, “Sustaining the Fair Housing Act.” *Cityscape: A Journal of Policy Development and Research* vol. 4, no. 3: 1999, 93-106.



Two programs were enacted to finesse HUD's unenforceable mandate. The Fair Housing Assistance Program (FHAP)³⁶ was started in 1984 to support state and local governments' fair housing enforcement programs that would be "substantially equivalent" to federal law. In addition, the Fair Housing Initiatives Program³⁷ was established in 1986 to support public and private fair housing organizations that assist potential victims of housing discrimination with issues such as preliminary investigations and testing.

The Fair Housing Act was still, however, viewed as incomplete and weak.³⁸ Enactment of the Fair Housing Act Amendments of 1988³⁹ (the 1988 Amend-

ments) capped a nine-year effort to address these weaknesses. The 1988 Amendments added two protected classes: familial status (families with children) and persons with mental or physical disabilities. The 1988 Amendments also addressed longstanding issues with the original act's weak enforcement provisions. Constitutional concerns were raised about vesting sole power with HUD Administrative Law Judges (ALJs) and guaranteeing a trial by jury. The 1988 Amendments set up an enforcement process to address these concerns.

HUD now can initiate investigations independent of a complaint.⁴⁰ If a complaint is brought, a complainant can decide to pursue his or her case in federal district court or file with HUD. In the latter case, if HUD determines reasonable cause exists after investigating the claim, and the alleged discrimination occurred in a jurisdiction with a HUD-certified "substantially equivalent" law, HUD must defer to action in that venue. Otherwise, each party has the right to elect to have the case heard in a federal district court.

If no such election is made, the case is then put before a HUD ALJ. Under the Amendments, HUD ALJs may grant compensatory damages, injunctive relief, and substantial civil penalties. In addition, DOJ-led cases now can seek damages and civil penalties and federal district court judges or juries can grant compensatory damages and injunctive relief, and award punitive damages.

³⁶ U.S. Department of Housing and Urban Development, "Fair Housing Assistance Program (FHAP)." (www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP, accessed August 5, 2018).

³⁷ U.S. Department of Housing and Urban Development, "Fair Housing Initiatives Program (FHIP)." (www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHIP, accessed August 5, 2018).

³⁸ Massey "Legacy," *op. cit.*

³⁹ Public Law 100-430, Fair Housing Amendments Act of 1988, enacted September 13, 1988.

⁴⁰ The following discussion draws on Ware, "New Weapons for an Old Battle," *op. cit.* and Schill, Michael H. and Friedman, Samantha, "The Fair Housing Amendments Act of 1988: The First Decade." *Cityscape: A Journal of Policy Development and Research* vol. 4 no. 3, 1999. 57-78.

Despite these improvements to the 1968 Act, significant challenges remain to ensuring equal access to housing.⁴¹ Continued evidence of racial and economic discrimination and segregation suggest the Act's ineffectiveness.⁴² Existing protected classes do not include additional groups that experience housing discrimination—sexual orientation and gender identity, for instance, remain uncovered. Also, the law itself, its enforcement, and its funding are often politically attacked, leading to case backlogs and precluding full, robust enforcement.

Tactical concerns over enforcement strategies also remain. Initially, the introduction of new protected classes created transition problems as state and local “substantially equivalent” agencies had to update their laws. Enforcement has focused predominantly on rental market discrimination relative to home sales.



Federal efforts to enforce the 1968 Act's mandate that local jurisdictions affirmatively further fair housing have been weak, and few jurisdictions have been legally threatened with the loss of federal funds due to discriminatory local building or land use provisions. Challenges to, for instance, zoning restrictions with arguably discriminatory impacts, remain politically difficult to pursue. Pattern and practice cases have been few and far between, reflecting both the high evidentiary bar as well as the lack of political will to pursue these cases.

Moreover, today, discrimination is often achieved effectively through indirect housing access requirements. While federal housing programs prohibit housing discrimination, for example, private market providers still can discriminate based on an applicant's source of income (e.g., Housing Choice Program vouchers), which can be considered a proxy for race.⁴³ Finally, online advertising, driven by advertisers' increased ability to target specific groups and individuals, is emerging as a new battleground to police for housing discrimination.⁴⁴

⁴¹ The following two paragraph synthesizes numerous articles assessing the state of fair housing efforts, including Massey “Legacy,” Yinger “Sustaining,” and Ware “New Weapons,” all *op. cit.*

⁴² See, for instance, Turner, Margery Austin “Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000: Final Report.” The Urban Institute: Washington, DC. November 2002.

⁴³ Rotem, Rebecca, “Using Disparate Impact Analysis in Fair Housing Act Claims: Landlord Withdrawal from the Section 8 Voucher Program,” 78 Fordham L. Rev. 1971, 1972, (2010).

⁴⁴ White, Gillian B., “When Algorithms Don’t Account for Civil Rights.” *The Atlantic*, March 7, 2017. (www.theatlantic.com/business/archive/2017/03/facebook-ad-discrimination/518718)

One positive recent development, however, has been a 2015 Supreme Court decision, *Texas Inclusive Communities*,⁴⁵ which affirms that Congress explicitly intended to include disparate impact claims under the Fair Housing Act. While the legal use of disparate impact theory, most often used against landlord screening and local restrictions on affordable housing, was affirmed by the Court, housing discrimination claims on this basis still can be difficult, requiring the plaintiff to bear the burden of proof.⁴⁶

Claims that cite the effects of segregation under the Fair Housing Act are also recognized under appellate court decisions dating back to the 1970s but are less tested and more difficult than disparate impact cases.⁴⁷ Despite the *Inclusive Communities* affirmation of disparate impact theory in 2015, the Department of Treasury last year asked HUD to reconsider its use of disparate impact regulations currently in effect. In response, Secretary Ben Carson issued a notice of proposed rulemaking.⁴⁸

Impact of the 1968 Fair Housing Act Today

Without question, the 1968 Act has had a profound influence in purging the most blatant forms of discrimination in the real estate markets. But discrimination can be accomplished effectively in covert ways of which individuals experiencing racial bias may be unaware. That reality exists because a Black prospective buyer or renter may receive starkly different information from that given to a non-Hispanic White prospective borrower or renter. Information about unit availability, price, and locational amenities is critical to a successful housing search. Discrimination can be disguised as differential treatment based on financial capacity, which is not illegal. The saturation of Black Com-

Inadequate Federal Financial Regulatory Oversight Undermines Black Homeownership Taken from the 2018 *State of Housing In Black America*

Federal regulators have reinforced the negative impacts of decades of discrimination through inadequate enforcement of anti-discrimination laws and inadequate oversight of lending practices to address the unique lending challenges experienced by Blacks due to decades of unequal and unfair access to mortgage credit and homeownership. The housing market meltdown that began in 2007, for example, was largely precipitated by the saturation of the housing market with predatory and fraudulent subprime lending practices that disproportionately targeted Black communities. Nonprofit housing associations, private research institutes and civil rights groups complained about, documented, and tried to get federal financial regulators to end predatory subprime lending more than a decade before the market's collapse, with little success.

Moreover, when federal legislators enacted the Home Affordable Mortgage Program (HAMP) to help borrowers avoid foreclosure, they excluded from participation borrowers holding private label subprime loans, although those loans were experiencing the highest foreclosure rates and were disproportionately held by Black borrowers. And because Black borrowers were not allowed to access HAMP for their private-label subprime loans, they lost their homes at a disproportionate rate relative to non-Hispanic Whites, who largely had conventional loans (i.e., Fannie Mae and Freddie Mac) that were eligible for HAMP.

45 U.S. Supreme Court. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. (2015)

46 Schwemm, Robert G. and Bradford, Calvin, "Proving Disparate Impact in Fair Housing Cases After *Inclusive Communities*" (2016). *Law Faculty Scholarly Articles*. 594. (uknowledge.uky.edu/law_facpub/594).

47 Schwemm, Robert G., "Segregative-Effect Claims Under the Fair Housing Act" (2017). *Law Faculty Scholarly Articles*. 618. (uknowledge.uky.edu/law_facpub/618)

48 HUD, "Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard." *Federal Register*, vol. 83, no. 119. June 20, 2018.

Federal Financial Regulatory Agency Policies Reinforce Decades of Discrimination

Taken from the *2018 State of Housing In Black America*

Compounding the challenges to recover from the ravages of the foreclosure crisis in distressed lower- and moderate-income and Black communities, the GSEs, Fannie Mae and Freddie Mac, imposed an additional fee on borrowers wanting to purchase in weak markets. Known as the Adverse Market Impact Fee, that charge has disproportionately affected low- to moderate-income and Black communities, further driving down home prices, undermining the economic stability of those areas, and helping to drive borrowers in those communities into foreclosure.

Not only did Black homeowners disproportionately lose their homes relative to non-Hispanic White homeowners, their credit scores were further diminished for reasons having nothing to do with being less credit worthy than their non-Hispanic White counterparts. This episode is only the most recent example of the failures of federal institutions to protect the rights of Blacks in the mortgage market. It should be no surprise, therefore, that Blacks continue to struggle to attain and succeed in homeownership.

munities by reckless and fraudulent predatory subprime loans was known to all federal financial regulations and completely ignored until the housing market collapsed in 2008, taking the U.S. economy with it.

Even today, federal regulatory oversight of the housing finance agencies continues to pursue policies that limit access to safe and affordable mortgage credit by people of color. Requirements for high downpayments and credit scores penalize Blacks for the decades of discrimination they have been forced to endure. Discrimination has limited the ability of Black applicants to pass the unnecessarily stringent financial litmus tests that are mandated to qualify for the lowest-cost and sustainable mortgage products on the market. Failure to require federal housing agencies to use up-to-date credit-scoring models, for example, may further be denying homeownership opportunities to Blacks or causing them to pay unfairly high fees. The *2018 State of Housing in Black America* focuses on these and other barriers in detail.

CONCLUSION

This review of the effectiveness of both the Kerner Report and the 1968 Act demonstrate the challenges faced in overcoming centuries of racial bias and discrimination in our nation. Blatant discrimination that was common in the 1960s has fallen dramatically. But the fact that discrimination is not overt does not mean it is nonexistent or less destructive. The fact that the Black homeownership rate today is unchanged from its level in 1968 is testament to the power of covert acts of racial bias. As this paper has pointed out, the United States will never achieve its promise of a truly integrated and equitable society until the structural impediments to economic justice are torn down. That will require an honest, concerted, and consistent effort by Congress, the White House, and the courts.

Five key takeaways from this brief review of the Kerner Report and the 1968 Act include:

- (1) Impediments to Black economic advancement are significant and entrenched, embedded in the structure and operation of both private and public actors that allow discrimination to continue, albeit in ways that are difficult to detect and remove without major changes to federal laws and regulations;
- (2) No administration over the past half-century has invested the requisite resources that could make the meaningful and lasting changes required for our nation to achieve a truly equitable society;
- (3) Market forces alone cannot offset the impacts of institutional discrimination because institutional bias, by definition, has been and continues to be embedded in the markets and the institutions themselves;
- (4) America is becoming more diverse, and a growing share of the U.S. population is facing obstacles to economic mobility akin to the challenges historically faced by Blacks; and
- (5) The long-term economic and social interest of our nation's future success depends on our ability to live up to its promise to be a fair, equal, and just society.

Because the majority of babies in the U.S. are now born to people of color and those babies will comprise the majority of working-class Americans in less than 15 years,⁴⁹ building a movement for change should be even more doable than it was in the 1960s.

Both Blacks and Latinos (who face similar economic hardships to those faced by Blacks), hold significant political power and must find a way for that political power to count. Black and Latino voter loyalty must be repaid with action, not words. It's time to demand that our political leaders move beyond promises and toward the meaningful and lasting changes that will lead American society toward justice and equity.

⁴⁹ Wilson, Valerie. *People of Color Will Be a Majority of the American Working Class In 2032*. Economic Policy Institute. June 9, 2016.



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