1988

An Unfinished Agenda: The Federal Fair Housing Enforcement Effort

James A. Kushner

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylpr
Part of the Law Commons

Recommended Citation
Available at: https://digitalcommons.law.yale.edu/ylpr/vol6/iss2/8
An Unfinished Agenda: The Federal Fair Housing Enforcement Effort

James A. Kushner*

"Federal fair housing enforcement effort," like such terms as "military justice" and "honest lawyer," is an oxymoron. There are isolated examples of federal fair housing enforcement efforts, but the federal government's historically dominant role in segregating the nation, resisting the dismantlement of apartheid, and ignoring pervasive patterns of housing discrimination eclipses these largely symbolic efforts.1 Critiques of the federal fair housing enforcement effort invariably focus on the incredibly low numbers of cases and complaints handled by the Civil Rights Division of the Justice Department and by the Department of Housing and Urban Development (HUD). From the 1968 passage of Title VIII2 until 1980, the Civil Rights Division of the Justice Department brought approximately 300 cases;3 by 1979 it was handling about 32 cases per year.4 However, in the early years of the Reagan Administration, the Justice Department filed no cases,5 and in 1987 the Department filed only 17 Title VIII cases.6 The other arm of federal enforcement, the HUD conciliation mechanism created by section 810 of Title VIII,
has a similarly disappointing record. In 1977, for example, HUD received about 3,391 complaints, only 277 of which HUD successfully conciliated.\(^7\) The Justice Department, prior to the Reagan Administration, settled only 23 complaints each year.\(^8\) The victims of discrimination obtained the contested housing in only about one-fourth of these contested cases.\(^9\) The most disturbing aspect of the current nearly invisible federal enforcement effort is the total absence of leadership in the quest for equal rights.

Though I too am critical of the federal enforcement effort, I wish to acknowledge that positive steps have been taken. Executive Order 11,063,\(^{10}\) issued by President Kennedy, barred discrimination in federal housing programs. Congress passed, and President Johnson signed, Title VIII, the Fair Housing Act of 1968.\(^{11}\) The Justice Department’s Civil Rights Division under both the Nixon and Carter Administrations developed a jurisprudence under Title VIII that would eliminate the onerous obligation to prove the defendant’s motivation and that would permit private litigation and local enforcement to proceed upon proof of an inference of bias and the presence of damages.\(^{12}\) The federal judiciary, including the Supreme Court, has also interpreted the language of Title VIII broadly.\(^{13}\) Title VIII encouraged both the local enforcement of administrative complaints and the passage of fair housing legislation in many states and localities seeking eligibility for HUD enforcement funding. Indeed, 38 states and 82 local government units have laws certified as substantially equivalent to Title VIII, and another 16 lo-

---


cal government units have such certification pending. Finally, although Congress has provided minimal funding to state agencies for fair housing enforcement, the 1987 Housing and Community Development Act contains the Fair Housing Initiatives Program (FHIP), which will provide some funding for testing and private enforcement.

In order to analyze the federal enforcement effort it is important to define what is meant by fair housing. Fair housing is not simply the absence of discrimination in the decision to rent, sell, market, or lend. Fair housing means housing that is open to all. Fair housing must mean the absence of neighborhoods and developments segregated by race or national origin. Today's dual housing market translates into segregated schools and neighborhood public facilities; it results in declining funding for the central city, which escalates separation of the races and the spread of racial stereotyping. Today, whites, as well as minority groups, are discouraged from entering communities not traditionally marketed on an integrated basis. This analysis will first critique the federal enforcement effort and then proceed to set an agenda necessary to achieve effective enforcement.

I. Federal Fair Housing Nonenforcement

Early federal efforts in the field of housing accepted and even mandated segregation. Through the Federal Housing Administration mortgage insurance programs, the most effective master plan in American land use history, the Roosevelt and Truman Administrations designed and executed suburban apartheid. These programs called for obligatory racially restrictive covenants resulting in racially separate subdivisions. In addition, Presidents Roosevelt, Truman, and Eisenhower administered "separate but equal" public housing, war housing, and subsidized private housing programs. The pattern of public and subsidized housing site selection under the Kennedy, Johnson, Nixon, Ford, Carter, and Reagan Administrations resulted in projects being located in either

Fair Housing

the all-white suburbs or the all-minority central city, thus guaranteeing continued segregated occupancy and increased community segregation. Moreover, every president since Eisenhower has failed to aggressively seek desegregation in the public housing program. Efforts to address issues tangential to the field of housing exacerbated residential segregation. For example, massive relocation programs under the urban renewal and highway building programs of Presidents Eisenhower, Kennedy, Johnson, and Nixon resettled white displacees in suburbia and blacks in the ever-increasingly concentrated minority sections of central cities. The Reagan Administration has shown resistance to efforts to end segregation in housing programs by reducing obligations to report racial housing program participation, thus rendering enforcement and auditing more difficult.

First and foremost among the numerous existing impediments to effective federal fair housing enforcement is the general ambivalence toward integration and affirmative action, ambivalence displayed by leadership in all segments of society and evidenced even within the civil rights activist community. The Johnson, Nixon, Ford, Carter, and Reagan Administrations have all failed to issue substantive regulations or otherwise to enforce Title VI of the 1964 Civil Rights Act prohibiting discrimination in government programs. The Nixon, Ford, Carter, and Reagan Administrations have also failed to promulgate substantive regulations defining obligations and violations under Title VIII and to carry out the HUD affirmative obligation to advance fair housing contained in Title VIII. HUD may point to affirmative marketing programs, but such policies are irrelevant where projects are located in segregated communities and undercut by widespread discriminatory practices.

24. J. Kushner, Apartheid in America, supra note 1, at 110-119.
25. J. Kushner, Fair Housing, supra note 20 §§ 1.04, 7.02.
26. Id. at §§ 10.01, 10.04.
27. Id. at § 7.02.
28. Id. at § 4.21.
of HUD-regulated landlords. Although the Carter and, to a lesser extent, Reagan Administrations have occasionally conditioned HUD community development block grant eligibility on elimination of the most egregious segregation or suburban exclusionary zoning patterns, both regimes failed woefully to insist that recipients establish effective fair housing enforcement.

Central to the failures of these administrations has been the absence of fair housing and nondiscrimination leadership since President Kennedy's issuance of an Executive Order barring discrimination in federal housing programs and President Johnson's support for civil rights and signing of Title VIII. Congress has neglected to provide appropriate oversight of federal programs. Appropriate oversight would have confirmed the numerous independent reports and testimony on the generally understood segregative impacts of federal housing and community development activities. Ideally, such oversight would have generated controls and mitigation measures.

Throughout the Reagan Administration, HUD has maintained its traditional stance as a mediator, seeking voluntary cooperation rather than acting to enforce the fair housing laws. This is exemplified by the Reagan Administration's hostility toward testing for discrimination. HUD's own study has demonstrated that only testing can identify a pervasive scheme of discrimination, since victims seldom know when they have received disparate treatment. Thus, without comprehensive testing Title VIII is relegated to a symbolic, minor role in the quest for fair housing. The Fair Housing Initiatives Program (FHIP) contained in the recently passed

---

29. Past Problems in Two Communities Lead to Conditions on County CD Grant, 10 Hous. & Dev. Rep. (BNA) 284 (1982). See also City of Norwood v. Harris, 683 F.2d 150 (6th Cir. 1982) (per curiam) (upholding HUD grant reduction to "0" for refusal to comply with fair housing conditions, albeit on jurisdictional grounds). But cf. City of Kansas City v. HUD, 669 F. Supp. 525 (D.D.C. 1987) (requiring formal administrative proceedings as a prerequisite to conditioning community development block grant entitlement based on performance in prior years).


Fair Housing

1987 Housing and Community Development Act may make a small start toward correcting this problem.\(^3\)

The Reagan Administration and the Justice Department under Attorney General Edwin Meese have been enthusiastic in their efforts to dismantle affirmative action integration maintenance programs in housing.\(^3\) The centerpiece of the Reagan fair housing enforcement effort has been the attempt to dismantle the integration maintenance program at Starrett City, where admissions are geared to maintain a set minority-majority racial mix.\(^3\) It is ironic and tragic that the administration has chosen to attack one of the very few initiatives designed to achieve integration. Starrett City is a well-designed and good faith affirmative action preferential admissions program which is necessary to avoid community segregation. Admittedly, in a perfect world, race-conscious quotas and similar policies would be anathema to egalitarian ideals. The disgrace of the Reagan Administration is the failure to offer any plan or policy initiative to desegregate or to preserve what limited integrated living opportunities exist. HUD has proposed highly unrealistic "freedom-of-choice" policies to achieve integration consistent with the Justice Department ideology. These proposals include: (1) creating magnet projects with enhanced amenities; (2) providing race-neutral tenant transfers to maximize desegregation; (3) providing buddy system transfers to projects where the transferee is in the minority; (4) marketing projects to those least likely to apply; and

---


\(^3\) United States v. Starrett City Assocs., 840 F.2d 1096 (2d Cir. 1988), aff'g, 660 F. Supp. 668 (invalidation of the quota emphasizing concern for a ceiling quota on minority admissions but appearing to premise the ruling on the non-temporary nature of the program). See also United States v. Atrium Village Assocs., 1988 U.S. Dist. Lexis 266.
(5) improving project security.\textsuperscript{35} Efforts to defend HUD for its pervasive practice of administering public and subsidized housing and community development programs on a racially segregative basis, not efforts to desegregate and end discrimination, dominate the caseloads of the Civil Rights Division of Justice and of HUD.\textsuperscript{36} Still, HUD programs continue to employ the full panoply of discriminatory marketing practices prohibited by Title VIII.

Title VIII’s lack of enforcement teeth is another major impediment to effective federal fair housing enforcement.\textsuperscript{37} Severe limits on damage awards\textsuperscript{38} and attorney fees\textsuperscript{39} discourage its utilization, and the lack of any significant public enforcement diminishes the Act’s efficacy even in the few cases in which it is involved. The House Report on the proposed Fair Housing Amendments Act of 1980, an earlier version of the currently pending bill, stated:

The primary weakness in the existing law derives from the almost total dependence upon private efforts to enforce its provisions. For financially capable victims of housing discrimination, the Act has provided litigation remedies. For the vast majority of victims, however, this course of action is not feasible. Alternative enforcement under Title VIII is limited to “pattern and practice” cases brought by the Attorney General. While these cases have dealt with virtually every important type of discrimination, and have had a significant impact on the state of the law, relief for individual victims of housing discrimination has not been readily available through this avenue.\textsuperscript{40}

Housing providers have failed to take the law seriously since early judicial enforcement resulted in such minimal awards.\textsuperscript{41} Because of the low awards, private attorneys, upon whom enforcement rests,


\textsuperscript{36} J. Kushner, Fair Housing, supra note 20 §§ 3.16 (rentals), 3.25 (sales), 3.52 (tenant assignment), 6.01 (community development), 7.02 (site selection).


\textsuperscript{38} 42 U.S.C. § 3612 (limits punitive damages to $1,000).

\textsuperscript{39} 42 U.S.C. § 3612(c) (limits attorneys fees to those litigants unable to afford an attorney, denying awards in other cases).

\textsuperscript{40} H.R. Rep. No. 865, 96th Cong., 2d Sess. 4 (1980).

\textsuperscript{41} J. Kushner, Fair Housing, supra note 20 app. 9-1.
Fair Housing

have almost universally refused to represent potential litigants. Only in the isolated cases where victims were aware of the discriminatory treatment, knowledgeable about legal remedies, desirous to gain access where they were unwelcome, successful in locating counsel, and willing to commit themselves to the litigation process was a private suit brought.

II. Toward Effective Federal Fair Housing Enforcement

Effective federal enforcement of fair housing requires passage of the 1987 Fair Housing Amendments Act. Congress has repeatedly failed to pass the amendments to Title VIII originally proposed by Representatives Drinen and Edwards and reintroduced almost annually with apparent bi-partisan support. The Reagan Administration supports a modified version of the amendments sponsored by Senator Dole. The current proposal, Senate Bill 558, sponsored by Senator Kennedy, would lengthen the statute of limitations, increase damages and attorneys fees, expand coverage to the disabled and families with children, and reach discrimination in property appraisal and insurance. All of the omnibus amend-

47. S. 558, H.R. 1158, and S. 2146 (the administration bill) extend the statute of limitations to two years from the current 180 days.
48. S. 558, H.R. 1158, and S. 2146 eliminate the $1,000 punitive damages cap. S. 2146 provides for up to $50,000 in civil penalties, $100,000 for a second offense, funds to be collected by the Attorney General. These proposals would appear to be consistent with congressional power. Tull v. United States, 107 S. Ct. 1831 (1987) (environmental penalties without jury trial).
49. Attorneys fees are available without regard to financial ability under S. 558, H.R. 1158, and S. 2146.
50. Many of the proposed amendments are clarifying amendments, whereby issues identified through litigation are expressly covered by the Act. For example, both S. 558 and H.R. 1158 provide coverage for discrimination by hazard insurers. See Mackey v.
ment legislation contains provisions that add those with physical or mental impairments to the group of protected classifications. Only the Kennedy bill and the corresponding House proposal, House Bill 1158, expand Title VIII to prohibit discrimination against families with children, as was recommended by the Assistant Secretary for Equal Opportunity and Fair Housing at HUD.\textsuperscript{51} The administration bill, Senate Bill 2146, fails to reach "no-children" rules.

The Kennedy bill endorses disparate impact, rather than intent, as a measure of proof.\textsuperscript{52} Most significantly, it commences realistic federal fair housing enforcement by establishing administrative law courts empowered to impose significant civil penalties. Senate Bill 2146 does not propose administrative law courts. However, under the Kennedy and House bills, as well as under the administration proposal, HUD would refer complaints to state or local agencies that have an equivalent enforcement process. The administration proposal, Senate Bill 2146, relies on conciliation as the principle enforcement device. Under this bill, the Attorney General would be authorized to seek specific performance of conciliation agreements and could litigate individual claims on behalf of victims for whom the conciliation process had proven ineffective. In addition, the administration proposal would allow a victim to seek a temporary restraining order to hold a unit open during the conciliation process. Both the administration and the Kennedy proposals provide for permissive binding arbitration clauses in conciliation agreements. All the proposals agree on the present lack of adequate enforcement.\textsuperscript{53}

In addition to passage of the Fair Housing Act amendments, effective fair housing enforcement requires that HUD issue the long-


Fair Housing

awaited Title VIII regulations that were recalled in the early days of the Reagan Administration.\textsuperscript{54} HUD must also issue community development block grant regulations describing an acceptable fair housing enforcement program.\textsuperscript{55} Such a program must provide for: (1) local reporting of racial and national origin occupancy and application rates by landlords, developers marketing subdivisions and condominiums, and real estate brokers; (2) a comprehensive program for testing those housing providers with significant minority under-representation;\textsuperscript{56} and (3) the funding of government litigation programs or private nonprofit fair housing organizations with the capacity and commitment to represent complainants in fair housing litigation.\textsuperscript{57}

This country needs an aggressive program to desegregate public, subsidized, and any other housing units held or supervised by HUD or other federal agencies. Future funding must be conditioned on compliance, and "pattern or practice" litigation must commence. Where modest incentives for desegregation prove ineffective, Congress must impose racial or other minority admissions or transfer policies.\textsuperscript{58}

Effective fair housing enforcement also requires realistic affirmative marketing plans and programs for existing and proposed housing projects, including mandatory quotas for showing units to

\textsuperscript{54} Memorandum from the President, 17 Weekly Comp. Pres. Doc. 73 (Jan. 29, 1981) (moratorium on new regulations).
\textsuperscript{55} The block grant program must be administered affirmatively in conformity with the policies of Title VIII. 24 C.F.R. § 570.496(a) (1987). HUD's proposed block grant rules include stepped-up fair housing standards. 49 Fed. Reg. 43852, 43879, 43900 (1984).
\textsuperscript{56} Kentucky, which has enjoyed perhaps the most aggressive public enforcement in the nation, may be showing results. Apartment Discrimination Declines in Louisville, Fair Hous.-Fair Lending (P-H) ¶ 6.5 (Dec. 16, 1985) (testing demonstrated an 84% decline in frequency in 1985 to only a 7.4% rate of discrimination, down from 46.2% in 1977 and 24.3% in 1980). \textit{See also} Kentucky Commission on Human Rights, Desegregation Improves at Housing Authorities With Plans, Worsens at Authorities Without Plans (1986) (small reductions at projects with affirmative action plans); Kentucky Rental Discrimination Drops to 10.5 Percent, Fair Hous.-Fair Lending (P-H) ¶ 9.9 (1986) (statewide, stressing impact of landlord reporting and enforcement); Kentucky Study Finds Housing Bias Almost Halved Since 77, 3 Fair Hous.-Fair Lending (P-H) ¶ 8.6 (1988), \textit{citing} Kentucky Commission on Human Rights, Race Discrimination in Housing Almost Halved in Louisville and Lexington But Discrimination Persists, 1977-1987 (1987). The Kentucky counties showing success are the sites of effective metropolitan school desegregation. Alternatively, it may be that school desegregation is the essential precondition for reducing the incidence of housing discrimination.
\textsuperscript{57} This should be based on the model of the Leadership Council For Metropolitan Open Communities program in Chicago, one of the nation's best fair housing litigation programs.
members of racial groups not likely to apply, and preferential rents, financing, or other incentives. Outreach agencies or real estate professionals must advertise and conduct tours of project areas. Affirmative action techniques should be used to assure that integration opportunities exist in Section 8 and rental voucher programs. Currently, virtually all rent supplement recipients locate housing in neighborhoods where they are in the racial majority, thereby intensifying segregation. Subsidized housing site selection practices which assure the maintenance and expansion of segregated communities must be halted.

Effective fair housing enforcement also requires changes in programs not directed toward housing but nonetheless currently fostering segregation. For example, federal transportation subsidy recipients should be required to coordinate land use and housing plans to ensure accessibility to affordable housing and transit and to include appropriate affirmative action mechanisms to encourage and assure integrated housing and neighborhood patterns.

Moreover, the school desegregation promise must be fulfilled, particularly in the North and West. Desegregation must include the suburbs, for the apartheid that results from symbolic central-city-only desegregation dictates racial housing patterns and denies fair housing. The Supreme Court decision in *Milliken v. Bradley*, which limited desegregation to the violating school district, induced white flight to suburban districts immune from busing, thus erecting a massive barrier to metropolitan desegregation. Despite great success in the desegregation of southern schools, the current Court, sadly, has served as a segregating force. Indeed, by refusing to equalize school district funding in *San Antonio Independent School District v. Rodriguez*, the Burger Court approved racially "separate and


unequal” schools, and thus neighborhoods, in a cruel and ironic play on the discredited *Plessy* doctrine. Only through desegregated neighborhoods will home-seekers choose integration, and only through such residential integration will the need for school desegregation remedies be reduced or eliminated.

The administration or Congress must audit existing governmental policies, including tax consequences, to determine which programs and policies have a segregating tendency. Those programs and policies with a segregating effect should be eliminated or their impacts mitigated so that the federal government ceases to be the primary contributor to and implementor of segregation. A national low-income housing production program must be restored. The moratorium during the Reagan years has had a devastating impact on the nation’s shrinking and deteriorating housing stock. Housing shortages and rent control exaggerate demand, cut mobility, facilitate landlord discrimination and exploitation, and result in both a drop in the fairness of housing and the catastrophic rise in homelessness.

Finally, HUD must exchange its symbolic fair housing “road shows” and April “fair housing month” poster contests for serious programs of public information and enforcement which convey the message that federal fair housing enforcement exists and that long absent national leadership condemning discrimination and segregation has returned. HUD and presidential leadership can direct the nation toward an integrated and egalitarian society through initiatives, such as the imaginative use of grants, rebates, financing subsidies, and tax incentives for persons to move to integrated neighborhoods or neighborhoods where they are in the racial minority, and through the use of incentives for real estate professionals who facilitate choice and integration. These initiatives, together with aggressive fair housing enforcement, would establish a national

---

64. See generally G. Orfield, Must We Bus? (1978); D. Pearce, Breaking Down Barriers 40 (1980) (based upon a study of 14 communities, the researcher concluded that cities which have metropolitan-wide school desegregation have experienced substantially greater reductions in housing segregation). See also G. Orfield, Toward a Strategy of Urban Integration: Lessons in School and Housing Policy From 12 Cities (1982).
ethic of nondiscrimination, equality, and truly fair housing. To many, Title VIII answered the quest for fair housing. Twenty years of experience with the Fair Housing Act, however, teaches us that the effective struggle for equal access to housing has but begun.