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Segregation Now, Segregation Tomorrow, Segregation Forever?

Elizabeth K. Julian†

We make two general assertions: (1) that American cities and suburbs suffer from galloping segregation, a malady so widespread and so deeply imbedded in the national psyche that many Americans, Negroes as well as [W]hites, have come to regard it as a natural condition; and (2) that the prime carrier of galloping segregation has been the Federal Government. First it built the ghettos; then it locked the gates; now it appears to be fumbling for the key. Nearly everything the Government touches turns to segregation, and the Government touches nearly everything.¹

Introduction

Whether racial segregation is consistent with the basic values of our country has long been an issue for debate, on both the right and the left, even as the country has moved forward from the victories of the Civil Rights Movement.² The frustration and anger

†. The author is a lawyer, not an academic, and this Article does not pretend to be a traditional law review article. It is a reflection on the themes of the *Summit for Civil Rights* symposium held at the University of Minnesota Law School in November of 2017. This Article seeks to encourage the next generation interested in promoting and supporting a more open and inclusive society to learn from the past, and to go boldly and creatively into the future. To quote Edward M. Kennedy, who quoted Robert F. Kennedy in his 1968 tribute to Robert F. Kennedy, “[o]ur future may lie beyond our vision, but it is not completely beyond our control.” Senator Edward M. Kennedy, Tribute to Robert F. Kennedy (June 8, 1968), <https://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/EMK-Speeches/Tribute-to-Senator-Robert-F-Kennedy.aspx>.

1. 114 CONG. REC. 2,280 (1968). During the floor debate on an amendment to H.R. 2516, which “would extend the principle of fair housing to the sale and rental of real estate in our country,” Senator Edward Brooke quoted this statement made during the hearings before the Subcommittee on Housing and Urban Affairs of the Committee on Banking and Currency. *Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency*, 90th Cong. 298 (1967) (quoting the statement of the National Committee Against Discrimination in Housing).

2. See THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICAN CITIES (Chester Hartman & Gregory D. Squires eds., 2010); see Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555 (2008); see, e.g., George C. Wallace, Ala. Governor, The Inaugural Address of Governor George C. Wallace (Jan. 14, 1963), <http://digital.archives.alabama.gov/cdm/singleitem/collection/voices/id/2952/rec/5>.

of African Americans at the resistance and hypocrisy of White Americans around the issues of segregation, desegregation, and integration is understandable beyond peradventure.³ Perhaps we are doomed to live out our days in the angry, divisive separateness that characterizes the current moment, as it has for so much of our history. But we do not have to be. There are and always have been people who are willing to do the heavy lifting and understand the long game. We can again pull ourselves back from the brink and start moving forward again, but to do so we must be honest and clear about why we have not made the progress we should have made over the past fifty years. We were warned about the dangers of continuing down the path of separate and unequal, and we were challenged by the architects of the Fair Housing Act (FHA)⁴ to undo the harms that had been done by segregation. The history of the past fifty years is a history of our failure to do that. So, today we stand challenged once again to turn away from the naysayers, the apologists, and the excuse-makers to aggressively combat the vitriol, the violence, and voice of the White supremacists and their elected representatives from the courthouse to the statehouse to the White House. It begins with acknowledging, at the beginning of the third decade of the twenty-first century, the detailed truth about our segregated history, and the reality of the harms segregation has inflicted and continues to inflict. It ends with the removal of every vestige of that segregation in American life, root and branch. It will not be accomplished in our lifetime, but unless we rededicate ourselves to that task with the determination of the people who came before us—the heroes, both sung and unsung—who worked all their lives to right the country's fundamental wrong, we will not endure—nor should we.

I. The Promise of 1968

The FHA, the last major piece of legislation of the Civil Rights Movement, was passed on April 11, 1968, following Dr. Martin Luther King, Jr.'s assassination on April 4, 1968.⁵ It came on the heels not only of the assassination of Dr. King, but following the

3. Lisa Trei, *Black Children Might Have Been Better Off Without Brown v. Board*, *Bell Says*, Stanford Report (Apr. 21, 2004), <https://news.stanford.edu/news/2004/april21/brownbell-421.html>.

4. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2009)).

5. *Id.* (noting that this legislation “was enacted (1) to prohibit discrimination in housing, and (2) to direct the Secretary of Housing and Urban Development to affirmatively further fair housing in Federal housing and urban development programs”).

issuance, on February 29, 1968, of the Kerner Report by the National Advisory Commission on Civil Disorders.⁶ The Commission had been appointed by President Lyndon B. Johnson to investigate the cause of the 1967 race riots throughout the United States and provide recommendations for the future. The Commission's words were blunt:

Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most [W]hite Americans. What [W]hite Americans have never fully understood—but what the Negro can never forget—is that [W]hite society is deeply implicated in the ghetto. White institutions created it, [W]hite institutions maintain it, and [W]hite society condones it.⁷

The Report called for federal housing programs to “be given a new thrust aimed at overcoming the prevailing patterns of segregation.”⁸ The Report warned that “[i]f this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them.”⁹ The Commission acknowledged the challenge but forcefully argued that the alternative was unacceptable:

To pursue our present course will involve the continuing polarization of the American community and, ultimately, the destruction of basic democratic values. The alternative . . . is the realization of common opportunities for all with a single society. This alternative will require a commitment to national action—compassionate, massive, and sustained, backed by the resources of the most powerful and the richest nation on this earth. From every American it will require new attitudes, new understanding, and, above all, new will.¹⁰

One of the many specific recommendations of the Kerner Report was that Congress enact a national “comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing.”¹¹ The passage of the FHA addressed that recommendation, albeit without the

6. NAT'L ADVISORY COMM'N, REPORT ON CIVIL DISORDERS (KERNER COMM'N) 1 (1968). This report was commissioned by President Lyndon B. Johnson to examine the race riots of the summer of 1967. It aimed to answer three questions: (1) “What happened?”; (2) “Why did it happen?”; and (3) “What can be done to prevent it from happening again?” *Id.*

7. *Id.* at 1.

8. *Id.* at 13.

9. *Id.*

10. *Id.* at 1.

11. *Id.* at 263.

enforcement teeth called for, and for a brief time there was some national leadership in that regard. The story of Housing and Urban Development (HUD) Secretary Romney's efforts to desegregate the White suburbs in the early 1970s is well known, as is the response by President Nixon, effectively shutting down such efforts and pivoting away from the idea that residential segregation was to be dismantled as part of the march toward justice for African Americans.¹² The resistance to "desegregation," much less "integration," was widespread due in large part to White racism, but also to concern among a segment of the African American leadership that pressing for integration that White people clearly did not want, jeopardized the kinds of economic investment in African American communities that was desperately needed. By the late 1970s the emphasis, even among Democrats, of national housing policy focus was on "improvement" of the conditions in the ghettos, not integrating the White suburbs or White neighborhoods/enclaves that already had the desirable conditions and opportunities that had been long denied African Americans locked in the ghetto. The "Open Housing" movement, which had been an integral part of the civil rights struggle throughout the 1960s gave way to a more limited notion of "fair housing," focused on individual acts of private discrimination in the housing markets, leaving the segregation that had been imposed by governmental action at the local, state, and national level largely untouched by the federal government, or anyone else.¹³

While important, the non-discrimination provisions put all the burden of righting the historic wrongs done by the country to African Americans squarely on the shoulders of individual victims of discrimination rather than on the architects and beneficiaries of segregation. One might expect this from a president and a party whose power flowed from the "Southern strategy." In truth, it was also the activists on the left—who inherited the mantle of the Civil Rights Movement—who, for many complicated and not-so-complicated reasons, essentially abandoned the imperative to

12. Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 387–88 (2007) ("Nixon certainly understood that the fair housing act was seen as directed against suburbs. His campaign positions were characterized by 'hedging': he 'did not raise the [fair housing] issue to woo minorities,' saying that he would not 'campaign for the [B]lack vote at the risk of the suburban vote.") (quoting DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS: POLITICS, PRINCIPLE, AND POLICY 46 (2001)).

13. See generally HOUSING DESEGREGATION AND FEDERAL HOUSING POLICY (John M. Goering ed., 1986).

dismantle housing segregation “root and branch.”¹⁴ The results of this collective failure are tragically documented in Patrick Sharkey’s book *Stuck in Place: Urban Neighborhoods and the End of Progress Toward Racial Equality*.¹⁵

The FHA did contain an important and potentially powerful provision which mandated that the federal government “affirmatively [] further” the purposes of the FHA in the administration of all housing and urban development programs and activities.¹⁶ This provision sought to address the challenge inherent in Senator Brooke’s observation about the role of the federal government in creating and perpetuating segregation.¹⁷ It reflected recognition that segregation was the lynchpin to “opportunity hoarding” by White people, at the expense of Blacks and other people of color.¹⁸ Over the next forty years, with a few exceptions, that potentially powerful mandate was essentially ignored or avoided by both policy makers and most advocates in favor of the “non-discrimination” provisions of the Act and efforts to guild the ghetto.¹⁹

II. Going Forward in 2018

So here we are on the eve of the third decade of the twenty-first century, fifty years after Kerner and the passage of the FHA. Yes, progress has been made on employment, voting,²⁰ and

14. *Green v. Cty. Sch. Bd. of New Kent*, 391 U.S. 430, 438 (1968) (referencing the legal mandate to desegregate public schools).

15. See PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* (2013).

16. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 81–89 (1968) (codified as amended at, 42 U.S.C. § 3608(d) (2009)).

17. See generally 114 CONG. REC. 2280 (1968) (statements of Sen. Brooke) (exploring the federal government’s role in creating segregation).

18. *Id.*

19. See generally CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960* (2005). Toward the end of the second term, the Obama Administration promulgated a robust regulation implementing this forty-five-year-old statutory provision. The rule speaks powerfully about the harms of segregation and the need for HUD fund recipients to address these harms. However, the Trump Administration has taken action to postpone implementation by states and local jurisdictions who receive HUD funds out to 2020, so it is unclear what the future holds in that regard. For additional resources related to HUD’s Final Rule, see *Affirmatively Furthering Fair Housing*, DEP’T OF HOUS. & URB. DEV., https://www.huduser.gov/portal/affht_pt.html (last accessed April 14, 2018).

20. The issue of whether residential segregation is necessary to secure minority voting rights has long been the topic of discussion, though no one has seriously suggested it is a legitimate basis for legally compelling segregation. It has been advanced as an argument against aggressively championing housing policies that promote integration or seek to remedy the effects of segregation, particularly on low-

education, but we have stayed very segregated. Location matters, and segregation has always been the gatekeeper to access the opportunities that White people take for granted, such as education, employment, decent housing in safe neighborhoods, homeownership that builds wealth, a healthy environment that supports, rather than damages, and mental and physical health. Racial disparities in every quality-of-life metric and indicator in this country are directly and demonstrably tied to the policy of racial segregation.²¹ While the case can certainly be made that segregation harms everyone in society, the truth is that the harm has always fallen most acutely on Black people and other people of color.²² Real desegregation means remediating those harms with intention. There is no other way.

III. Teach the Children Well

We have done an incredibly effective job of hiding the facts behind why things are the way they are from at least two generations of children who should have been taught the truth. By 1968, the Vietnam War was diverting the attention of the young White people who appeared more sympathetic to the Civil Rights Movement than their parents, draining much of the political will and resources to take up the challenge of the Kerner Commission regarding race. In November of that year, the country narrowly chose a president whose political future was tied to a White Southern base vehemently opposed to “integration,” and the Democrats found themselves divided and defensive on the issues of both the war and civil rights. At this crucial time in our history, we, as a country, turned away from the hard work that the Civil Rights Movement set us up to do. We declared Dr. King’s birthday a holiday, listened to the “I Have a Dream” speech once a year, celebrated Fair Housing Month in April, and declared that war won. It was not. Today, the facts tell the story, and they leave us no place to run and no place to hide. Young people need to be told that they

income people of color, by expanding housing opportunities for minority persons outside the predominately minority neighborhoods. That debate/discussion must be left to another day, but it is one of the arguments that continues to come up in the integration debate.

21. See MARISA NOVARA, ALDEN LOURY & AMY KHARE, METRO. PLANNING COUNCIL & THE URB. INST., THE COST OF SEGREGATION 16 (2017), <http://www.metroplanning.org/uploads/cms/documents/cost-of-segregation.pdf> (discussing the “link between concentrations of poverty and negative outcomes for low-income people” and addressing mounting evidence that high segregation levels impact regional economic growth).

22. *Id.*

have been lied to, perhaps by well-meaning people, perhaps not, but in any event, the successes of the Civil Rights Movement, while important milestones on the road to justice, were not the end of the road. Even if there were good reasons to stop a minute to rest, there were and are, miles and miles to go; we must start moving again if we ever hope to achieve the country of our highest aspirations. We must teach, educate, explain, and listen to young people in school, not only about the fact of undeniable continuing racial and economic disparities, but also the “why” and “what” public policies could and must be employed to address those disparities that are demonstrably caused by government action and inaction over the past fifty years. There are excellent sources which document the facts and tell the story of our efforts with unrelenting force.²³ We are no longer predicting what will happen if we fail to come to grips with our legacy of segregation: we have lived it and the evidence is in.²⁴

IV. Organize and Participate in the Political Process

The alchemy of race and housing has seldom been a politician’s finest hour. The harm done by segregation has rarely been part of the political discussion because it is seen as too controversial and politically dangerous.²⁵ Advocates must make it even more controversial and politically dangerous to not deal with it. They must put desegregation at the top of the policy agenda at every level of government. The issue must be talked about in the political arena, not just in the academic or legal arenas. Politicians of every race, ethnicity, and background must be held accountable. Demagogues abound. Truth tellers and people of good will must outnumber them. Most of all, voters must outnumber them.

There may be reason to hope. Today, we see younger politicians talking about the challenges we face because of our racial

23. See, e.g., RICHARD ROTHSTEIN, *COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017). This book, which documents with powerful detail the deep and wide history of how all levels of government created and continue to sustain a segregated and unequal America, should be read by every thinking person in the country. The book clearly and methodically lays out the facts and challenges the reader to think about what can be done to redress the clear legal harms that have been inflicted upon people and communities by the policies of segregation.

24. SHARKEY, *supra* note 15, at ch. 4–5.

25. See Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (last updated July 8, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> (discussing how politicians have long avoided bringing discussions about addressing segregation into the public eye).

history and the common ground that we share when we are honest about that. The newly elected mayor of Minneapolis actually embraces the goals of the FHA and talks about the harms of segregation.²⁶ In Dallas, a young innovator with a background in education started an organization to engage a cross section of community leaders and activists in the discussion of the need for a comprehensive housing policy based in the reality of what segregation has done in the City of Dallas.²⁷ The idea of dealing openly and honestly about race and income in the housing space has been embraced by the local newspaper and local thought leaders.²⁸ It has also found a real, if perhaps reluctant, acceptance by the elected officials that dealing with inequity cannot be ignored any longer because it is harming everyone. The growing number of racially and economically diverse suburbs that would like to remain integrated and whose leadership is looking for policies that will support that goal are potential allies in this struggle. Minority communities that were made separate and unequal by governmental policy, and people who were contained in those communities while being excluded from the geographies of opportunity, all have demonstrable harms for which there must be a creative and aggressive remedy. Advocating for truly proactive “desegregation” can give those communities more power over the threat of gentrification than unfocused resistance to needed investment. A community organizing strategy that starts with the history of *de jure* segregation in a neighborhood and the harms that continue to be inflicted on those places and the people who live in them has potential for more effective advocacy and remedy. The legitimacy of community demands related to housing, schools, safety and security, access to healthy food, healthy air and water, social and cultural amenities, and the ability to form personal and social relationships across racial and ethnic lines are supported by the law and the facts. In the hands of a well-informed and

26. Myron Orfield & Will Stancil, *New Minneapolis Mayor Jacob Frey Could be a Significant Leader on Housing and Civil Rights*, STAR TRIB. (Jan. 10, 2018), <http://www.startribune.com/new-minneapolis-mayor-jacob-frey-could-be-a-significant-leader-on-housing-and-civil-rights/468684353/>.

27. *What's the Problem?*, OPPORTUNITY DALLAS, <https://www.opportunitydallas.org/what-s-the-problem/> (last accessed Mar. 21, 2018).

28. See, e.g., Mike Koprowski, *Segregation in Dallas Is a Poverty Trap*, DALL. NEWS (Oct. 17, 2017), <https://www.dallasnews.com/opinion/commentary/2017/10/17/segregation-dallas-poverty-trap> (noting that “economic and racial housing segregation has remained one of the main organizing features” of Dallas); Editorial, *A One-Two Punch: Dallas Must End Housing Segregation to Reduce Chronic Poverty*, DALL. NEWS (Nov. 15, 2017), <https://www.dallasnews.com/opinion/editorials/2017/11/15/one-two-punch-dallas-must-end-housing-segregation-reduce-chronic-poverty>.

supported community, knowledge can indeed be power in the political arena.

V. Litigate

Historically, litigation has been one of the most important tools in the tool box for addressing racial and social injustice. The legal system is arguably uniquely situated to address the harm that has been and is being inflicted every day on people because of racial segregation. It is not necessary to propose new laws, but rather to take a new look at old law and traditional legal theories regarding when people and institutions should be held accountable for inflicting harms that they knew or should have known would flow from their actions and which they inflict with callous disregard for the people they are harming.

Calculating the harm done to individuals, families, and communities by housing discrimination can be done precisely, but it cannot be done simply. A housing injury never occurs in isolation, because housing resources play such a large part in shaping access to education, employment, and health care.²⁹

Courts established soon after the FHA's enactment that a cognizable claim exists for anyone who suffers an actual injury, either economic or non-economic, from a defendant's conduct that perpetuates segregation.³⁰ One of the first cases that went to the Supreme Court interpreting the newly enacted FHA was brought by a White woman and a Black man against a White landlord, who used his control of rental policies to deny Black people access to his housing.³¹ It was undisputed that the Black plaintiff had a cognizable right to sue under the FHA for the denial of the rental unit.³² A unanimous Supreme Court also ruled, though, that the White plaintiff had standing to bring suit under the Act, as the landlord's alleged exclusionary and discriminatory rental policies and practices denied both plaintiffs *the right to interracial*

29. George Lipsitz, Professor of Ethnic Studies, University of California, San Diego, Injury to Individuals and Families from Housing Discrimination at San Diego Fair Housing Center's Annual Fair Housing Conference (Sept. 8, 2000) (transcript on file with author).

30. Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 713–14 (2017) (providing a useful account of the history of litigation under the FHA related to segregation, as well as a carefully reasoned analysis of the potential for use of the FHA in this arena going forward).

31. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 206–07 (1972).

32. *Compare* Brief of Respondent Metro. Life Ins. Co. at 15, *Trafficante v. Metro. Life Ins. Co.*, No. 71-708 (9th Cir. July 17, 1972) (arguing that the petitioners lacked standing under 42 U.S.C. § 1982 because neither had been denied the right to lease property and that neither suffered any injury), *with Trafficante*, 409 U.S. at 205 (holding that the language of 42 U.S.C. § 1982 “is broad and inclusive”).

association.³³ The Supreme Court continued to affirm such “noneconomic” injuries as cognizable under the FHA in other cases over the next decade.³⁴ Other early cases brought under the FHA affirmed that the principle purpose of the FHA was to promote “open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”³⁵ Exclusionary zoning practices by municipalities formed the basis for a number of important cases brought under the FHA, which also recognized that the principal purpose of the FHA was to promote “open, integrated residential housing patterns.”³⁶ As recently as 2015, the Supreme Court, in a case affirming that legal challenges to policies and practices that have a disparate impact or perpetuate segregation are cognizable under the FHA, noted that “[m]uch progress remains to be made in our Nation’s continuing struggle against racial isolation [and in] striving to achieve our ‘historic commitment to creating an integrated society.’”³⁷ The Court affirmed that the “FHA must play an important part in avoiding the Kerner Commission’s grim prophecy that ‘[o]ur Nation is moving toward two societies, one [B]lack, one [W]hite—separate and unequal.’ Th[is] Court acknowledges the FHA’s continuing role in moving the Nation toward a more integrated society.”³⁸ As an example, municipalities have recently initiated litigation against banks, alleging that their redlining and predatory lending practices in minority neighborhoods constitute non-economic injuries that hinder the city’s ability to pursue its goals of fair housing and an integrated community.³⁹

33. *Trafficante*, 409 U.S. at 209–10.

34. *See, e.g.*, *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111 (1979) (finding a municipality was injured by being robbed of its “racial balance and stability”); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376–77 (1982) (explaining that the loss of social and professional benefits of living in an integrated society can be cognizable injuries under the FHA).

35. *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

36. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (quoting *Otero*, 484 F.2d at 1134); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988), *aff’d*, 488 U.S. 15 (1988); *see also* *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *reh’g denied*, 423 U.S. 884 (1975).

37. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Kennedy, J., concurring in part and concurring in judgment)).

38. *Id.* at 2525–26.

39. *City of Philadelphia v. Wells Fargo & Co.*, No. 17-2203, 2018 WL 424451 at *5 (E.D. Pa. Jan. 16, 2018) (recognizing that noneconomic injuries are “generally cognizable under the FHA” and denying the defendant’s motion to dismiss) (citing

In addition to non-economic injuries related to the right to interracial association and benefits of living in an integrated society, there is increasing evidence that segregation creates toxic environments for children.⁴⁰ Racial isolation and concentrated poverty were the characteristics of the “ghetto” that the Kerner Report spoke about so urgently.⁴¹ Today, racial disparity on every quality-of-life metric and indicator in this country is directly and demonstrably tied to the durable policy of racial segregation. The health, wealth, education, income, and social well-being of a person are, all other things equal, going to be different depending on the race of that person. Those who are working on the issue of “policing” as part of criminal justice reform know that people of color are going to be disproportionately arrested for a wide range of crimes, either because they are in a “high crime,” i.e. predominately minority, neighborhood, or conversely because they are in a neighborhood where they are perceived to “not belong.”⁴² In either case, racial stereotypes about who is supposed to be where geographically are a vestige of segregation. The historical role of police in controlling the Black community through the use of publicly sanctioned force and intimidation—or “protecting” the White community from Black people—is well documented.⁴³ Desegregation requires removing those vestiges of segregation “root and branch.”

At the most personal and individual level, racial segregation means that people have fundamentally different life experiences depending on their race. The research regarding the negative physical, mental, and emotional effects on Black children from growing up in segregated neighborhoods of concentrated poverty is

Havens Realty Corp., 455 U.S. at 376–77; *Gladstone Realtors*, 441 U.S. at 111; *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209–10 (1972).

40. SHARKEY, *supra* note 15, at 183–184; *see also* Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods—A Constitutional Insult*, 7 RACE & SOC. PROBLEMS 21 (2015).

41. *See* NAT’L ADVISORY COMM’N, *supra* note 6.

42. Christopher M. Sullivan & Zachary P. O’Keeffe, *Does More Policing Lead to Less Crime—Or Just More Racial Resentment?*, WASH. POST: MONKEY CAGE (July 25, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/25/does-more-policing-lead-to-less-crime-or-just-more-racial-resentment/?utm_term=.efedd2454233; Gregory Smithsimon, *Are African American Families More Vulnerable in a Largely White Neighborhood?*, GUARDIAN: BOOKS (Feb. 21, 2018), <https://www.theguardian.com/books/2018/feb/21/racial-segregation-in-america-causes>.

43. *See* DANYELLE SOLOMON, CTR. FOR AM. PROGRESS, THE INTERSECTION OF POLICING AND RACE (Sept. 1, 2016), <https://www.americanprogress.org/issues/race/reports/2016/09/01/143357/the-intersection-of-policing-and-race/>; *Race, Trust, and Police Legitimacy*, NAT’L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, <https://nij.gov/topics/law-enforcement/legitimacy/pages/welcome.aspx> (last accessed Mar. 20, 2018).

evidence of harm every policy maker knows or should know has been caused by segregation and the failure to dismantle it. Conversely, evidence continues to emerge regarding benefits to such children of growing up in more racially and economically diverse environments of opportunity.⁴⁴ To the extent that public and private policies deny people—particularly children—the benefits of living in an integrated community, as well as expose them to the harms associated with living in a high poverty environment, legal recourse may be available. The law, as it has developed under the FHA from enactment to present day, supports claims by a range of potential plaintiffs who have been or will be harmed by such policies. It may be too late for thousands of children shackled by policies that imposed segregation on them from the day they were born, but the evidence is piling up; for today's children who struggle with the ongoing harms imposed by the policies which create and perpetuate segregation, the statute of limitations has not run.

Conclusion

Fifty-five years ago, a racist White politician infamously declared “[s]egregation now, segregation tomorrow, segregation forever.”⁴⁵ Fifty years ago, the Kerner Report grimly prophesied that we were moving toward two societies, separated by race, and unequal.⁴⁶ In spite of the passage of the laws designed to address those conditions, and in spite of progress on many fronts, we remain a society that is still separate and unequal on the basis of race.⁴⁷ There may be many well-meaning people who wish it was not that way, and many people who say they would do something about it if they could, but that does not change the reality. The world belongs to a new generation, but this generation must study and learn what the past has to teach about the failures to dismantle segregation, despite the publicly acknowledged imperative to do so fifty years ago. Clearly, there is no single solution to a problem as complex

44. See SHARKEY, *supra* note 15; Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016); Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates*, HARV. & NAT'L BUREAU ECON. RESEARCH (2015), https://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf.

45. Wallace, *supra* note 2.

46. NAT'L ADVISORY COMM'N, *supra* note 6.

47. See JANELLE JONES, JOHN SCHMITT & VALERIE WILSON, 50 YEARS AFTER THE KERNER COMMISSION: AFRICAN AMERICANS ARE BETTER OFF IN MANY WAYS BUT ARE STILL DISADVANTAGED BY RACIAL INEQUALITY, ECON. POL'Y INST. (2018), <https://www.epi.org/files/pdf/142084.pdf>.

and durable as racial segregation, but understanding the mistakes of the past, as well as the successes, is essential to making change. To the extent that, as a result of generational evolution on the issues of race and social inclusion, more people and entities desire the benefits of healthy, well-resourced, more integrated neighborhoods and communities, the potential for advocacy, including litigation, that challenges policies and practices that make it difficult for people of different races and ethnicities to choose to live together should be aggressively pursued. But, even if the benefits of a more integrated, less segregated society for all are not universally appreciated, that does not absolve the country from acknowledging and addressing the profound harms that segregation has caused and continues to cause people of color, particularly Black children, both absolutely, and in relation to the privileges afforded White children. Despite whatever we thought, hoped, or assumed would happen if we were able to dodge this essential issue, we now know the hard facts. And a reckoning is required.

Finally, we must acknowledge that this country will not be great, and will not truly do justice, until we close the distance between us because of race. To this generation of leaders and game-changers, I would say: this time, do not confuse means with ends. Keep your eyes on the prize. If you can do that, you will be responsible for saving the Republic. It will be a worthy legacy.