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## Segregation and Environmental Justice

Myron Orfield\*

Serious examination of the negative impacts of environmental racism must include an examination and understanding of racial segregation and its consequences. In this article, I address the role that racial segregation and concentrated poverty play in perpetuating and intensifying racial disparities in health. I define segregation and concentrated poverty and provide a historic overview of how America's cities became segregated. I focus on how structures and institutions function to maintain racial segregation, concentrated poverty, political powerlessness, and consequently, the overexposure of communities of color to harmful environmental toxins. I conclude with an examination of potential solutions—including legislative and legal strategies—for addressing segregation and concentrated poverty.

Racial segregation is defined as “the physical separation of the races in residential contexts.”<sup>1</sup> Sociologists and city planners designate neighborhoods with more than 40% of the population in poverty as extreme poverty neighborhoods, and those between 20% and 40% in poverty as transitional areas that are on the way to becoming much poorer.<sup>2</sup> Robert Bullard

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1. David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404, 405 (2001).

2. Paul A. Jargowsky, *Ghetto Poverty Among Blacks in the 1980s*, 13 J. POLY ANALYSIS & MGMT. 288, 289 (1994). Of those living in concentrated poverty, over one-half are black and nearly one-third are Latino. *Id.* at 293. In 1970, 1177 census tracts containing 4,419,000 people experienced concentrated poverty. As of 1990, close to 2800 census tracts, or 7,973,000 people, experienced concentrated poverty. INSTITUTE ON RACE & POVERTY, CONCENTRATED POVERTY AND RACIAL SEGREGATION: EVALUATING PROGRAMS AND POLICIES 3 (1999). Although the level of concentrated poverty declined by twenty-seven percent in the 1990s, the recent economic downturn and the

has pointed out that the environmental protection apparatus has had “an adverse impact on poor people and people of color”<sup>3</sup> and this is particularly accurate in terms of the fair housing apparatus. Although the Civil Rights Act of 1964 made it illegal for programs receiving federal financial assistance to discriminate on the basis of race<sup>4</sup> and the Fair Housing Act of 1968 prohibited most forms of housing discrimination,<sup>5</sup> at the heart of almost all the urban centers in United States are racially segregated neighborhoods with very high poverty rates.<sup>6</sup>

While there are some very poor white neighborhoods in Appalachia and some older rust belt cities, 75% of poor whites in the United States live in predominantly middle income neighborhoods.<sup>7</sup> On the other hand, 75% of poor blacks and 50% of poor Latinos live in neighborhoods with more than 20% of the households in poverty.<sup>8</sup> In extreme poverty neighborhoods, the population is comprised of 32% poor blacks, 18% poor latinos, but only 5% poor whites.<sup>9</sup> Poor blacks are about six times as likely as poor whites, and poor Latinos more than three times as likely as poor whites, to live in neighborhoods densely populated with poor people.<sup>10</sup>

These neighborhoods are shaped by a number of complex and mutually reinforcing factors including continuing pervasive housing discrimination,<sup>11</sup> white resistance to integration, political fragmentation, and exclusionary local land use

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weakening state of many older suburbs underscore that the trend may reverse once again without continued efforts to promote economic and residential opportunities for low-income families. Paul Jargowsky, A Forum Co-Sponsored by Brookings Institution and Living Cities: The National Community Development Initiative, *Stunning Progress, Hidden Problems: Declines in Concentrated Poverty in the 1990s* (May 19, 2003), <http://www.brookings.edu/es/urban/speeches/20030519.pdf>.

3. Robert D. Bullard, *Building Just, Safe, and Healthy Communities*, 12 TUL. ENVTL. L.J. 373, 374 (1999).

4. 42 U.S.C. § 1981 (2000).

5. 42 U.S.C. § 3601 (2000).

6. See Jargowsky, *Ghetto Poverty Among Blacks in the 1980s*, *supra* note 2.

7. DAVID RUSK, *INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* 71 (1999).

8. *Id.* at 71-72.

9. *Id.*

10. *Id.*

11. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 105 (1993).

controls.<sup>12</sup> Illuminating the complexity of segregation, some scholars have suggested that many blacks are becoming ambivalent about integration and choose to live in segregated neighborhoods—in spite of the diminished life opportunities—rather than face intense white hostility on a daily basis.<sup>13</sup>

Numerous studies demonstrate that blacks and Latinos at all income levels are subject to discrimination in the housing market. Some real estate agents show blacks and Latinos only a small subset of the market at their relative income levels and steer whites away from black, Latino and integrated areas. Furthering the discrimination, some mortgage lenders systematically under-loan to blacks and Latinos as compared to whites of comparable income and background.<sup>14</sup>

The findings are consistent throughout the United States.<sup>15</sup> The discrimination is even more severe for blacks than Latinos and persists at more severe levels for black middle- and upper-income home-seekers.<sup>16</sup> Until at least the end of World War II, both sanction of law and physical violence kept blacks tightly confined in ghetto areas within cities.<sup>17</sup> In many cities, ordinances confined blacks to certain wards, and restrictive covenants attached to mortgages forbade the sales of homes to blacks in white neighborhoods.<sup>18</sup>

As ghetto populations expanded, pressure mounted to open up new neighborhoods to blacks. Unscrupulous real estate agents often employed a process known as “blockbusting” to create new black neighborhoods.<sup>19</sup> Blockbusters were real estate agents who induced panic-selling among white homeowners by convincing them that the neighborhood was being invaded by blacks, then bought homes cheaply from

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12. INSTITUTE ON RACE & POVERTY, *CONCENTRATED POVERTY: CAUSES, EFFECTS, AND SOLUTIONS* 15 (1999).

13. See, e.g., SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 9 (2004).

14. See MASSEY & DENTON, *supra* note 11, at 104; see also JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* (1995).

15. See MASSEY & DENTON, *supra* note 11, at 85-88.

16. *Id.*

17. See *id.* at 83; see also EDWARD G. GOETZ, *CLEARING THE WAY: DECONCENTRATING THE POOR IN URBAN AMERICA* 21-24 (2003).

18. GOETZ, *supra* note 17, at 21-24.

19. See MASSEY & DENTON, *supra* note 11, at 37-38; see also *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 416 (1971) (noting that this practice was also known as “panic peddling”).

fleeing whites and sold them to blacks at a profit.<sup>20</sup>

Federal and state housing policies have always caused concentrated poverty. For more than fifty years, a disproportionate share of subsidized housing has been built in poor segregated neighborhoods.<sup>21</sup> This housing practice tends to reinforce and make permanent racial and social divisions.

After restrictive covenants were declared unconstitutional in the 1940s,<sup>22</sup> the federal government created another powerful segregation mechanism. Following World War II, the Federal Housing Administration (FHA) made homeownership accessible to returning GIs and others by guaranteeing loans with small down payments, lower interest rates, and longer mortgage periods.<sup>23</sup> New mass production techniques made tract suburban housing more affordable. Expensive new federally financed highways made such areas accessible. It became less expensive to live in new suburban homes than to rent apartments in the city. White families left cities in overwhelming numbers, but federal policies prevented blacks from following.<sup>24</sup> The FHA would not provide low-cost loans to neighborhoods with “inharmonious racial or nationality groups,” such as for blacks moving into white areas.<sup>25</sup> The private market followed FHA guidelines.<sup>26</sup>

The instruments that created wealth-building opportunities for white families in all-white neighborhoods did not provide comparable low-cost funds to rehabilitate or finance older housing in the urban areas where blacks were confined. Poor whites, even those immigrating in the nineteenth century, never lived in the sort of concentrated poverty that is the norm for the black and Latino poor in the twenty-first century. While ghetto housing is a waypoint on an upwardly mobile

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20. See, e.g., *Linmark Assocs. v. Town of Willingboro*, 431 U.S. 85 (1977) (striking down a town ordinance banning “for sale” signs aimed at decreasing fear among whites of black families moving into the area); *Keefe*, 402 U.S. at 416 (describing how blockbusters used flyers, phone calls, and personal visits to convince whites that black families were moving into nearby houses).

21. *GOETZ*, *supra* note 17, at 2-3.

22. See *Shelley v. Kramer*, 334 U.S. 1 (1948).

23. *MASSEY & DENTON*, *supra* note 11, at 52-53. Until the postwar period, it was hard for most Americans to own a home. *Id.* Homes built one at a time were expensive because banks generally required at least a thirty-three percent down payment and a short five-to-ten year payment period. *Id.*

24. See *id.* at 54-55.

25. *Id.* at 54.

26. See *id.* at 51-54.

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track for whites, it has become a permanent destination for blacks. Additionally, urban development projects have also disproportionately affected minorities, especially blacks, and many have forced low-income residents to relocate in favor of construction of roads, highways, and more expensive housing units.

Changes in the economy and racially motivated responses to such changes have been among the strongest factors contributing to the segregation of racial and ethnic minorities. For instance, in Detroit many employers relocated their businesses from cities to suburbs due to cheap availability of land, but the migrations were racially selective. In the 1950s the city's population consisted of 16.2% blacks, but by the year 2000 that number changed to an astounding 82%.<sup>27</sup> As the jobs moved into the suburbs, a greater percentage of whites than blacks retained their jobs. People who remained in the city were left with low-paying jobs, worked in older factories that were less technologically sophisticated, and were subject to more hazardous and poorer working conditions.<sup>28</sup>

White suburbanites' fears of blacks integrating their neighborhoods and of declining property values have driven attempts to prevent blacks from moving into those areas.<sup>29</sup> Additionally, fears of declining property values caused many whites to leave inner-city neighborhoods.<sup>30</sup> These trends have contributed to the creation of concentrated poverty and racially segregated neighborhoods.<sup>31</sup> Local governments have further contributed to segregation through the use of zoning and planning restrictions that prevent minority populations from moving to opportunity-rich suburbs in many areas around the United States.<sup>32</sup>

Overreliance on local property taxes to fund community services also places segregated minority populations at greater risk for reduced services.<sup>33</sup> The movement of employers and

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27. Amy J. Schultz et al., *Racial and Spatial Relations as Fundamental Determinants of Health in Detroit*, 80 *MILBANK Q.* 677, 681-82 (2002).

28. *Id.* at 683.

29. MASSEY & DENTON, *supra* note 11, at 37-38.

30. *Id.*

31. *Id.* at 37-40.

32. See Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, *FORDHAM URB. L.J.* (forthcoming 2006).

33. See MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 15-16 (2002) (discussing tax base and tax sharing).

high-paid jobs from urban areas results in a lower tax base for the black and other mostly minority populations living in those areas. The lower tax base limits the availability of resources necessary to promote health care and limits access to a wide spectrum of services, such as hospitals and pharmacies.<sup>34</sup>

As neighborhoods become racially identifiable and poor, businesses close. Often the tax base that supports public services in a highly fragmented region begins to erode. Private credit is withdrawn due to racial bias and bad conditions for investment. Metropolitan housing segregation, fiscal disparity, and discrimination in credit put the poor of color on an iceberg that is melting. As the problems intensify, the resources that support public service erode.<sup>35</sup> Taxes, high to begin with, rise in an attempt to prevent declining levels of services.<sup>36</sup> The fiscal situation thus creates leverage that entrenches social separation. The concentration of poverty greatly intensifies the basic problems caused by individual poverty.<sup>37</sup> Furthermore, the concentration of poverty reduces the political power of those residing in these neighborhoods, thus limiting their ability to oppose the locating of environmental hazards in or near their neighborhoods.<sup>38</sup>

Toxic hazards such as chemical plants, waste facilities, freeways, and garbage stations are frequently located in or adjacent to residential areas with large concentrations of communities of color.<sup>39</sup> At least a part of the reason for this must be the powerlessness created by the geographic concentration of poverty.<sup>40</sup> In most societies, the poor are relatively politically powerless. They tend to be overwhelmed with the requirements of living, less-informed about issues, less likely to vote, and unable to make substantial financial contributions to political campaigns. In a political regional context, local governments and metropolitan planning agencies jointly make decisions regarding locally undesirable land uses (LULUs).<sup>41</sup> Often, these decisionmaking groups proceed along

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34. See Schultz et al., *supra* note 27, at 690.

35. See ORFIELD, *supra* note 33, at 54-55.

36. See *id.*

37. See Schultz et al., *supra* note 27, at 692-93.

38. See *id.* at 695-96.

39. See Bullard, *supra* note 3, at 393-96.

40. See George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421 (1993).

41. ORFIELD, *supra* note 33, at 163-72.

the path of least resistance by concentrating toxin-generating facilities where they will face the least political opposition.<sup>42</sup> The existence of racially segregated and high poverty neighborhoods, along with political powerlessness, contributes to serious environmental risks for communities of color.

The segregation of blacks and other people of color in low-income neighborhoods is independently associated with negative health outcomes.<sup>43</sup> A recent article by Helen Epstein introduced into the mainstream the idea that segregated neighborhoods have a negative effect on residents' health.<sup>44</sup> This has been recognized by the U.S. Department of Housing and Urban Development (HUD) through its Moving To Opportunity (MTO) experiment, in which it was found that residents moving from poverty-stricken neighborhoods into more affluent areas saw positive health results.<sup>45</sup> The MTO program was an ambitious experiment by HUD, building on the famous *Gautreaux* litigation<sup>46</sup> and the emerging concept that deconcentrating poverty is the most efficient way to improve the lives of the poor.<sup>47</sup> The *Gautreaux* families were dispersed throughout the Chicago area and when freed from the harms of concentrated poverty, they were much more likely to be employed, their children did better in school, and they were generally safer.<sup>48</sup> In the follow-up study with the MTO families, researchers expected to find improvements in life outcomes similar to the *Gautreaux* families, but the most significant outcomes they found were substantial

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42. *Id.*

43. See Williams & Collins, *supra* note 1, at 409.

44. Helen Epstein, *Ghetto Miasma; Enough to Make You Sick?*, N.Y. TIMES, Oct. 12, 2003, § 6 (Magazine), at 74, available at <http://www.nytimes.com/2003/10/12/magazine/12HEALTH.html>.

45. John M. Goering, Judith D. Feins & Todd M. Richardson, *What Have We Learned About Housing Mobility and Poverty Deconcentration, in CHOOSING A BETTER LIFE?: EVALUATING THE MOVING TO OPPORTUNITY SOCIAL EXPERIMENT* 28-29 (John M. Goering & Judith D. Feins eds., 2003).

46. See *Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930, 937 (1974) (quoting then-HUD Secretary George Romney as stating: "The impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community. . . . To solve the problems of the 'real city', only metropolitan-wide solutions will do."), *aff'd sub nom Hills v. Gautreaux*, 425 U.S. 284 (1976).

47. See GOETZ, *supra* note 17, at 53-55.

48. LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 67-70 (2000).



improvements in participant health.<sup>49</sup>

In interviewing several families who moved out of poor segregated neighborhoods, Helen Epstein found that all of them reported better health conditions.<sup>50</sup> Some family members reported reductions in problems such as hepatitis and high blood pressure, while others reported improvements in diabetes and asthma problems. All concluded a positive relationship exists between racially segregated neighborhoods and negative health outcomes.<sup>51</sup>

While the MTO researchers may have been surprised, it was nothing new to the field of public health. Researchers have long understood that urban residents overall have lower life expectancies than the national average, but blacks also lead shorter lives even within the same city.<sup>52</sup> In addition, Helen Epstein found that infant mortality rates for blacks in Westchester County, New York are almost three times higher than the national average.<sup>53</sup> Moreover, blacks in severely segregated areas such as Detroit, the south side of Chicago, and the Watts area in south central Los Angeles have the same probability of death at age forty-five that white people living in less segregated neighborhoods have at age sixty-five.<sup>54</sup>

Life expectancy rates also shed light on the effects of segregation and concentrated poverty. In 1996, blacks could expect to live an average of 70.3 years, up from 69.5 the previous year.<sup>55</sup> For whites, life expectancy was 76.8 years, up from 76.5 in 1995.<sup>56</sup> Not coincidentally, minorities also experience disproportionately high rates of diseases and illnesses.<sup>57</sup> A study found that residential segregation had direct and indirect impacts on the spread of infectious diseases and was a major reason for the disparity between these

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49. Goering, Feins & Richardson, *supra* note 45, at 6-7, 28-33.

50. Epstein, *supra* note 44, at 98, 102.

51. *Id.*

52. See Schultz et al., *supra* note 28, at 678.

53. Epstein, *supra* note 44, at 77.

54. *Id.*

55. INSTITUTE ON RACE & POVERTY, *supra* note 12, at 12.

56. *Id.*

57. Dolores Acevedo-Garcia, *Residential Segregation and the Epidemiology of Infectious Diseases*, 51 SOC. SCI. 1143 (2000). This follows in part from the increased levels of poverty seen among segregated minorities. See Kenneth Finegold, THE URBAN INST., *Race, Ethnicity, and Health*, 20 SNAPSHOTS OF AMERICA'S FAMILIES III (2004), available at [http://www.urban.org/UploadedPDF/310969\\_snapshots3\\_no20.pdf](http://www.urban.org/UploadedPDF/310969_snapshots3_no20.pdf).

diseases among the white and minority populations.<sup>58</sup> The high density of affordable housing in poor segregated neighborhoods, increased drug and other crimes in those areas, and limited access to medical care all contribute to the growing number of blacks, Latinos, and other minorities experiencing higher rates of diseases and lower life expectancies.<sup>59</sup>

Poor people often lack health insurance and do not have access to adequate health care due both to financial constraints and spatial isolation from healthcare resources.<sup>60</sup> In her recent article, Helen Epstein described this public health crisis in poor, segregated urban communities as a “miasma” that reduces both the quality of life and life expectancy of people who live in them.<sup>61</sup> She contrasted the health status of people confined to those neighborhoods with the improved status of people who have moved to more affluent environments. After considering a couple of hypotheses, she wondered if the miasma might not turn out to be segregation itself.<sup>62</sup>

Reducing the harms of living in racially segregated and high-poverty neighborhoods will require continued efforts on the part of environmental justice advocates and coordinated, complementary efforts to eliminate racial disparities in housing opportunities. Clearly, the concentration of unhealthy LULUs in poor minority areas must stop, while existing LULUs must be remediated. Minorities should be encouraged or empowered to move away from these areas. Poor whites have been able to avoid many of the ravages of environmental injustice, because they have much broader housing choices than blacks and Latinos of similar income levels, and thus can move into environmentally safer neighborhoods. If housing discrimination could be dramatically reduced, poor blacks and Latinos would no longer be isolated in neighborhoods vulnerable to environmental racism. Activists fighting environmental racism should therefore also work for residential desegregation and integration.

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58. See Acevedo-Garcia, *supra* note 57.

59. *Id.*

60. See CATHERINE G. McLAUGHLIN, HEALTH POLICY AND THE UNINSURED 221-27, 229-30 (2004); STEPHEN ZUCKERMAN & JENNIFER HALEY, THE URBAN INST., VARIATION AND TRENDS IN THE DURATION OF UNINSURANCE 10 (2004), available at [http://www.urban.org/UploadedPDF/311112\\_DP04-10.pdf](http://www.urban.org/UploadedPDF/311112_DP04-10.pdf).

61. Epstein, *supra* note 44.

62. *Id.*

A variety of states and counties have land use planning statutes with affordable housing provisions. There is evidence that the Oregon system of land use planning and the Montgomery County, Maryland moderately priced dwelling unit ordinance have resulted in increased integration.<sup>63</sup> These present promising methods of opening up the suburbs. In 1995, Minnesota passed a fair sharing housing bill called the Livable Communities Act.<sup>64</sup> In 2003, Illinois passed a fair sharing housing bill for the Chicago metropolitan area.<sup>65</sup> Massachusetts strengthened its anti-snob zoning ordinance last year, and over 100 municipalities in the United States have enacted inclusionary zoning ordinances.<sup>66</sup>

Litigation can be a powerful means of achieving social justice, and housing litigation may hold more promise than legal actions directly challenging environmental racism. Lawsuits directly challenging incidents of environmental

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63. See RUSK, *supra* note 7, at 153-200; Robert L. Liberty, *Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*, 30 B.C. ENVTL. AFF. L. REV. 581, 598-99 (2003) (citing NATIONAL ASS'N OF HOME BUILDERS, HOUSING OPPORTUNITY INDEX: FIRST QUARTER 2002 (2002)); Arthur C. Nelson, Casey J. Dawkins & Thomas W. Sanchez, *Urban Containment and Residential Segregation: A Preliminary Investigation*, 41 URB. STUD. 423, 431 tbl. 2 (2004); Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21<sup>st</sup> Century*, 23 W. NEW ENG. L. REV. 65, 78-79 (2001); see also KAREN DESTORAL BROWN, THE BROOKINGS INST. CTR. ON URBAN & METRO. POLICY, EXPANDING AFFORDABLE HOUSING THROUGH EXCLUSIONARY ZONING: LESSONS FROM THE WASHINGTON METROPOLITAN AREA 5, 7 (2001), <http://www.brookings.edu/es/urban/publications/inclusionary.pdf>; LEWIS MUMFORD CTR. FOR COMPARATIVE URBAN & REG'L RESEARCH, CENSUS DATA FOR THE CITY OF PORTLAND, <http://mumford1.dyndns.org/cen2000/WholePop/CitySegdata/4159000City.htm> (last visited Nov. 29, 2005).

64. See Edward G. Goetz, Karen Chappelle & Barbara Lukermann, *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 LAW & INEQ. 31, 46-47 (2004).

65. See Illinois Housing Development Authority, *Affordable Housing Planning and Appeal Act*, <http://www.ihda.org/ViewPage.aspx?PageID=32> (last visited Nov. 30, 2005).

66. See Common Interest, Issue Brief #2, Massachusetts and "Anti-Snob" Zoning, [http://www.bpichicago.org/rah/pubs/ci\\_issue\\_brief2.pdf](http://www.bpichicago.org/rah/pubs/ci_issue_brief2.pdf) (last visited Nov. 30, 2005); Massachusetts Housing Partnership, *New Guidelines Will Help Cities, Towns Review Chapter 40B Development Proposals*, [http://www.mhp.net/news\\_ideas/latest\\_news.php?function=show&ID=606](http://www.mhp.net/news_ideas/latest_news.php?function=show&ID=606) (last visited Nov. 30, 2005); Jurisdictions with Mandatory Laws, <http://www.gamaliel.org/DavidRusk/Table%201-list%20of%20IZ%20laws.pdf> (last visited Nov. 30, 2005).

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racism on grounds of racial discrimination or lack of equal protection face substantial hurdles. In many instances of environmental racism, it will be difficult to prove intentional discrimination on the part of the government.<sup>67</sup> Claims may have to rest solely on evidence that the government's act of, for example, choosing the site for an environmental hazard, has had a disproportionate impact on people of color. Such a showing will not establish an equal protection claim. Government actions are unconstitutional under the Fifth and Fourteenth Amendments of the U.S. Constitution only if the government has acted with the intent to discriminate.<sup>68</sup>

Section 601 of Title VI of the Civil Rights Act of 1964 prohibits racial discrimination in programs or activities receiving federal financial assistance.<sup>69</sup> As with the constitutional provisions, private individuals may sue to enforce section 601, but only a showing of intentional discrimination will establish a claim.<sup>70</sup> Neither section 602 of Title VI, which directs government agencies to issue rules, regulations, and orders to effectuate section 601, nor the regulations promulgated under sections 601 and 602, some of which do address disparate impact discrimination, are enforceable by private-party actions.<sup>71</sup> Finally, Executive Order 12898 issued in 1994 by President Clinton directs federal agencies to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations," but the order creates no private right of action against the government or its agencies.<sup>72</sup>

Activists must put pressure on the federal government to enforce these statutes, particularly those that redress disparate impact discrimination. Perhaps even more importantly, they

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67. See, e.g., *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied sub nom. Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 434 U.S. 1025 (1978).

68. *Washington v. Davis*, 426 U.S. 229, 239 (1976); see also *City of Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980).

69. 42 U.S.C. § 2000d (2000).

70. See *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

71. *Id.* at 282.

72. *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994).

must work to amend federal law to provide for more private rights of action to enforce prohibitions against disparate impact litigation in the subject areas that cover environmental justice.

The federal Fair Housing Act and many state housing laws allow a disparate impact claim to be brought in court by a private party.<sup>73</sup> While these cases are not easy to bring or win, this is a huge advantage in the level of proof required, and there are number of these cases where plaintiffs have achieved substantial victories.<sup>74</sup>

Moreover, the Supreme Court has found that metropolitan-wide remedies may be implemented in fair housing cases against defendants such as HUD and possibly the IRS (in the case of tax credit allocation).<sup>75</sup> A remedy providing for significant affordable housing opportunities in the suburbs could allow low-income black and Latino households to move to opportunities like better schools and employment prospects, and away from environmental hazards. Pressure on the fair housing front would likely have a cross-pollinating effect, as it would seem that the harms of environmental racism strengthen discrimination claims that support equitable remedies in fair housing cases.

Under the federal Fair Housing Act, all federal agencies dealing with housing have an obligation to affirmatively further fair housing.<sup>76</sup> This duty also extends to state agencies administering federal housing programs.<sup>77</sup> Direct subsidy production by HUD has steeply declined over the last several decades, but the Low Income Housing Tax Credit administered by the IRS has expanded to produce about 80,000 low-income units a year.<sup>78</sup> Much of this housing is being built in poor,

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73. See *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied sub nom. Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 434 U.S. 1025 (1978); ROBERT SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION app. c (Supp. 2005) (listing thirty-three states with laws substantially equivalent to the federal Fair Housing Act as amended in 1988).

74. See SCHWEMM, *supra* note 73, at sec. 10:6.

75. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284 (1976) (affirming a remedial order awarding Chicago families vouchers to move to the suburbs as compensation for the substandard conditions of their housing projects).

76. 42 U.S.C. § 3608(d) (2000).

77. *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133-34 (2d Cir. 1973); *United States v. Charlottesville Redevelopment and Hous. Auth.*, 718 F.Supp. 461, 464-65 (W.D. Va. 1989).

78. ABT ASSOCS., UPDATING THE LOW INCOME HOUSING TAX CREDIT (LIHTC) DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2001 16-17

segregated neighborhoods, reinforcing racial segregation and the concentration of poverty.<sup>79</sup> Recently, a New Jersey appellate court held that the low-income housing tax credit allocations by state agencies were subject to requirements of the federal Fair Housing Act.<sup>80</sup> A similar lawsuit has begun in Connecticut.<sup>81</sup> It is possible that this will open up an area of litigation that will provide a new vehicle for fair housing efforts.

The New Jersey Supreme Court in the famous *Mt. Laurel* cases held that exclusionary zoning violated the general welfare clause of the New Jersey Constitution.<sup>82</sup> This has resulted in approximately 50,000 units of affordable housing being built in the New Jersey suburbs.<sup>83</sup> There was no racial component in the court's remedy, and hence most of the housing has gone to poor white people.<sup>84</sup> But there has been some progress here.

As long as racial segregation separates poor blacks and Latinos from the more politically powerful middle- and upper-class society, it will be difficult for them to achieve the political

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(2003), [http://www.abtassociates.com/reports/20003630222505\\_16197.pdf](http://www.abtassociates.com/reports/20003630222505_16197.pdf).

79. *Id.* at 28-35; Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1019-1022 (1998).

80. *In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 848 A.2d 1, 12-13 (N.J. 2004). Although it held that the state agency was bound by Title VIII's direction to administer the housing program so as affirmatively to further fair housing, the court rejected the plaintiffs' argument that the agency had violated this requirement by allocating too large a share of the tax credits to segregated urban areas. *Id.* at 20.

81. Plaintiffs in the Connecticut case are currently appealing the state superior court's dismissal of the complaint based on a finding that there is no private right of action to enforce federal and state laws requiring government agencies affirmatively to promote fair housing. *Asylum Hill Problem Solving Revitalization Association v. King*, No. (X02) CV 03-0179515-S.

82. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390, 490 (N.J. 1983); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713, 730-31 (N.J. 1975).

83. Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1271 (1997); John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 670 (1996); Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1135 n.52 (1995).

84. Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577, 608 (1997).

leverage to achieve environmental justice. It is just too easy for a wealthy white society to locate its environmental hazards in poor, racially distinct, politically powerless places. History shows that poor segregated neighborhoods and cities have been historically targets of discrimination by surrounding white middle-class jurisdictions. Poor neighborhoods not only get too much hazardous waste and other environmental hazards, but in tough times they lose their fire stations, their schools, and their teachers. As long as housing discrimination holds blacks and Latinos separate from white society, they will be also held apart in terms of individual opportunity and basic health. We need both strengthened environmental justice provisions and a more concerted effort to end residential segregation.