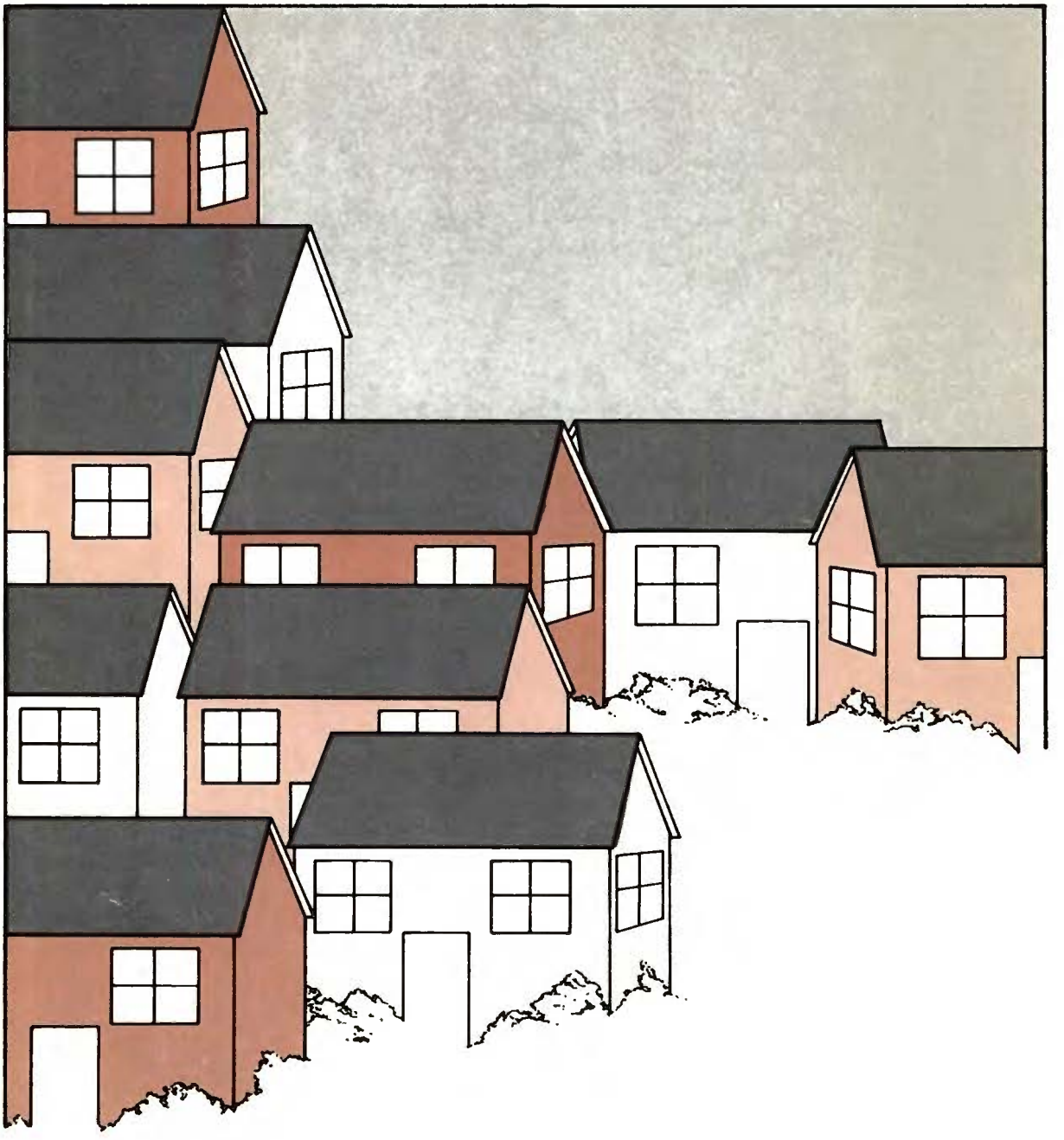
ISSUES IN HOUSING DISCRIMINATION

A Consultation/Hearing of the United States Commission on Civil Rights, Washington, D.C., November 12-13, 1985

Volume 2: Proceedings



U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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The consultation/hearing was convened at 1:50 p.m., Clarence M. Pendleton, Jr., Chairman, presiding.

Commissioners present: Clarence M. Pendleton, Jr., Chairman; Morris B. Abram, Vice Chairman; Mary Frances Berry; Esther Gonzalez-Arroyo Buckley; John H. Bunzel; Robert A. Destro; Francis S. Guess; and Blandina Cardenas Ramirez.

Staff members present: Susan Morris, Acting Staff Director; and James Mann, General Counsel.

Opening Statement of Chairman Clarence M. Pendleton, Jr.

CHAIRMAN PENDLETON. If there is anyone here who is hearing impaired, please acknowledge. We do have someone to help you. If there is no need at this point, we can have the person rest until someone comes who is in need. Thank you.

I want to open this consultation segment on issues in housing discrimination. Ladies and gentlemen, my name is Clarence M. Pendleton, Jr., Chairman of the United States Commission on Civil Rights. On behalf of my colleagues, I would like to welcome you to the Commission's consultation/hearing on issues in housing discrimination.

The current Federal fair housing law, Title VIII of the Civil Rights Act of 1968, prohibits discrimination based on race, color, religion, sex, or national origin in the sale, rental, and financing of most housing. Despite this prohibition, housing in many parts of the country remains segregated by race. Housing experts disagree as to the precise causes of racial residential segregation. Some believe discriminatory practices, such as racial steering, contribute greatly to housing patterns, while others claim it is individual preference or market factors, such as land costs and the availability of financing. Still others attribute housing segregation to income and educational levels.

Interest in the Federal Government's efforts to enforce Title VIII has risen in the past few years. In 1983 the Commission held a 2-day consultation on fair housing. Legislative attempts to amend Title VIII have included the introduction of several bills. None of these has yet passed Congress, despite the growing interest in amending current Federal housing law.

The Commission felt the need to address some of the housing discrimination issues of greatest concern because of their timeliness and importance. In addition, these proceedings will serve as a basis for any recommendations the Commission may wish to make regarding Federal enforcement of present fair housing law.

Over the course of the next day and a half, participants in these proceedings will discuss the possible causes of housing segregation; legal issues, including the standard of proof to be used in Title VIII litigation; use of racial occupancy controls; and Federal fair housing enforcement efforts. The panels and speakers for this afternoon and most of tomorrow constitute the consultation component of these proceedings. These participants will summarize, and I repeat summarize, papers prepared by them and submitted in advance to the Commission and then answer questions from the Commissioners and staff.

Late on the afternoon of the second day, there will be two hearing witnesses from the Department of Housing and Urban Development and from the Department of Justice, who will testify with regard to their agencies' enforcement of Federal fair housing law. Following the conclusion of the hearing segment, there will be an open session in which members of the public are invited to testify. If anyone wishes to testify in this open session, please consult the Commission staff.

Due to time constraints, we will be unable to entertain any questions from the audience.

I am to remind you that tomorrow afternoon we have a change in the schedule. William Bradford Reynolds will be testifying from 2:30 to 3:15, and HUD General Counsel John Knapp will be testifying from 3:30 to 4:30, in order to accommodate Mr. Reynolds' travel schedule.

Causes of Housing Segregation

CHAIRMAN PENDLETON. Panel 1 for this afternoon, in the consultation section, will address the causes of residential segregation. The panelists include: Dr. Richard Muth, chairman of the Department of Economics at Emory University; Dr. Reynolds Farley, research scientist with the Population Studies Center at the University of Michigan; Dr. William A.V. Clark, professor in the Department of Geography at UCLA; and Dr. Arnold Hirsch, associate professor in the Department of History and School of Urban and Regional Studies at the University of New Orleans.

I guess we'll start with you, Dr. Muth. If you would summarize your paper, I'm certain there will be questions coming from my colleagues.

Statement of Richard F. Muth, Chairman, Department of Economics, Emory University

DR. MUTH. Perhaps I might begin by saying one of the greatest pieces of uniformity in the four papers in this session that I read is that black populations are highly segregated in U.S. cities from others on the basis of all evidence. Calculations suggest that something on the order of 80 percent of black populations would have to be moved in order to be distributed in the same way as the remainder of the population over urban areas. Even more surprising, perhaps, in view of the marked progress that has been made in other areas in the past 25 or so years, is that there appears to be very little, if any, reduction in the residential segregation of blacks over that period.

There has been a variety of explanations offered, as the Chairman has just suggested. Income differences, in particular, are offered as explaining the difference in locational patterns of blacks and whites. However, I think these differences contribute very little to the explanation. In the first place, there are many instances of segregated low-income areas, which are either all white or all black. For years, along the east side of State Street in the city of Chicago, you saw an all-black, low-income residential area. Across State Street to the west was an all-white, low-income residential area.

In discussions of segregation, differences between central cities and suburban areas are often emphasized. And it is sometimes felt that blacks' incomes simply aren't great enough to allow them to reside in suburban areas. On the other hand, if one looks at the 1980 census for the incomes of whites in central cities and suburban areas, the differences are surprisingly small. The average income is almost exactly $20,000 for white families living in the central city, $23,700 for white families living in suburban areas. The differences are in the direction that most people would believe, but the differences are much smaller, I believe, than is usually thought to be the case.

Most importantly, when segregation indexes are standardized for income (that is, separate calculations are made for people at different income levels), values of these indexes fall perhaps from 0.8 to 0.6, suggesting that even when income differences are accounted for, some 60 percent of the black population would have to be moved to be distributed residentially in the same way as white households.

So, while part of the segregation may be due to income differences, in my judgment, it's only a minor part.

A variety of other acts are also said to contribute to residential segregation. Many of these are governmental acts. Restrictive covenants that were seen in real property deeds were often said to contribute to segregation, and indeed, they may have once. On the other hand, it was in 1948 that the Supreme Court outlawed, or rather held to be unenforceable, this kind of restrictive covenant. The practices of the Federal Housing Administration, likewise, have been pointed to, but in 1962 President Kennedy made his famous stroke of the pen. In the ensuing 23 years, segregation has still been very much with us.

One area where I perhaps disagree with some of my fellow panelists would be on the importance of suburbanization and the importance of various actions that the government has taken, both in contributing to suburbanization and contributing to segregation.

The Federal income tax treatment of income from owner-occupied housing is frequently cited as promoting homeownership. There has been a variety of studies in the economic literature which suggests that perhaps no more than 4 percentage points of the degree of homeownership is accounted for by the tax advantage. Currently, there are approximately two-thirds, or 67 percent, of households in the U.S. who are homeowners. This percentage rose from around 50 percent—I don't remember the exact figure—at the end of World War II. The effect that the Federal income tax advantage may have had on this is quite small.

Likewise, the advantage that FHA or VA mortgages might have given people as an incentive to become homeowners is relatively small. I won't bore you with the calculations, but in my judgment, the incentive is perhaps about half that provided by the Federal income tax treatment of income from owner-occupied housing.

The one area where the Federal Government and where government generally may have had an impact is in freeway building. In general, improved transportation plus higher incomes and larger urban populations all have been responsible for the great degree of urban decentralization that has taken place in the postwar period. At the same time, the evidence does not suggest to me that black households in effect fill the void left by whites departing from the central city. If anything, I would argue that the expansion of black areas within central cities in the North and East would have taken place even in the absence of the degree of suburbanization of white families.

Many discussions of segregation attribute such segregation to a variety of actions by private individuals. Among these are owners or managers of rental property, real estate brokers, mortgage lenders, and so forth.

To take but one example, managers or owners of rental property have been said to have caused segregation by refusing to rent to black tenants. If the alleged refusal, which may well be the case, were due to a unique aversion on the part of owners and managers to dealing with black tenants, the income from the building owned and managed by the discriminators would be lower than it otherwise would have been. The owner would have had an incentive to change managers, or the owner would have had an incentive to sell his equity interest in the building to someone else rather than to suffer a reduction in income. Much the same thing can be said for others, for real estate brokers, mortgage lenders, and others. The acts which they are alleged to have performed all would lead to lower incomes and incentive for them to seek some other line of work that didn't involve dealing with blacks in real estate transactions.

I think a more readily defensible explanation for black segregation is that white households prefer segregation more than blacks prefer integration. This is self-segregation, but it's self-segregation only on the part of whites.

What smattering of empirical evidence does exist suggests, indeed, that whites are willing to pay more for the occupancy of real property provided they reside in the vicinity of other whites. Likewise, the evidence I've seen is that blacks are also willing to pay more for housing that is in the vicinity of white households. Now, this is self-segregation, but self-segregation on the part of whites and not on the part of blacks.

This explanation of residential segregation of whites and blacks is consistent with many other phenomena that involve spatial separation of different kinds of land uses and that are readily explainable, in my judgment, on the basis of what people are willing to pay for occupancy of property under different conditions.

This country has a long history of ethnic minority areas. These are different in many respects than

black residential areas have been, but are to be explained by, I think, a very similar kind of process.

In other countries of the world, in Northern Ireland and in Lebanon, there is strong segregation of different religious groups. In Belfast and other Northern Ireland cities, Roman Catholics and Protestants live in spatially separated areas of the city. In Lebanon, in Beirut, the western half of the city, if I recall correctly, is Muslim-occupied, and the eastern half of the city is occupied principally by Christians. It seems quite reasonable to suppose the members of either of these religious groups would be willing to offer a premium to live in the vicinity of others of the same group and to avoid contact with members of the other group.

Finally, there are a variety of examples in nonresidential land uses where one has the same kind of clustering as one sees in clustering of households. One of the most famous examples is the garment district in New York City where firms engage in various stages of fabrication of women's garments, and they have tended to cluster together, in different locations historically, but always in the vicinity of each other.

In this particular case, there is a high degree of specialization of function in the production of women's garments. Walking the streets of the garment district, it is not unusual to see racks of semifinished clothing being rolled along the street from one manufacturer to another. In such instances, one might well believe that garment firms would pay a premium to work and to locate adjacent to others in the same business.

To take but a couple of other examples, which I think are explained in virtually the same way, automobile dealers are typically clustered together along major streets of U.S. cities. And virtually any U.S. city has what is known as an entertainment district. In all these cases, there are economic advantages for like kinds of firms to be located adjacent to each other, and there is no particular advantage, in some cases disadvantages, for others to be located in their vicinity.

Not only this, but I believe the explanation that I would prefer readily explains the so-called discriminatory behavior of landlords and real estate agents and of mortgage lenders. If it were true that white residents would offer more to live in the vicinity of other whites, then if a black tenant is to move into an otherwise white-occupied building, the amounts that white tenants would offer would tend to fall. Either the owner of the property would have to reduce his rental rates, or he would find vacancies in this building as white tenants departed. In either case the rental income from the building would tend to decline.

In my judgment, enforcement of provisions such as those in Title VIII may well tend to reduce the incidence, the frequency, of the kinds of behavior that may be illegal. At the same time, it is by no means clear to me that this will enhance integration or reduce segregation.

Although it is quite possible to force managers or owners of rental property to show vacancies in the buildings they own or manage to black tenants, it is much more difficult to prevent other white tenants from moving out. Given that they have moved out, it is almost impossible to make other whites move into the apartment building itself or move into the integrated area.

I wish I were able to offer a plan for reducing the degree of segregation. I am unable to do so. The only economic suggestion I would have would be to take measures that would increase the amounts either whites or blacks would pay for integration.

One way in which this might be done is through the housing payments plan, which is a program now being experimented with by the Department of Housing and Urban Development. Under this program, lower income families would be given vouchers which they could use in the payment of rent for housing that is produced by the private sector. If these vouchers were made to carry a higher value, provided certain standards so far as residential integration were met, then I would expect that a greater degree of integration would take place.

There may well be social changes going on now that will some day make, perhaps in my children's generation, segregation a thing of the past. On the other hand, being an economist and not a sociologist or a psychologist, I am in no position to comment upon that.

CHAIRMAN PENDLETON. Thank you, sir. Dr. Farley.

Statement of Reynolds Farley, Research Scientist, Population Studies Center, University of Michigan

DR. FARLEY. Thank you, Mr. Pendleton.

I have some copies of the tables. If anyone was unable to get them earlier, let me make them available now.

The patterns of black-white residential segregation found in metropolitan areas today date from the late 19th and early 20th century. The urban historians who described northern cities in the post-Civil War period note that blacks were one of many immigrant groups concentrated in low-income areas, but that blacks who wished to do so and could afford to do so were able to live throughout the cities.

A black ghetto was not found in Chicago until the great migration of World War I, and in Detroit blacks lived throughout the city as recently as 1915. Constance Green, in her history of Washington, points out that for several decades after the Civil War, blacks lived throughout the city, even in the northwest quadrant. Historians who describe the southern cities distinguish an ante bellum period of racial integration from the pattern of segregation which emerged later.

In the closing decades of the 19th century, a Jim Crow system of segregation developed, based on the premise that intimate social contacts between the races was undesirable. Residential segregation was an important component of that segregation. It was accomplished through real estate practices, intimidations, and legal restrictions.

Real estate agents came to recognize that their white clients did not want to live with black neighbors, so they turned black customers away. Green, for instance, reports that by the late 1890s here in Washington, those well-to-do and highly educated blacks who had good government jobs were unable to find housing in any area except neighborhoods that already had a large black population.

Violence was frequently directed toward those blacks who moved into or stayed in white areas. DuBois points out that in the late 1890s there was a former black Foreign Service officer and a bishop of the AME church who dared to move into white neighborhoods in Philadelphia. They were intimidated and forced out. In Chicago, blacks lived in the Hyde Park community prior to World War I, but neighborhood organizations intimidated them and removed them from that area. The Ossian Sweet affair in Detroit in the 1920s was not the exception. Similar incidents of racial violence occurred in many cities when blacks entered white neighborhoods.

Jim Crow legislation mandated segregation in almost all areas of public life, so it was only a small step to enact city laws or ordinances that mandated residential segregation. Most of those were overturned by the Supreme Court, since they infringed upon an owner's right to dispose of his property as he saw fit.

Restrictive covenants became common shortly after the turn of the century. They were upheld in 1926 in a decision from Washington, but 20-some years later the Supreme Court refused to let Federal or State courts enforce restrictive covenants.

That was followed in the post-World War II period by several other changes that should have had the effect of reducing segregation, including changes in the ethics of the real estate dealers' associations which had previously prevented them from introducing minorities into an area, President Kennedy's change in Federal housing policies, and the Civil Rights Act of 1968 which banned racial discrimination in the housing market.

Let's turn a bit to trends in residential segregation. The absence of data at the census tract level for early in this century makes it difficult to look at trends in many cities before 1940. Lieberson was able to investigate what was happening in 10 northern cities between 1910 and 1950. He distinguished the foreign-born white population, the native-born white population, and the black population.

In 1910 blacks were somewhat more segregated from native-born whites than were foreign-born whites. Between 1910 and 1950, the segregation of foreign-born whites from native-born whites declined sharply, but the segregation of blacks from both native- and foreign-born whites increased. The Taeubers summarized those trends by saying: "The most consistent findings from the historical investigations is a sharp increase in residential segregation between 1910 and 1930 in every city, both northern and southern, for which we have data."

Since 1940 the censuses have given us detailed information, and we can conduct a fine-grained analysis of the extent of racial segregation in cities. The findings reveal a high level of segregation with no more than modest changes in recent decades.

Outside the South, black-white residential segregation reached peak levels in 1950. In the South, the maximum levels of residential segregation were recorded in 1960.

We might expect substantial reductions in residential segregation during the 1970s for four reasons. First, the Civil Rights Act of 1968 was operative for the entire decade. Second, there were modest

improvements in the economic status of blacks vis-a-vis that of whites. Third, the racial attitudes of whites became more liberal. Finally, blacks continued their push for equal opportunities.

Table 1A shows segregation scores for 1960, 1970, and 1980 for the 25 cities with the largest black populations in 1980. This measure of segregation takes on its maximum value of 100 when all blacks and whites live in racially homogeneous areas, the South African model. Were individuals randomly distributed, the index would take on a value of approximately zero.

Between 1970 and 1980, black-white residential segregation decreased in 20 of the 25 cities. In Los Angeles the segregation score fell from 90 to 81, but here in Washington there was no change in black-white residential segregation in the central city. Overall, there was a decrease of about 6 points in the average segregation scores of these central cities.

It is difficult to explain or define what constitutes a major decline, but drops of 10 points or more were recorded in six cities—Houston, Dallas, Oakland, Jacksonville, Columbus, and Richmond. On the other hand, blacks and whites became more segregated from each other in Philadelphia and in Cleveland, and in three cities there was no change in the extent of segregation.

Table 1B presents a similar set of segregation scores for the 16 metropolitan areas that had a black population of one-quarter or more in 1980. A pattern of declining segregation is evident in the 1970s in these metropolises. In Baltimore, for example, the metropolitan segregation score fell from 81 to 74, and in San Francisco from 77 to 68. These are black-white segregation scores, so Hispanics and Asians are excluded from the analysis.

If one expected sharp drops in residential segregation during the 1970s, I think he or she would be disappointed. Only a few metropolitan areas or central cities experienced drops of 10 points or more. Nevertheless, the decreases in black-white segregation were greater in the 1970s than in the 1960s. Indeed, if you go back to 1940, the decade of the 1970s stands out as one in which black-white segregation declined the most.

The uniqueness of black-white residential segregation may be gauged by analyzing patterns for two other groups who have come to the United States in recent years: Hispanics and Asians. They differ in that the Hispanic and Asian populations have grown much more rapidly than the blacks, and for the most part, Hispanics and Asians have entered cities more recently than blacks. About one-third of the Hispanic population in the United States was born abroad, and more than half of all Asians were born abroad.

We might expect that Hispanics and Asians would be highly segregated from non-Hispanic whites, that they would settle in their own enclaves, that they would have financial problems, and for a variety of reasons would prefer to live with other immigrants or other recent migrants to the city. We might expect a high level of segregation for those groups. But we find that Hispanic-white or Asian-white residential segregation is quite low compared to that of blacks.

This comparison is shown in table 2. In the Nation's largest metropolis, the segregation score comparing the residences of blacks and non-Hispanic whites was 81, while that comparing Hispanics and whites was only 65. The residential segregation of Asians in New York was even much less, with an index of 49. Here in the Washington metropolitan area, the level of black-white segregation is at least double the level of white-Hispanic or white-Asian segregation.

These indexes also suggest that a continuation of the trends of the seventies will leave blacks highly segregated in the foreseeable future. That is, if the average black-white segregation score goes down by about 6 points a decade, it will take five to six decades for black-white segregation to fall to the current levels of Hispanic-white or Asian-white segregation.

Let me turn to the causes of racial residential segregation. There are three popular explanations for the persistence of black-white segregation. One might be identified as the "birds of a feather" idea. According to this view, metropolitan areas are tessellations of ethnically identifiable neighborhoods in which the isolation of blacks from whites is typical, not unusual. In many cities we can identify areas that are predominantly of one ethnic group, or that were in the past. The census of 1980 facilitates this kind of analysis, since it asked a question about ancestry. This allows us to contrast ethnic and racial residential segregation.

Table 3 compares the residential distribution of blacks and of the 11 largest ethnic groups to that of people who said their ancestry was English, the first of the European groups to come to the United States and the group that contributed heavily to our culture and government. There are moderate levels

of ethnic residential segregation. Descendants of those groups coming to the United States prior to the Civil War are not highly segregated from the English, as illustrated by an average segregation score of 22 for Germans and 23 for the Irish. Descendants of groups arriving later in the 19th century, such as Poles, Hungarians, and Italians, are more segregated from the English. The group that is most segregated from the English is Russians, an ethnic group whose residential choices were once limited by restrictive covenants. Nevertheless, Russians are much less segregated from the English than are blacks.

These statistical measures suggest that residential segregation, to some extent, affects all groups. However, there are two distinctive aspects of black-white segregation. First, blacks are much more segregated from whites or from the English ancestry group than are the other minorities. Second, black-white residential segregation persisted at a high level for decades, while the segregation of other ethnic groups from native whites declined.

A second argument for residential segregation focuses upon the economic gaps that distinguish blacks and whites and argues that this economic difference causes the racial polarization we see. If racial residential segregation were entirely dependent on economic status, we might expect that poor blacks and poor whites would live together in some neighborhoods, and that rich blacks and rich whites would share prestigious and exclusive areas, perhaps out in the suburbs. However, we find instead that blacks at every economic level are highly segregated from whites of the same economic level.

We considered once again those 16 metropolitan areas and computed residential segregation scores, controlling for family income and educational attainment. Here in Washington, for example, the segregation score comparing black and white families in the $10,000 to $15,000 income category in 1979 was 70. When we calculate the similar residential segregation score for black and white families in the $35,000 to $50,000 income category, we also get a segregation score of 70.

Blacks are thoroughly segregated from whites, regardless of how much they earn or how many years they spent in school. You might expect that the highly educated black elite would face few barriers and would frequently live in the desirable neighborhoods occupied by extensively educated whites. That is not the case. The segregation score comparing college-educated blacks and whites is just about as great as the segregation score comparing blacks and whites who dropped out of high school.

A third explanation for persistent residential segregation focuses upon the attitudes of whites and blacks and the discriminatory real estate practices such attitudes may foster. Writing almost 90 years ago, DuBois asserted: "The undeniable fact that most Philadelphia whites prefer not to live near Negroes limits the Negro very seriously in his choice of a home."

Allan Spear's investigation of the first ghetto that emerged in Chicago led him to conclude: "The development of a physical ghetto in Chicago, then, was not the result chiefly of poverty; nor did Negroes cluster out of choice. The ghetto was primarily the product of white hostility."

Is it likely that racial animosity is responsible for the current high levels of residential segregation? On the one hand, we have convincing evidence from many attitude surveys which show that almost all whites endorse the right of minorities to live wherever they can afford to live. Furthermore, no more than a small minority of whites would be upset if a black moved next door.

On the other hand, whites apparently hold many other perceptions that encourage residential segregation. I refer here to the findings of our investigation of the causes of residential segregation in the Detroit area. White residents, we found, generally held three beliefs about racial change in neighborhoods. First, they felt that stable interracial neighborhoods were rare. Once a few blacks entered the area, it would soon become largely black. Second, many whites presumed that property values decreased when blacks came into an area. Third, there was agreement among whites that crime rates are usually higher in black areas than in white areas.

These attitudes have important consequences. Whites were extremely reluctant to purchase housing in areas in which blacks are entering. In Detroit, and presumably in most other metropolitan areas, everybody in the housing market, from those who sell it to those who are buying, knows which areas are open to blacks.

A significant fraction of whites reported that they would be uncomfortable if blacks were represented in their neighborhoods. If blacks made up as little as 7 percent of the population in an area, about one-quarter of the whites say they would be uncomfortable, and more than a quarter say they would not

purchase a house in such areas. This, of course, provides motivation for real estate dealers to steer blacks and whites to distinct locations. Many of these practices violate Title VIII, but if they continue, they may help to segregate areas.

Is racial steering still a common practice? Do minorities experience discrimination in the housing market? The most extensive study of this was conducted by HUD in 1977. Prospective black and white clients were sent out to see about the availability of advertised housing in a sample of 40 metropolises. If a black contacted four real estate agents to purchase a house, there was a 72 percent chance of experiencing discrimination; if they sought to rent, 48 percent.

Making assumptions about the normal search process, the HUD report concluded that about 70 percent of the blacks and whites who sought rental housing were steered. About 90 percent of those who sought to buy housing were steered. There are more recent studies from Dallas, Denver, and Boston, suggesting that there is a continuation of these apparently discriminatory marketing practices.

The attitudes of blacks are also important in accounting for residential segregation. For more than two decades, national samples of blacks have been asked whether they prefer a racially mixed or segregated neighborhood. Consistently, three-quarters of the black respondents have selected the integrated neighborhoods.

In our Detroit study, we asked blacks if they would be comfortable in neighborhoods of different racial compositions, and whether they would be willing to move into neighborhoods of different racial compositions. Most blacks would be comfortable in any neighborhood except those that had no black residents before they got there. Almost all blacks were willing to be the third black in a formerly white area, and most blacks were willing to be the second. However, many blacks expressed a great reluctance to be the first black on a white block. Some expressed a fear that crosses were going to be burned on their lawns. More common was a feeling that their white neighbors would be critical, unfriendly, or make them feel unwelcome.

These survey data point to an issue that impedes residential integration. Whites strongly endorse the ideal of equal opportunities, but would feel uncomfortable if more than token numbers of blacks entered their neighborhoods. Blacks desire to live in mixed areas, but are reluctant to be the first black in a white area.

In our Detroit study, we asked respondents to imagine they were searching for new housing and that they located one house that was in a desirable suburb and another house that was in the northwest corner of the central city, which is a rather prosperous and attractive part of Detroit. We told them the houses were structurally similar and equally attractive, but the one in the suburb cost $8,000 more. Given these alternatives, 90 percent of the whites said they would move into the suburban home. Eighty percent of the blacks, however, selected the home in the central city, in the city of Detroit.

Although endorsing the ideal of residential integration, many whites are actually willing to spend large sums of money to avoid living in an area that they believe belongs to blacks. Blacks, we found, were very knowledgeable about the housing market and housing costs. They were also knowledgeable about the openness of different areas. They knew that whites in many suburbs would be somewhat upset if they moved there, and they realized that suburban housing typically cost more than central city housing. For these reasons, many blacks who express a preference for integrated living may avoid some suburbs and seek housing in those neighborhoods that already are too black to be attractive to whites.

Instead of concluding on a pessimistic note, let me mention three strategies that may help to ensure equal opportunities.

First, to the extent that real estate dealers discriminate against customers, discrimination that the customer may frequently not realize is going on, to the extent that that occurs or there is steering, these are violations of Title VIII of the Civil Rights Act. Quite clearly, few Federal agencies or local enforcement agencies have given a high priority to preventing that type of criminal behavior.

Second, Title VI of the Civil Rights Act of 1964 calls for the termination of Federal funding if the benefits of such programs are allocated in a racially discriminatory manner. If the municipal governments participate in a web of discrimination that isolates blacks from whites, then the termination of Federal funding may be in order. When George Romney served as Secretary of HUD, he developed a program to do this, but to the best of my knowledge, it has not been implemented recently.

Finally, it has been more than 31 years since the *Brown* decision promised to eliminate State-imposed racial segregation in public schools. Great progress

has been made in some areas; but in most metropolitan areas, public schools are coded by the color of their students, their teachers, and their staff. Evidence from the 1970s suggests that there is a strong relationship between school integration and neighborhood integration. If the public school system were racially integrated, there would be fewer incentives to carry out discrimination in the housing market or to steer black and white customers to separate areas.

Thank you.

CHAIRMAN PENDLETON. Thank you. That's very interesting. Dr. Clark.

Statement of William A.V. Clark, Professor, Department of Geography, University of California at Los Angeles

DR. CLARK. Thank you, sir.

In the brief time we have to make these summaries, I would like, after some comments on the levels of segregation, to argue, unlike my colleagues and panelists who have already been talking, that, in fact, we are not dealing with economics, preferences, urban structural discrimination; but rather, it is the complexity of those intertwining factors in a complex, dynamic urban housing market that we must address.

It is clear that there are still significant levels of separation between blacks and whites, even though I think that the changes in the indexes are quite dramatic. Drops of 5 and 6 and above 10 points in some cases have not been seen in any other decade than between 1970 and 1980. And although there is still ongoing analysis of the reasons for this decline, at least part of it is related to economic gains by blacks, although still minor; to increasing white acceptance of black households of similar class and income; and to the general suburbanization of the black population.

Although there was only limited suburbanization up until the 1960s and 1970s, between 1970 and 1980 the large cities in particular showed dramatic gains in the proportion of the black population living in the suburban areas. One of the tables in the full paper illustrates that this is significant. There are, of course, debates about this black suburbanization. Is it simply spillover of expanding black ghettos, or is it truly the movement of black populations to surrounding and higher income white areas? Evidence and arguments can be adduced for both of these.

Part of the difference in the explanation is related to the control on income. Some recent work has shown that it is indeed the black higher income households, the so-called black elite, who are moving to white neighborhoods in the suburbs. This trend is occurring now and no doubt will continue as upper income black households select areas in which there are already some black households, but much lower than the formerly all-black neighborhoods to which they were moving.

But it is explanation that has most concerned me in making these summary comments. I believe there is much greater consensus on the explanations of the patterns of residential segregation than there was 20 years ago. The set of factors seems to be identified. My copanelists have referred to them: questions of economics, questions of preferences, questions of urban structure, and questions of discrimination. How are they linked together, and in what way does this multiple causal structure underlie racial residential segregation?

I would argue quite strongly that it is misleading to focus on only one of these underlying factors, and this leaves a misleading and simplistic impression of what I think is a very complex dynamic. In discussion of each of these forces, I will try to be brief and to the point.

Economics has received a lot of attention. We have heard it discussed here at length, and it is often a discussion that is limited to income. It is argued that if we were to use only incomes, we would expect to find significant numbers of black households in the suburbs. But this viewpoint obscures an argument that income alone is an inadequate measurement of the economic impacts of residential decisionmaking. People do not make decisions on where they will live based on their income alone. The cost of housing, the extent of household wealth, the equity that they have already acquired in their housing—and as we know that many black households were renters, have been for a long period of time, and are still renters, and so did not gain in the inflationary spiral that occurred in the 1970s and early 1980s and, therefore, did not have the equity in housing to make purchases in expensive suburban areas.

Often inexpensive suburban housing and low income, as I say, are combined to argue that there should be many low-income blacks in suburban areas. But this ignores even an additional characteristic, and that is the location of jobs. Accessibility to

jobs, although not an overriding force in residential decisionmaking, is an element, along with income, assets, equity, and wealth, in where someone will live. Government and public service jobs are especially centrally located, and blacks are disproportionally represented in these jobs. Thus, they are likely to prefer housing in some reasonable distance to those jobs rather than in distant suburbs.

An analysis that attempts to combine the questions of income, of housing cost, and of the journey-to-work distances suggests that at least part of the separation is related to this complex of economic forces. But as economists, geographers, and sociologists have noted, it is economics in association with preferences that bears an additional part of the explanatory weight.

As Professor Muth has already noted, if whites have a greater aversion to living among blacks than do other blacks, then whites will offer more for housing in predominantly white neighborhoods than would blacks, and separation of residential areas of the two groups will result. Indeed, the paper that Professor Muth read today reiterates a position that he earlier established in his book on cities and housing.

Surveys have established that although whites prefer neighborhoods ranging from zero to 30 percent black, blacks prefer neighborhoods in the range of 50–50, that is, half black and half white. This difference emphasizes a gap in the desires of the two groups. The differences in preferences of blacks and whites also generate a gap in the desired level of integration of neighborhood settings.

The importance of this finding is that a number of economists and political scientists have been able to show in hypothetical analyses, in which there are only slight differences in preferences, that we can get very distinct patterns of residential separation. Currently, there are several ongoing research efforts that are involved in attempting to measure the way in which the patterns might be influenced by preferences in combination with incomes and housing costs.

But even taking housing costs and preferences and incomes is insufficient without realizing that these decisions that are made in the housing market occur within an urban structure. It is important to add to economics and preferences what I will call the urban context and the nature of information availability. We might note initially that the housing market is a dynamic system in which hundreds of thousands of decisions and tens of thousands of moves are made each year. Even the simple analysis of turnover levels indicates that it is unlikely that the system dynamic is influenced by any one set of actors in the housing market.

Both from survey evidence and from anecdotal evidence, we know that both black and white households move short distances, although black households move somewhat shorter distances than whites. People move to nearby neighborhoods with which they are familiar and which obviates the necessity of having to break all of the ties with their former friends, their relatives, churches, and neighborhood social institutions.

Simple maps, two of which I included in the paper, show the choices of households moving into a metropolitan area. Choices by blacks and whites often indicate their desire to be with groups of other blacks or other whites.

Moreover, we find, in expressing those preferences, that individuals are mostly concerned with cost of housing and the kinds of neighborhoods. We look at survey data on people's expressed preferences for their decisionmaking, and we find them talking about the cost of housing and quality of neighborhoods more than we find them talking about the levels of public services per se.

The issue of information within the urban context comes into play when we consider how people go about searching for housing. To put it simply, where a household looks will have a direct influence on where it will move, and the evidence is that housing searches are conducted in a quite limited area. People do not look, except in rare instances, all over the city. They look near where they are already living.

It has been suggested, in fact, that people's houses and their jobs are anchor points from which they consider searching in the surrounding areas. Several studies have shown that the premove location was the most critical variable in determining locational choice, and that there was a strong bias toward selecting nearby units.

There has, of course, been considerable debate over the way in which low-income and minority households search within the housing market. Some have suggested that there have been more limited possibilities and opportunities for minority households because of their limited search behavior. In general, the literature has not confirmed this. Although there are arguments on both sides, minority

and low-income households do not seem to search particularly differently in terms of the areas they consider, but they do seem to search differently in that they utilize more informal sources than white households. That is, they are more likely to hear about houses from neighborhood bulletin boards and from friends than through structured real estate informational systems.

The urban context is also reflected in the expressions of central city decline, inner-city crime rates, and deteriorating housing, which is used as an explanation for white migration from central cities to suburbs. Indeed, part of the separation must be expressed in terms of the structural changes that have been occurring in cities over the last 20 years, in which whites had expressed preferences for suburban locations, and they have not been replaced by other whites moving into cities from other metropolitan areas.

When we turn to the last of the factors, that is, discrimination as an issue in causing the separation in residential areas, it is important to distinguish between public or government discrimination, discrimination by publicly sanctioned or licensed bodies, and the actions of individuals, which I will call private discrimination. Sometimes we refer to it as prejudice. It is, of course, the former, the government discrimination, or discrimination by bodies that have government authority, which has been of much concern in attempting to understand the way in which the patterns of separation have occurred. There are a large number of anecdotal and descriptive studies, particularly those from a historical perspective, that have suggested that the roles of government have been critical in generating the patterns that have occurred.

Putting aside for a moment whether or not we could have a sufficient collusive activity among so many actors on the part of government agencies, an unlikely event, in my opinion, it is worthwhile examining in a little more detail the issue of government discrimination. Recently, in an attempt to get a somewhat better understanding of this question, in several social surveys questions were asked of individuals about discriminatory acts. That is, individuals were asked in surveys, "Have you been discriminated against? If so, by whom?"

In looking at this data—surveys in Kansas City, in Little Rock, and in St. Louis—the responses for overall discrimination were on the order of 10 percent, but only about 3 percent of the population indicated they had been discriminated against by government bodies.

In addition to that information, it is important in discussing the issues of discrimination to examine the issues of intent. No one can deny the existence of racially restrictive covenants or earlier measures of homogeneous zoning, but the question of intent has never been examined thoroughly. Was the intent to exclude minority households per se because they were minority households, or was it the fear of invasion and effects on property values? It is not clear from the research literature.

The anecdotal evidence certainly notes that covenants had little impact beyond the 1940s, although they may have indicated the particular areas in which blacks were most likely to find housing.

There is a lively debate in the literature—and it's not the place to raise it here—on the issue of race versus class or economic position in terms of its impact on the separation of the races. It is certainly beyond the scope of this paper to take that question up, at least in the summary comments.

But to place all of the weight of the explanation of patterns of separation on government actions, that is, to identify it as the primary cause, is probably unwarranted. Although Dr. Hirsch presents persuasive argument for the impact of public actions, especially the impact of Federal housing authority subsidization of white flight by the interstate highway system and the provision of support for new single-family housing, he also notes that the Federal Government did not cause the process of suburbanization. It had been ongoing for a considerable period of time.

I would argue there are many actors involved in the suburbanization process, and to argue that these actors were all racially motivated is to stretch the argument too far.

In an attempt to investigate the level of discrimination, the audit study by HUD tried to match auditors and sent them out into the field to ask particular agencies a set of questions which might allow them to determine whether or not these agencies were discriminating against bias. Dr. Farley has already referred to that study, and I think the study can be read in a number of different ways. I don't want to get into the methodological issues that I find with the study; but I do know that HUD reported that blacks encountered discrimination about 15 percent of the time, and the study concludes that 15 percent would have a significant

impact on housing choices. To enlarge that to the 48 and 72 percent of figures that were mentioned earlier requires a manipulation in terms of probabilities of searches. There are a number of problems with the study. The samples were small, and the true estimation of discrimination could be as low as zero.

On many of the characteristics, such as courtesy, there was no difference in the way whites and blacks were treated.

Let me make a few brief comments about the issue of the housing-school link, which has been raised recently in the research literature. A thesis has been put forward that if we can integrate schools, we will then have integrated housing, that integrated schools will lead to residential integration, and that the experience of minority children and their parents in integrated schools will lead to residential relocation to those school neighborhoods.

Although it is simple to assert that schools and housing policies had an impact on each other, and several members of the Federal judiciary have so asserted, it is much more difficult to measure the relationship between schools and housing. It is quite clear that levels of school segregation are directly affected when neighborhood schools are used as the basis for school attendance zones. That is, if we have these levels of segregation and we have neighborhood schools, then children will be going to segregated schools.

But whether or not changes in the levels of school integration will, in turn, influence housing patterns is not at all clear. As several observers have noted, left alone, the market almost invariably resegregates. Integrated neighborhoods and schools tend to rapidly resegregate, and most U.S. cities have few neighborhoods that have been stably integrated over a long period of time. This is a research area that is in its infancy, but at this point desegregating the schools probably will not have any effect on desegregating housing. It seems to me that the demographics of the city are a much stronger force than public intervention.

In conclusion, I would comment that the review of the social science evidence that I have been pursuing in these brief comments suggests that it is a multiple causal structure we are dealing with, not an either/or situation. To me the most secure principle is that there is no single causative factor, and the issue is the relative weighting of the forces. And even there, there is clearly enough evidence on economic values, personal preferences, urban structure, and neighborhood inertia that any attribution to discrimination is likely to be smaller than previously suggested in the literature.

At the same time, there has been discrimination in the past, and there is no clear evidence that there is not continuing prejudice (as distinct from discrimination) in current urban life. We see prejudice not just in large cities between black and white in North America, but for other ethnic and religious groups in countless metropolitan areas around the world.

Lest these findings seem to be totally negative, it is clear that we are on a long course of achieving racial equality in this society. It is not likely to happen with a particular social intervention or a particular public program. It will only occur with the achievement of economic equality, and the major thrust in reducing levels of segregation and to prevent the development of a black underclass has to be addressed through jobs rather than housing. There is already some evidence that incomes of blacks as a percentage of whites' have improved, as noted by Dr. Farley.

However, as important as the black-white segregation issue that has dominated the literature is the multiethnic structure of the U.S. population. The State of California, certainly southern California, may well be 50 percent minority—black, Hispanic, and Asian—by the last decade of the century. This multiethnic structure is at least as important for decisions about education and housing and for issues of civil rights as is the simple separation between black and white.

Thank you.

CHAIRMAN PENDLETON. Thank you, sir. Dr. Hirsch.

Statement of Arnold Hirsch, Associate Professor, Department of History and School of Urban and Regional Studies, University of New Orleans

DR. HIRSCH. Thank you. Before I begin, I would like to express my appreciation to the Commission for inviting me to appear, and I feel privileged and honored to be here.

The divergence of disciplines represented for you today, the differences in training, perspective, and perhaps philosophy, have assured a vigorous airing of a wide range of views on the causes of residential segregation. I can only hope that my presentation, along with the others, will aid you in your deliberations; and I hope that by perhaps couching my own findings in light of the other perspectives raised, I

might clarify some of the issues, points of agreement and difference among the panelists today.

As a historian, I believe that we live by accretion. Layers of experience, piled upon an accumulation of structures, institutions, and beliefs, shape our daily lives. History is an inescapable, ongoing process always evolving and changing.

In terms of residential segregation, I have traced in my report the emergence of what I call the first and second ghettos, and hinted at the appearance of a third stage in recent years. I would like to be a bit more precise and slightly revisionist in my oral remarks.

In my report I dated the emergence of the first ghetto in the half-century between 1880 and 1930, and the second between 1940 and 1970. Too often the prisoners of our data, academics often rely on the arbitrary convenience of the census to mark their transitions. It seems reasonable now, however, to stretch the first stage to 1933 and the beginning of the New Deal. The second ghetto, characterized by government support and sanction for residential segregation, can subsequently be located more precisely between 1933 and 1968, the years marking the appearance of the Federal Government in housing and urban affairs and the legislative prohibition of overt discrimination following the passage of the Fair Housing Act.

I am also more confident now in explicitly positing a third stage beginning in 1968 that is characterized by the relative decline in the importance of new discriminatory pressures. Tied to massive demographic shifts, particularly the northward movement of rural southern blacks, their urbanization, and the decentralization of our cities, each stage must be viewed both in its own terms and in relation to the others.

The causes for residential segregation are numerous, and not all are related to race. I would raise, as each of our previous speakers did, the matter of economics, however defined, and the argument regarding cultural affinity or "birds of a feather" that Professor Farley mentioned. I would also add that the level of industrialization in different cities at the time when they received their large black populations was also important. Being serendipitous, I can also recognize historical "accident" and the fact that each city is different in its own way. And even looking to the early 20th century period of social reform, some of those activities lent further support to emerging residential segregation.

The key question, however, concerns the relative weight that can be assigned to racial discrimination. Prior to the Great Depression, a complex of factors led to the clustering and increasing concentration of urban blacks. It is abundantly clear, though, that in this early period racial hostility played an essential role and was instrumental in preventing the dispersal of those blacks who had the means and the desire to leave identifiably black communities.

Emerging between 1933 and 1968, the second ghetto was distinguished by the massive growth of highly segregated black communities and the appearance of new sustaining forces. Federal involvement in urban affairs before the passage of the Fair Housing Act stimulated the racial segmentation of metropolitan America, particularly in the postwar suburban boom, and supported residential segregation both with official sanction and public monies.

The charting of dissimilarity indexes lends weight to this view. Segregation quickly rose to high levels in the 20th century, and increased virtually across the board down to 1950, a period that encompassed the Federal Government's forceful application of explicitly racial restrictions in its various housing programs. And in our larger cities, particularly those with large black populations and those in the South, the increases in segregation could be traced in many instances down to 1970.

Did racial discrimination continue to play a role, however, in the third stage of development, in the post-civil rights era? That's the point at which many of our contemporary social scientists join the fray, and I hope my analysis has helped to place their work in historical perspective.

Professors Muth and Clark labor mightily to deemphasize the continued significance of racial discrimination and search for alternative explanations. For Professor Muth, the matter is simple. President Kennedy's 1962 stroke of the pen and the Supreme Court's ruling on restrictive covenants eliminated the impact of earlier discriminatory practices, and the reasons for the persistence of stubbornly high rates of residential segregation after those acts of expiation must necessarily be sought elsewhere.

Historians have a different view. We don't think that the impact of longstanding policies and practices can be wiped away overnight. We might wish the world operated that way. It would make our problems a lot easier to solve.

Professor Clark presents a more subtle and complex analysis positing economics, personal preferences, and urban structure as an explanatory framework. I must say I find quite a bit to agree with in Professor Clark's presentation. I do believe it's a complex of factors operating here. But I also believe that the matter of racial discrimination is still shot through each of those factors that he raises.

It seems to me, in my opinion at least, that he defines discrimination too narrowly, both in time and application. In his presentation, discrimination as a possible cause for residential segregation in the 1980s is sought only in the current application of discriminatory procedures and only in housing transactions themselves, whether in the private sector or the operation of government agencies. Such a conceptualization stacks the deck, ignores the lasting and continuing impact of earlier actions, and almost by definition finds overt discrimination exceptional in the post-civil rights era.

In putting forth economics as an alternative to discrimination, Professor Clark stressed not just income, but a complex of factors, including assets and equity, as significant in determining housing patterns. In his analysis, these variables display no discernible connection to race, although certainly in his comments he acknowledges the connection between race and class.

It is clearly beyond the scope of my paper and the others to deal with the economic evolution of the black community, its traditional weakness or its recent progress. We cannot pause to assess to what degree the economic indicators assembled reflect past patterns of discrimination in jobs, union membership, or homeownership, to cite just a few relevant points; but clearly, those would certainly affect the household wealth available today. They must be accounted for one way or the other before we can assert that the economic condition of the black community can be used as a discrimination-free variable in any equation. The historical connections between race and class are too close to be ignored.

In discussing personal and private preferences, Professor Clark asserts and I agree that these elements cannot be underestimated as a cause of persistent residential segregation. The major point made, however, seems to be that in the absence of massive collusion, little can be done to alter the impact of thousands of independent decisions.

There are two responses to be made. The first is that there is overwhelming evidence that massive collusion to deny blacks housing opportunities was indeed an everyday fact of life, at least down to 1950, in both the private and public sectors. And an arguable case can be made for extending that period to 1968.

Even in the post-civil rights era, after legal prohibitions had been placed on such discrimination in both the public and private spheres, it is still clear, as Professor Farley's discussion indicates, that some measure of collusion remains, even if we are not entirely definite about what measure that is. Even if greatly diminished, however, the cumulative impact of past action should not be overlooked.

Secondly, Professor Clark's discussion of personal preferences does not deny the existence of discrimination as much as it acknowledges it and makes one wonder how such preferences are institutionally expressed.

Similarly, Professor Farley's data on the reluctance of blacks to serve as pioneers in white areas reflects choices made in light of historical experience. Earlier pioneers paid dear penalties for their temerity. It is, in sum, easier to develop neat, clean, and mutually exclusive categories for analytical purposes than it is to maintain such precision when applying them to concrete situations. Like economics, the matter of personal preferences is also entangled in the web of racial discrimination past and present.

Urban structure and inertia convey a neutral connotation and comprise the last elements in Professor Clark's nondiscriminatory model. The economic, geographical, and sociological literature reviewed seemed conclusive, and I'm in full agreement with it. People conduct their housing searches in limited areas. They are most aware of the housing available near their current residences. Their existing location is the most critical factor determining a new one, and each of these findings seems to hold with even greater force for low-income households, renters, and minorities than others.

What is this other than the most graphic evidence possible of the historical burden imposed by the first and second ghettos? Clark's own evidence seems to point to the overwhelming impact of prior restriction, even in the absence of present discrimination. The extraordinarily high levels of segregation in the 20th century and the prominent, if not exclusive, role of racial prohibitions in creating those patterns

have left a living legacy that stretches into future generations. And it is one that cannot be easily dropped or wished away.

Natural barriers shaping the urban environment have also been referred to, and mention has been made of rivers, lakes, and valleys, and things such as that. But cities are manufactured environments, and it would be perhaps more appropriate to speak of highways, railroad embankments, viaducts, parks, and even urban renewal projects when discussing these barriers. And—at least—those constructed before the legislated end to public discrimination often lent themselves to racial gerrymandering. One need only consult the planners' maps in Atlanta that marked a "W" for white and "C" for colored on opposite sides of a designed roadway, or examine the route selected for the Dan Ryan Expressway in Chicago to see that these were concrete valleys that were not meant to be traversed.

Once established, segregated living patterns and supporting improvements displayed an inertia that sustained them even after overt discrimination had been outlawed. Thus, the use of recent surveys in which black respondents affirmed the absence of discrimination in current government operations is not terribly helpful. They may accurately confirm the lack of present discrimination in the public sector, but they cannot capture the living consequences of prior actions beyond the respondent's field of vision.

Despite my extended disagreement here with Professor Clark, I must assert that it flows from what I found to be the provocative, engaging, and challenging nature of his presentation, and it was a stimulation for thought.

I think I should also now sketch out what I see to be the general areas of agreement among the panel. There is a consensus that racial segregation was steadily increasing down to 1950, and in many of our larger cities, at least, continued to increase down to 1970. Moreover, these high levels of segregation seemed fiercely resistant to change, and no more than modest decreases were detected in the 1970s, although I would begin to share some of the budding optimism of the panel that things are beginning to change a bit more swiftly than they have in the past.

There also seems to be general agreement that the enforcement of existing civil rights legislation, though certainly necessary to keep at a minimum whatever degree of collusion remains in the private market, will not greatly affect overall residential trends. Finally, it is also clear that black suburbanization is proceeding at an accelerated pace, but the real significance of this movement is not as yet entirely clear.

More selectively, I agree with Professor Farley's assessment on the uniqueness of the black American experience. I found his comparative analysis particularly useful. I concur with Dr. Clark that multiple causes lie at the root of the problem, and that neither discrimination nor any other factor has acted alone to produce or sustain present conditions. And with Professors Muth and Clark, I certainly agree that economics and market forces loom large in any analysis of segregation in the 1970s and 1980s.

Where do we go from here?

The weight of the past has made itself felt not only in current problems, but in current policy and proposed solutions. The pervasiveness of past discrimination and the intense color consciousness that governed until recently (in historical terms at least) both public and private actions have themselves called forth color-conscious remedies in redress. Most evident in education and employment, some propose the application of race-based nose counting to our neighborhoods and suburbs. These remedies have been attacked on both philosophical and pragmatic grounds, and at the very least, it is clear that the broad national consensus that supported the civil rights legislation of the 1960s has broken down over such issues.

I also believe that such proposals, in terms of the current housing situation at least, are beside the point. Such plans fail to see that despite the continuity of high levels of segregation, the nature of the problem confronting us today is not the same as it was a generation or two ago. Before, the assault on racial barriers aided the most upwardly mobile blacks. Today, the growing black middle class has access to more and better housing, some of it integrated, and it is not clear to what degree their remaining segregation is imposed from within or from without.

It seems the more pressing problem is the growing class differentiation within that community and the concentration of black poor in our central cities. Possible remedies to address this problem should be economic, including job and income policies and proposals to restore the economic viability of our major metropolitan areas. These are matters of concern that reach well beyond race, and consequently may be pursued without resorting to the

device of race-based formulas. I am offering no specific proposals other than to urge the recognition of the nature of the problem and to focus attention on the need for economic development that would widen the area of choice for all, while vastly improving the quality of American life.

I agree with Professor Clark as he similarly called for economic equality, but disagree with him one more time on the subject of public intervention. His emphasis on private preferences and the implication that there is little public role to be played here seems to me to echo the 1950s argument that stateways cannot change folkways. We have been down that road before, and it is a prescription for political paralysis.

What we must recognize is that stateways have of course changed folkways, and not just in the Jim Crow South. Massive government power, as my report indicates, has already been applied to metropolitan America with telling effects. It's just that up to now, as in the case of slum clearance and urban renewal, public powers and money have been invested in a series of private agendas rather than public ones. To use such programs as an example of failed social reform and an implicit rationale for further inaction misreads both the intent and the nature of those programs. We must set our own economic house in order and labor within the political process and the Constitution to address the old and new problems that confront us.

Thank you.

Discussion

CHAIRMAN PENDLETON. Thank you.

We will now move to some questioning by my colleagues. I would ask that my colleagues each take a question, for those who have them, and a followup so we can get through a round of questions, and then go back for a second round, to give everyone a chance at the outset to ask questions and if we have time available later, to ask more.

Commissioner Buckley, do you have any questions?

COMMISSIONER BUCKLEY. No.

CHAIRMAN PENDLETON. Commissioner Berry.

COMMISSIONER BERRY. Mr. Chairman, I have a number of questions, and I guess I would like to wait and see if anybody has any time left for me to ask them; because if I ask one, it leads to a second one, and if I ask a second one, it leads to a third one. I'd like to have at least 5 minutes together.

CHAIRMAN PENDLETON. Why don't you begin with some of Commissioner Buckley's time.

COMMISSIONER BERRY. Thank you very much, Commissioner Buckley, for giving me some of your time. I will be as quick as I can be.

I appreciate, Professor Hirsch, your commenting on the other papers because it cut through some of the contradictions for me and will save some of my time, since you've done that in the record.

Let me ask first, Professor Muth, beginning with the beginning, you say in your paper that there are no studies that show that blacks pay more for comparable housing. That is also repeated in a couple of the other papers. I guess it's something that all scholars say now.

Are there any studies that show that blacks pay more if they want to move into a wealthy white neighborhood as the first, second, or third people than whites would have to pay under comparable circumstances—or, put differently, that real estate agents might try to charge them more for the house when they are first moving in than whites would pay to be in similar neighborhoods? Are there any studies like that that you know of?

DR. MUTH. Not to my knowledge. I don't know of any.

COMMISSIONER BERRY. Does anyone else on the panel know of such studies, or has anyone ever heard of that phenomenon? I'm only asking it because I'm trying to find out how much you know about these matters. Since it happened to me, I know it does happen, so I'm trying to find out whether there are any studies on it.

DR. CLARK. Commissioner, I think within the open housing study that I cite in my paper on Chicago, a study by Berry, he does get into some of those issues. And there is not very much evidence, but he concedes that that may occur in that initial phase when a high-income black household is moving into a transition area, that the prices in the transition area may well be higher; but it's higher relative to what?

COMMISSIONER BERRY. Higher than whites are paying to live in the neighborhood already.

DR. CLARK. Yes, higher than whites who might be going to buy in that area, higher than those whites; but not higher than a white would be paying in a solidly white area and moving out of that area.

COMMISSIONER BERRY. Right.

DR. CLARK. It's that transition of prices from mainly white to mainly black.

COMMISSIONER BERRY. Okay. I just wanted to be clear about that, because I understood all of your papers when you refer to that point, those of you who did, to be talking about blacks buying comparable housing in black neighborhoods. You weren't talking about when they first moved into a white neighborhood. You were talking about—

DR. CLARK. Transition neighborhoods are a different issue.

COMMISSIONER BERRY. Professor Hirsch.

DR. HIRSCH. The only thing I would add to that—it's the historian's bias again—is we have to pay careful attention to time and place. After World War II, in the forties and fifties, although a housing shortage still persisted, it was a different set of conditions than we have today, when there has been large-scale abandonment of central cities, and there are larger housing stocks available. So I would say you have to be aware of time and place when making those kinds of generalizations, that the overall state of the housing market would be very important.

COMMISSIONER BERRY. I understand.

Professor Muth, in your paper you talk about landlords or real estate agents who might be harmed economically if they had an animus towards blacks and wouldn't rent to them when other people could and would make more money out of it, that there might be some harm to them. This is on page 7 and elsewhere in your paper.

Are you talking about a market in which there are lots of people queued up to buy houses or queued up to rent houses? Or what kind of market are you talking about? It would seem to me that if a landlord has an animus towards blacks and there are plenty of other takers in the queue to rent his house or rent his apartment, the fact that he turned down a black, he may not be harmed at all. So what kind of market are you talking about on that issue?

DR. MUTH. It suggests he's not charging enough to anybody if indeed people are queued up to buy his house or rent his apartment. I don't see that kind of thing going on very often. Almost invariably when I see it happening, it's where some special financing or some special other arrangement is made under some kind of government program.

Not long ago in Atlanta there was a situation where people camped out overnight as if to buy World Series tickets to get mortgages as first-time home buyers under special programs, mortgage funds financed by tax-exempt State and local securities. When there are special arrangements like this, sure, people do line up to buy houses, but normally, this doesn't happen.

COMMISSIONER BERRY. No, I meant in a housing market like Washington, for example, where a desirable neighborhood—

DR. MUTH. Washington is a very different housing market than most because it has rent control. Now, again, where you have the existence of rent controls, then indeed, you do find that people make special efforts.

It has been said of Paris, and it may well be true in Washington, that people read the death notices and line up at the address of the deceased to get control of the apartment. Again, it's a situation of an especially good deal.

COMMISSIONER BERRY. But in any market where there are more renters or prospective renters than there is housing available or apartments available, would you conceive that a landlord doesn't necessarily have to subject himself to economic loss by determining to express his racial animus if there are plenty of takers?

DR. MUTH. Not really. Because I'm saying you get more from everybody, and prices are rising under those circumstances normally.

COMMISSIONER BERRY. Well, the point is not crucial, so I won't take up any more time with it; but it did occur to me that if you got plenty of takers—and I've seen that happen, not only here but other places—you don't lose anything if you're a landlord. You say, "I won't rent to blacks," if you know there are plenty of white folks who will rent your apartment, and you can charge them whatever that is. And I thought your statement was limited by that kind of market consideration. I just wanted to see if it wasn't.

I have a question of Professor Farley. I was very interested in your comparative data. Why do you think Asians and Hispanics are less segregated than blacks, since blacks have been in the country longer and all that? What is the reason? Is it purely economic, or what is it?

DR. FARLEY. There may be some economic component, although the economic status of Hispanics in the aggregate is not very prosperous. I think Hispanics and Asians, frankly, face fewer discriminatory practices when they go to rent a house or when they go to buy a house. I have not conducted similar studies of Hispanics or Asians in Los Angeles, San Francisco, or New York; but I suspect the

marketing of housing works quite differently for individuals whose skin color happens to be black.

COMMISSIONER BERRY. Also, you said that there is a perception on the part of whites that in neighborhoods that are predominantly black, police services are not as good, community services, and the like. Is that perception generally accurate, based on what you know about communities? And if so, why should that be the case? Just because it's black, why should the police services be worse?

DR. FARLEY. I don't know that I said police services would be worse.

COMMISSIONER BERRY. Community services.

DR. FARLEY. I'm not sure I said community services would be worse. I said there's a perception on the part of whites that it's a less desirable neighborhood in which to live. The racial composition is part of that perception. There may be places where black neighborhoods indeed do have fewer police services. The constraints on the fiscal budgets of those communities may be greater because of the income situation of the people who live there, the taxes which are being paid, and so forth.

COMMISSIONER BERRY. You said crime rates going up—or maybe it was Professor Clark?

DR. FARLEY. I said there's a perception that crime rates are higher.

COMMISSIONER BERRY. The crime rates are higher; the community is a less desirable place to live. Both of you mentioned that.

DR. FARLEY. Yes.

COMMISSIONER BERRY. What I'm trying to ascertain is: In a given city, not in different cities, do you think that perception has a relationship to reality, or is it just some idea from your studies or what you know about studies? Or is that just some figment of people's imagination?

DR. FARLEY. There is a recent study of the city of Chicago which looked at different neighborhoods, asking people whether they perceived their neighborhood to be a high-crime area or not a high-crime area. And the relationship between what people perceive and the recorded incidence of crime was not all that great. People are somewhat accurate, but if people perceive an area as high crime, that will deter whites in particular from moving into that area—it will deter everybody from moving into that area.

COMMISSIONER BERRY. One more. I have lots more. Maybe I'll get another shot. But both Professor Clark and Professor Muth and you, Professor Hirsch, talked about economic equality and economic solutions to the problem of housing desegregation. I just wondered if that is the case, if that is the solution, or if that is something that will solve the problem, why is it that blacks and whites who have the same social-economic status now don't live in the same neighborhoods? You think poor blacks and poor whites live in the same neighborhood, and middle-income blacks and whites and upper income blacks and whites. If one day we can get the incomes equalized, then we'll have desegregation. Did I get the wrong impression?

DR. CLARK. I think we're saying at the point that blacks who have the same incomes—of course, there's that generation of equity, wealth, and all the other things I was talking about—they can exercise their freedom to choose housing anywhere in the city. They may still well choose to live where their neighborhood institutions are. There is the importance of the black community church. The church is much stronger in black community life than it currently seems to be in many white suburban areas.

Those are still very important reasons why you might get people living together. You are getting upper income black households, certainly in Los Angeles, living in widely separated neighborhoods, small numbers of black households buying into expensive neighborhoods. The issue is numbers in terms of how many black households whites will accept before they feel like they're worrying about the proportions, and they begin moving out. It's that issue I was talking about with the residential preferences between whites accepting somewhere between zero to 30 percent blacks and blacks wanting 50–50 neighborhoods. You see from the studies, black households would prefer to live in neighborhoods that are half black and half white, but whites will not stay for long periods of time in neighborhoods that become half black.

COMMISSIONER BERRY. That's quite a solution as to what Professor Muth said and you said, which is to pay people. If I get another chance, I'd like to ask him how much he'd have to pay.

CHAIRMAN PENDLETON. Commissioner Destro.

COMMISSIONER DESTRO. I wanted to ask Dr. Muth—I want to follow up on Commissioner Berry's questions about the presumptions of your market model. It seems to me that what you're focusing on is the willingness of whites to pay more to live in exclusively or mainly white neighborhoods. And you seem to be focusing mainly on price. Am I right so far?

DR. MUTH. Yes.

COMMISSIONER DESTRO. It seemed to me, though, why would you completely focus on white neighborhoods? It would seem to me that if we were dealing with a purely economic model, if a stock of comparably priced housing might be less expensive in a black neighborhood, whites might follow the price into the black neighborhood, unless there were these other factors that Dr. Farley and Dr. Clark and Dr. Hirsch mentioned operating. Because if people are looking at price, one would think if you can get the same amount of housing for a lesser price, you would follow price on an economic model.

DR. MUTH. Well, economics deals with many things. In this instance, what I was arguing specifically was people care more about more than the specific dwelling units they live in. They care about a variety of factors which describe the surroundings of that dwelling unit. Public schools are certainly one. But the character of one's neighbors is another.

To take another example, economists have long recognized that people will work for lower salaries in kinds of jobs that are particularly pleasant. Economists who are paid by universities generally get lower salaries than economists working for private industry. Why? Because the conditions of work are more pleasant. And economists have recognized this at least as long ago as John Stuart Mill 135 years ago and probably longer.

COMMISSIONER DESTRO. If we ferret out all of the other factors, your suggestion is that maybe you need to pay people to overcome whatever resistance they have. What amount of differential are you going to have to pay to overcome the prejudice factor?

That seems to me to be the question because if whites are willing to pay more, some amount of that "more" is going to deal with "It's a nice place to live," but another part of that "more" is going to deal with "It's a nice place to live because there aren't a lot of black folks living there." At least that's what I hear everybody saying. And my question is: How much of that "more" is going to have to be paid for, in your suggestion, because you're going to have to pay for it to induce the whites to move into the black neighborhoods too.

DR. MUTH. I really don't know how much. It may be in the order of 10 percent; it may be in the order of 20 percent based on past studies I've seen. These studies, however, were done 20 years ago. I think one could estimate it if one set about it today, but I don't know just what the answer would be.

CHAIRMAN PENDLETON. Commissioner Ramirez.

COMMISSIONER RAMIREZ. I want to clarify one point. It's getting back to the same issue. I thoroughly appreciated the testimony of all of the presenters, and I thank them for coming. But, Dr. Muth, you said that white people were willing to pay more to live in an area that had no blacks or very few blacks in an all-white environment.

DR. MUTH. Yes.

COMMISSIONER RAMIREZ. How then can you say, if I am the owner of a property, if I am the developer of a housing development and I know that if I keep it all white I can either rent or sell that property for more money than I would if blacks came in, that then it would not be to my economic benefit to discriminate against blacks? It seems to me that it would be to my economic benefit to keep blacks out if the people with money are willing to pay more money for my product if I keep it all white.

DR. MUTH. Yes, I think that's what I'm saying.

COMMISSIONER RAMIREZ. But you also say that discrimination is not a strong factor because it would be to my detriment to discriminate against blacks because I would lose money on the sale of my product.

DR. MUTH. I think they're two sides to the same coin. If I say a developer will sell the units in his development for more if he sells them all to whites, he is also going to get less for his development if he sells some of them to black families.

COMMISSIONER RAMIREZ. Right. That's an incentive to discriminate, isn't it?

DR. MUTH. Yes, it is an incentive to discriminate. I'm not denying the fact that people in the real estate business may act the way that's commonly alleged. I guess my argument is that they do so not because of their own preferences, but because of what they perceive to be the preferences of their customers.

COMMISSIONER RAMIREZ. So what you're saying—

CHAIRMAN PENDLETON. That's three.

COMMISSIONER RAMIREZ. No, it's all part of the same. I'm trying to get at this because—first of all, I want you to know that my husband is a developer, and my sister is a real estate person, a very successful one. So I'm not antideveloper or antireal estate people.

But it's clear to me that indeed the market, because the value of a product, in this case a product having to do with housing, is based on the value that the buyer places on it; and that is fundamentally rooted in a lot of issues—some historical, some of preference, if you would—but because there is that subjective valuing of the product that is based, in part at least, substantially in a history of racial separation in this country, that then indeed it is the market that results in the situation where you are likely to have a higher value ascribed to those all-white environments, and that is ultimately the driving force for residential segregation.

Let me put it to you another way. When a developer develops an apartment complex in a transition neighborhood, and let's say it's below the 30 percent tipping point at which whites begin to get nervous—it's at 20 percent—and minority people begin to move in, one of the things I know happens is that future developments are eligible for less mortgage money because the banks view that development as a lower priced development because of the character of the minority population. And when you add to that the fact that financial institutions own a lot of those developments, we have a lot of market factors which are operating, some with government sanction and some without the attention of the Federal Government, which are leading to higher levels of segregation. Does that have any relationship, my understanding of that relationship, to the kinds of things that you've been talking about?

DR. MUTH. I think you're been describing many of the things that I did talk about, and I don't see that there's a difference.

COMMISSIONER RAMIREZ. But you don't think it's discrimination?

DR. MUTH. It's a manifestation of what I would prefer to call prejudice, since discrimination generally has a different meaning in economics. I'm not denying that these things exist. I'm saying that the principal reason, though, that these actions take place is not because of the individual preferences of people who work in banks or work in real estate offices or who work for developers, but it's rather what they perceive to be the preferences of their customers that these actions take place, and that they are symptoms, not really a cause, of the problem.

COMMISSIONER RAMIREZ. I will yield.

CHAIRMAN PENDLETON. Commissioner Bunzel.

COMMISSIONER BUNZEL. Thank you, Mr. Chairman.

I want to echo the comments of a number of our colleagues here and thank the members of the panel. These were very interesting papers. When you put economists and demographers and geographers and historians together, you get quite a mix. And I want to say, at the risk of embarrassing him, that Professor Farley's book *Blacks and Whites: Narrowing the Gap?* is one of the best and most informative books because it has a great deal of very interesting material in it. And for any of us who finds the background information that they're talking about today a tremendous need and assistance, I recommend it very highly.

DR. FARLEY. Thank you.

COMMISSIONER BUNZEL. I want to ask a question that may be too large to deal with here today.

One of the useful things about a lot of social scientists and their research is that they can do a good deal of work in description, looking at causes and so on. As a political scientist, I'm always interested in whether or not descriptions lead to policy prescriptions. A lot of social scientists do their work in what they like to think is essentially a neutral area, value free, so they don't have to deal with questions having to do with policy implications.

I suppose that everyone agrees that there is a good deal of diversity on this panel. After all, there are different methods of analysis employed by each of you, given your respective disciplines. I would like to ask you for a moment just to assume, for the sake of a different scenario, that you're sitting before a Senate Education Committee, let's say, and you're being asked for policy recommendations based on your findings. Perhaps you have 1 or perhaps you have 17. If you have 17, I don't think we're going to have the time.

The question is so large that it's unfair. But what I'm trying to get at is this: Given that each of you has an agreed-upon premise that these matters are terribly complex and that there are all kinds of issues that intertwine with others, there is still, nonetheless, the problem which this Commission has to deal with. Perhaps we wouldn't even have to go to the U.S. Senate. So assume you were sitting before the Civil Rights Commission. Based on your findings, what would you recommend? If you only have one major recommendation, what would it be?

Let me just start with each of you, since you're sitting from left to right. Dick Muth.

DR. MUTH. The only recommendation I have is what I have suggested in my paper, that indeed, measures which increase the willingness of people to pay for integration will tend to produce more integration. It is a gloomy prognosis on my part, I'm first to admit. Quite frankly, I don't see that great progress is likely in the immediate future, in the course of my lifetime.

COMMISSIONER BUNZEL. Dr. Farley.

DR. FARLEY. One would certainly be enforcement of present civil rights laws, particularly the provisions with regard to housing. Second, if you had the ability to generate a publicity campaign and to change attitudes and knowledge, I would try to convince suburban whites that if blacks come to their neighborhoods, the blacks who come are going to be very much like them in terms of education, occupation, and income. They are not going to be the unemployed, poverty-stricken individuals from the central city. If I had a similar ability to generate a publicity campaign, I would try to remind blacks that there are Federal housing laws and that blacks may overestimate the hostility they will face in moving into many largely white areas. Their neighbors may not be quite as racist as blacks sometimes perceive.

DR. CLARK. There are two thoughts I'll pick up from Dr. Farley's comments with the publicity issue. I think that there is insufficient understanding of this gap in preferences. If you were going to talk about publicity, if black households in particular were understood better, that smaller numbers of black households, in fact in some balance in the whole population, moved into neighborhoods with similar income, I think there would be a lot more acceptance than if either large numbers and/or a different income and class level moved in. But that's to pick up on your point. That's one suggestion. So it's again a publicity issue and information issue. The second is I still believe very strongly, given the unemployment rates for black youths run 40 percent or whatever, that we are dealing with a work fair, job fair program. We are dealing with some way of developing and changing the way in which the black population enters the mainstream economic market.

DR. HIRSCH. I appreciate being last in this progression.

I would echo the notion that enforcement of current civil rights law is the minimum, immediate step that should be taken and agree with the measures for increased publicity along those lines.

I'd also add, I think, in an age of limitations and tough political choices, we have to be very clear about priorities. Is the top priority going to be opening up white suburbs to economically successful blacks who may be barred, or perhaps to focus on the poor, the less well to do, who may be locked economically in the core cities? I don't think we can do everything all at once.

I know it's hard sometimes for academics to be dispassionate in analysis and want to solve the whole end of the thing, but politics does intrude. And I think if we had to set priorities, the economic condition of central cities and the people who live there, in my view, would and should take precedence over the other, which has really dominated the whole focus of housing integration down to this point. Opening up middle-class white areas to the economically successful has absorbed our attention. We may want to rethink that as a top priority, if we do in fact live in an age of limitations and limited resources.

COMMISSIONER BUNZEL. Thank you, Mr. Chairman. I'm sure we could all follow up on this, but I'll refrain.

CHAIRMAN PENDLETON. As usual, all of us have a lot of questions we want to ask. I guess my question gets down a little bit to part of where Commissioner Ramirez is. We know that rent control never produced a housing unit, and that's a governmental action. There's no question about that. But developers are going to know a bank is not going to lend where there is rent control if you can't get a good return on your investment.

You talked about moving into the suburbs, and we know that unless the land is available or unless the developer gets density bonuses to make a certain number of low-income units, whether that's senior citizens, whether that's ethnically oriented—but I guess my question is this: In one paper I read the other night, it said the enforcement mechanisms right now are too weak, and it said you go to HUD with a complaint and maybe get the complaint resolved, but that may be a negotiated settlement; and something might go to the Department of Justice, and there might be some civil cases brought.

Why do you suppose we need to continue with the same enforcement mechanism if there are those who say it is not effective? And what has to be done to change that enforcement mechanism, and you

have some idea how much money it would be, so that there would be a resolution of racial discrimination? I'm sure we can't settle so much the matter of economic discrimination. But what do you recommend we change in the enforcement structure?

HUD has a complaint-resolution process. It is not a litigation process. So in litigation you get us in the Civil Rights Division of the Department of Justice. Those two areas do not seem to be sufficient in the Federal domain for many people. I'm just trying to get at: What do you do different? Or are you saying that that's enough?

DR. HIRSCH. I'll take a very small piece of that and don't know where I'll wind up with it.

It seems to me you're talking about two things. One is the enforcement structure, and the second is the exercise of the powers that may be mandated by the current constitution of the agency. I have not looked into HUD enforcement myself and would not presume to comment on their enforcement procedures right now. I know you'll have later papers in this series of hearings that will deal with that.

But I think the first determination has to be made: Are the enforcement mechanisms and the existing structure being used to their optimum at the moment? And if that is the case, is there some fault, then, in the structure that is causing this whole thing to break down? And if you could answer the first part of that question affirmatively, "Yes, we are doing all we can under the existing setup," and are satisfied it's a bad answer, then you have to begin to look at that structure. And as I said, I have not studied it myself, and I'm not sure what I would say in terms of trying to restructure the HUD enforcement mechanism.

CHAIRMAN PENDLETON. Dr. Farley has said that we're going to have segregation regardless of income and schooling. And I would presume that means whether you move to suburbia or whether you stay in the central cities.

You have also talked about the fact that whites say that there's not a stable community if you let too many blacks move in. The second thing is that property values decrease and crime rates are higher.

In terms of my last question, is that at all related? How can enforcement mechanisms keep up with this process?

DR. FARLEY. I think they are related. I was indicating these are the perceptions. I was not treating the issue of exactly what is the racial difference in crime rates by neighborhoods. Whites certainly have a perception, at least from our Detroit study—and I think Detroit is more polarized by race than some communities—but whites have the perception that once blacks enter an area, it's going to become all black, that property values will decline with the entry of blacks, and that crime rates are higher.

One way in which discriminatory marketing can preserve white and black neighborhoods is, of course, to steer blacks and whites to different neighborhoods. If blacks are allowed to enter only certain neighborhoods, it is more likely the areas will become largely black. If blacks had free entry to all parts of the metropolitan area, perhaps there would be many areas with relatively small black populations, and the white apprehensions about racial change would not be so great.

CHAIRMAN PENDLETON. I've got part of Francis' time, but just one more question.

What is going to be the impact of gentrification on this process now? I grew up in this town when it was really racially separate. And as I look now, when we had the Fair Housing Act of 1968, blacks who could afford to moved to the suburbs and left the communities, as you said, to suffer for themselves. We gave people the model cities program, the urban renewal program, and all those things that made land values go up and go down; and we used a lot of Federal money to buy up land at a higher price and sold it back to developers at certainly a lower price.

Now, there are blacks who also are part of the gentrification process. What do we do in terms of making communities stable when there is this kind of movement from central city to suburbs and back to central city, and it looks like whites will forever escape along with some middle-class blacks that need to have to be in neighborhoods with other blacks?

DR. FARLEY. There are several studies of gentrification. It has not expanded and taken off as rapidly as some people speculated. Indeed, 15 years ago there were people who thought the thing to save central cities was gentrification. There's more of it along the East Coast than elsewhere. Some of the gentrified neighborhoods are racially mixed. I'm not sure they're economically mixed. But it seems to me those are market forces, and we're not going to see huge parts of our big cities somehow resurrected through gentrification. I think that's a small part of the urban housing market involving gentrification.

DR. CLARK. I agree with that. I don't think gentrification is an answer to solving these problems of segregation.

CHAIRMAN PENDLETON. I don't think so either, because in this town I can go right out to 14th Street, and I can see a whole lot of places where white folks came back, and some of us sold them the houses. And there are a lot of places up there. So that is going to be a real factor in this town. If you look at what's happening in terms of the commercial corridors, those properties are not owned by people who we would consider black. I think gentrification is a real problem, especially here in Washington, D.C.

DR. HIRSCH. I see it almost as a new form of urban renewal just through private market mechanisms, not the subsidy. The private market has just gotten to the point where the developers don't need the subsidies to make a profit. They can simply rely on the increased desirability of these locations and go out and do it themselves.

CHAIRMAN PENDLETON. I'm going to stop and let Commissioner Berry take over.

COMMISSIONER BERRY. I'll be as fast as I can.

Professor Clark, you seem to believe that demographic factors—you pointed to the increase in the Hispanic population and so on—might be a way of breaking down this problem eventually, not only the economic equality issue that was raised earlier. But if that's true about demographics and how many people there will be, Professor Hirsch tells us in his paper that when blacks increased in large numbers in the cities, there was more segregation rather than less segregation—and so does Professor Farley. So I just wondered about your faith in demography as a way to solve the problem.

DR. CLARK. I don't think I was saying that demography would solve them. I think to some extent we are the victims of, or that demography will overtake us. I don't think whether we want demography or not will have anything to do with it. The numbers of Hispanics, the numbers of Asians are having impacts on the structure of the city. And my major point was that as these numbers come, we are not completely powerless, but they are very, very strong forces, and any social intervention is going to have to be major to have any impact on them.

For example, no one, I think, 10 or 15 years ago would have predicted the Hispanic increases in the San Fernando Valley, the city of Los Angeles, because of the strange shape of Los Angeles.

COMMISSIONER BERRY. But is this going to make for less racial segregation in housing?

DR. CLARK. It probably is.

COMMISSIONER BERRY. You think so. For blacks, not Hispanics and Asians?

DR. CLARK. That is the issue that I don't think we have a complete answer on yet. I think that if those trends we have been identifying, if you look at that table of the numbers of blacks in the suburban areas, yes; as you spread the black population, you must have some impact on those levels of segregation.

COMMISSIONER BERRY. I'm going fast, not to be impolite, but because they're going to shut me up.

On suburbanization there seems to be a difference of opinion. You both keep talking about suburbanization of blacks. But it was my impression from looking at the data that in the suburbs blacks are usually segregated too, that they usually live in segregated neighborhoods in the suburbs. So how is that going to break down residential segregation, greater suburbanization?

DR. CLARK. I would argue they don't live in as segregated neighborhoods.

DR. FARLEY. Commissioner Berry, I think suburban areas are going through some of the same kinds of racial change that occurred in central cities a while ago. To be sure, some suburban blacks are living in integrated areas, but we need look no further than the inner-belt area in Prince Georges County to see a large black suburban ghetto emerging. Perhaps a transition from white to black takes longer in the suburbs, but I don't think suburbanization offers the hope of high levels of residential integration.

COMMISSIONER BERRY. Professor Hirsch.

DR. HIRSCH. What happens when you get a census return in 1980 is a statistical snapshot of what exists. You may be undergoing racial transition, and if you count the heads in 1980, what you find is a mixed area. But you don't know if one set is coming in and another set is going out, and what will be down the road 10 or 15 years from now.

I would also say you have to be aware of a regional difference, especially in the southern cities. The high numbers of blacks down in those suburbs really represent old, poverty-stricken rural enclaves that all of a sudden have been brought into the Sunbelt as white subdivisions have sprung up around them. Then all of a sudden, the census finds this new subdivision, they call it a suburb, and there's a pocket of black suburbanites already there.

COMMISSIONER BERRY. My last question. On housing and school desegregation and the relationship, there also seems to be a difference of opinion.

Professor Clark, you comment, if I remember correctly, on a study that was done by Diana Pearce on metropolitan desegregation, which you found methodologically flawed in your view; but you also seemed to think that there was not much relationship between school desegregation and housing. And Professor Farley, if I read you right, saw that there was some relationship. Professor Hirsch, I couldn't tell. You didn't comment.

DR. CLARK. Let me address that specifically. As far as I know, the study by Professor Pearce is the only study that found any relationship. All of the other studies that have been done, including my own, have not been able to show any link and, if anything, have shown just the opposite, that it has no effect.

Now, in the particular study by Professor Pearce, the impact, really apart from the methodological issues, was very, very small, as I read the study. Only about 2 or 3 percent—some were as high as 7 percent; I don't remember—of any ads for housing mentions school as an issue. It was on that basis that she concluded there was a link. I think that's rather slender evidence.

COMMISSIONER BERRY. Dr. Farley, do you have anything further?

DR. FARLEY. Yes, I read the evidence from the seventies as indicating where there was thorough metropolitan integration in such places as Charlotte, Jacksonville, Tampa—in those areas there was an unusually large decrease in residential segregation. I think that comes about because one aspect of marketing housing has to do with schools. Schools are color coded except where integration has occurred. There is much less incentive to discriminate in the housing market if schools are integrated. Sure, there may be some incentive, but I think school integration helps to guarantee equal opportunities.

CHAIRMAN PENDLETON. Thank you.

We will now take a break.

[A short recess was taken.]

Legal Issues in Housing Discrimination

CHAIRMAN PENDLETON. As indicated by the program, we now move to our second panel, which will address the legal issues in housing discrimination. The panelists include John O. Calmore, visiting professor of law at North Carolina Central University School of Law; Marshall D. Stein, a partner in the Boston law firm of Cherwin and Glickman; Otto J. Hetzel, professor of law at Wayne State University; and Douglas W. Kmiec, professor of law and director of the Thomas J. White Center on Law and Government at Notre Dame University Law School.

Gentlemen, we would ask you to very briefly summarize your paper, and I would ask you to use your papers in a discussion with questions from my colleagues as we proceed through this consultation.

I want to thank you very much for coming.

We'll start off with Mr. Calmore.

Statement of John O. Calmore, Visiting Professor, School of Law, North Carolina Central University

MR. CALMORE. Thank you. I want to express appreciation for being invited to come and present my paper. This is my first year as a professor. I come from a practice background as a legal services lawyer since 1971, and people with that background don't often get a chance to speak to official Washington, so I'm doubly appreciative to appear before you.

I recall when I was in law school I was told it would sharpen my mind by narrowing it. And I have tried to resist that tendency, not just in this paper, but in the way I have approached the practice of law.

I think that a point of view and direction is very important in analyzing housing discrimination generally and housing discrimination law in particular. And when I speak in terms of a point of view and direction, I'm speaking about a vision and not just an analytical perspective that looks merely to legal doctrine.

I think that the debate, whether intent or effect is the proper standard for proving housing discrimination, is really a debate about what is the proper definition of discrimination. The proponents of the intent standard really seek to redefine discrimination. They seek that redefinition, however, by a substantial divorcing of themselves from social policy implications. I think they seek that redefinition by looking narrowly at legal doctrine and not sufficiently at social context, and not sufficiently at normative context.

I think it's important that we recognize that there is a tremendous gap between the social realities of discrimination and the ideal of a colorblind society, that Title VIII is one instrumentality that is useful in narrowing that gap, and that as we look at that instrumentality, particularly in light of whether it reaches not only intentional discrimination but also discriminatory effect, we have to look primarily at whether that instrumentality is effective and fair to the parties.

Let me begin by addressing the concept of discrimination, the nature of discrimination, and how that gets worked out in litigation.

I think it is fairly clear by now that—there is no debate—that discrimination has produced for many

nonwhites, and particularly Afro-Americans, a disadvantageous distinction. And that distinction is a result of disparity. It may be a disparity in treatment at the hands of an individual, or it may be a disparity in condition. And a disparity may be not merely individualized treatment, but also institutionalized treatment, systemic treatment. That disparity, whether a result of illicit motive or discriminatory effect, is correctly within the purview of antidiscrimination law.

To limit the effective scope of antidiscrimination law to intentional discrimination only requires a somewhat ahistorical analysis. It ignores the Nation's official commitment to a racist past. It assumes that future society, predicated on the ideal of color blindness, has already arrived and that the effects of past discrimination have already been overcome.

Moreover, the limit of intentional discrimination ignores present realities of how discrimination is varied in its theme, consisting of systemic and institutional manifestations that often have either nothing or very little to do with illicit motivation.

Title VIII of the Civil Rights Act of 1968 states that it is the policy of the United States to provide, within constitutional limits, for fair housing throughout the United States. It is virtually impossible to talk about discrimination in housing and the reach of right and remedy under the primary statute without talking about policy. Yet, ironically, the term "fair housing" is nowhere defined in the statute.

However, it is clear from the expansive provisions prohibiting discrimination that the Fair Housing Act's objectives are more than providing for equal treatment in isolated private transactions. It also provides for equal opportunity to purchase or rent housing. Thus, the act prohibits not only refusal to deal, negotiate, or make available housing because of race; it also prohibits discrimination in terms, conditions, and privileges in connection with renting or buying. It prohibits discrimination in housing advertisements, including implicit discrimination through advertisements such as "a room available in a white house." The act further prohibits such things as blockbusting, redlining, steering, and exclusionary zoning. It imposes on HUD and other Federal agencies a duty to administer programs and activities related to housing and urban development in a manner that furthers the purposes of fair housing, in terms of desegregation, in terms of integration, and in terms of nondiscrimination.

In 1970 this Commission defined fair housing as the goal of increasing the accessibility of nonwhite groups to housing throughout metropolitan areas.

If you look at footnote 5 of my paper, you find what I think is the best definition of fair housing, by Professor Chandler. He defines fair housing as:

> A goal of national policy to undo the results of officially approved housing discrimination between the years 1930 and 1962. This goal would include achievement of residential integration of the metropolitan areas of the nation, thereby cojoining the 1949 goal of "a decent home and a suitable living environment for every American family" with the apparent 1968 goal of removing racial barriers to home acquisition.

It is interesting that we have such a difference of opinion with respect to the importance and the interpretation of the legislative history of Title VIII. I think I devoted a couple of pages to it because I'm of the view that the legislative history is primarily inconclusive.

Attorney Stein devoted almost his whole paper to legislative history to support an argument that during the 3 years prior to the actual passage of the act there was some concern that the legislation would provide a prima facie case on the basis of results only, and that provision was rejected, and therefore, intent is the requirement.

Professor Hetzel seems to address the issue reluctantly, thinking that it is perhaps not conclusive, but he had some inside dope, so to speak, and addressed the history very well.

There is one aspect of legislative history that I don't believe was addressed in the other papers, and it stems from a 1976 case called *Laufman* v. *Oakley Building and Loan Company,* a case that dealt with redlining. And I think that this history is the history that I would adopt in interpreting Title VIII.

This was a Federal district court. The court said: "In this case, a realistic examination of the concerns that led to the adoption of this legislation proves a better guide to congressional intent than the dusty volumes of Sutherland on statutory interpretation."

The events that led to the adoption referred to by the court and focused on particularly were the events that were discussed in the National Advisory Commission on Civil Disorders. The Federal Fair Housing Act, passed in April of 1968, was passed a month after the Commission report came out. Senator Brooke made extensive reference to the Commission report in explaining why it was so important to have a Fair Housing Act.

The Commission focused particularly on the isolation between blacks and whites, the problems of residential segregation. And as the court said in *Laufman:*

> Congress responded to the problems dramatized by the disorders of 1967 by passage of the Civil Rights Act of 1968, including, as recommended by the Commission, the strong fair housing legislation now before the court. As this indicates, the concerns of Congress were large and somewhat varied, and its response equally wide-ranging.
>
> As indicated, plaintiffs urge that the fair housing mandate of this Act be given a liberal interpretation so as to effectuate the purposes of Congress. Defendants argue that its terms should be construed niggardly. The plaintiffs have the more persuasive position, and accordingly, the court will, if necessary, interpret the language used by Congress, give the provisions of the Act a generous construction.

It is incompatible with that history and it is incompatible with a generous construction of the act to limit violation to intentional discrimination.

The history of the Fair Housing Act reveals a recognition that the sad history of the Nation is one where we had officially sanctioned discrimination under the Federal Housing Administration and the Veterans Administration, which furthered the suburbanization which was largely white; that the isolation, the segregation of blacks was largely government created, assisted, and perpetuated.

In 1972 the Supreme Court stated that the language of the Fair Housing Act is broad and inclusive, that the act is to carry out a national policy that Congress considered to be of the highest priority, and that vitality can be given to this priority only by a generous construction of the statute.

A noted authority on fair housing, Richard Schwemm, at the University of Kentucky, has said: "This mandate by a unanimous Supreme Court to construe Title VIII broadly has become the foundation for all subsequent judicial interpretations of the Fair Housing Act."

I think in light of this it is simply wrong to argue, as Attorney Stein does, that even though a disparate impact test of proof is far more effective than an intent test, this confuses the substantive right to be free of racial discrimination with the procedures available under Title VIII for securing these rights. The Fair Housing Act clearly recognizes that societal discrimination in housing was to be remedied, and it necessarily transcends remedies directed toward individuals acting with an illicit motive.

In the paper I have devoted substantial pages to a consideration of the legal doctrine, the shifting of the burdens of proof. I think that I have demonstrated that the courts have worked this out in a way that is fair to defendants, that it merely asks that defendants justify discriminatory effect. And if the defendant has some legitimate, nondiscriminatory reason for taking the challenged action, and there were no less discriminatory alternatives, it will rebut a discriminatory effect case.

I don't think the case law reveals a need to change that. The Supreme Court has had at least two opportunities to do so in considering both Title VII and Title VIII and has refused to do so, even while recognizing that under the equal protection clause, there is indeed a necessity to prove intent to prove a violation.

The other thing that I tried to point out is that most fair housing cases involve private transactions where intent is indeed an issue. The bulk of the disparate impact cases in the past have had to do with exclusionary zoning. There is now, however, not a trend but a growing recognition at least, that within the context of private transactions, there is analytic utility in applying a disparate effect as the test.

This becomes very important as you recognize the need to link both poverty and racial discrimination. In the paper I point out a case called *Dreher* v. *Rana Management,* where the owners of property converted housing that had primarily housed blacks to student housing for Hofstra University. The blacks were displaced. There was a disproportionate impact. However, there was not racial discrimination, no violation of Title VIII.

In another private landlord context, I cite the case of *Betsey* v. *Turtle Creek.* In that case the landlords sought to convert an apartment to an all-adult building. In order to implement the policy, they sought to evict the families. That eviction had a disproportionate impact on blacks, and in that case there was held to be a violation of Title VIII because the justification was not sufficient.

The importance of this trend into private transactions is growing. It's growing for the following reasons.

First of all, the exclusionary zoning issue has decreased in importance because the Federal Government has cut back on production programs for low-income housing. The administration instead is relying much more on existing housing stock to be the housing program for poor people.

Thus, you will find that more and more the private landlord will have an opportunity to discriminate against families with children, will be able to discriminate against female-headed households, will be able to discriminate against welfare recipients; and often it will masquerade as something else when in reality it will be racial discrimination. Without the availability of discriminatory effect as a standard, we just simply cannot reach that discrimination.

So in closing, let me say that I believe that the instrumentality of the Fair Housing Act is fair and effective as it is presently constituted. The effect standard has not caused any dysfunctions or problems so substantial that it would merit some kind of change.

And finally, the fact that so many nonwhites live in poverty—36 percent of blacks are mired in poverty—means that often some proof of economic inequality is going to be the best evidence of racial discrimination, not the intent to discriminate against a family with children or welfare recipient or just a poor person.

Thank you.

CHAIRMAN PENDLETON. Mr. Stein.

Statement of Marshall D. Stein, Cherwin and Glickman, Boston, Massachusetts

MR. STEIN. Thank you, Mr. Chairman.

I would first like to thank the Commission for having me come and present a paper. I am quite honored by that.

Most courts presently administer the Fair Housing Act under an effects standard. Professor Calmore, along with most of the commentators, assumes that this is the test for liability. Occasionally, a court or author has questioned this. The Supreme Court has not yet addressed which is the correct test. I think it's highly likely that the Supreme Court at some point will, and that the impact of that will be quite dramatic.

Given the importance of resolving whether intent or effect is the proper measure for Title VIII, it is appropriate to review what Congress intended when it passed the Fair Housing Act.

The legislative history of the act begins in 1966. At that point the Johnson administration submitted a substantial civil rights bill which had many different sections to it, one of which, Title IV of that 1966 act, was a fair housing act. It provided that the means for reviewing and adjudicating fair housing complaints was to be a Fair Housing Board, and it specifically provided in the legislation that that board was to be patterned on the National Labor Relations Board.

Both in committee and in general debate in 1966, Title IV of the act, and specifically the Fair Housing Board, like a magnet drew much attention, much concern, much criticism. The concern covered a range of interests. There was no doubt that substantial opposition was voiced to having any sort of a fair housing act at all.

But above and beyond that concern, there was very specific concern, which was repeatedly voiced, to having a Fair Housing Board patterned on the NLRB. And the concern specifically focused on the notion that if a showing was made that there was a transaction involving housing between members of different races which did not lead to a successful resolution, that would be a basis for finding a violation of the act, and at that point the burden would shift to the person who had refused to sell or rent the housing to show that their reason for doing so was not discriminatory.

The description of this concern was evidenced by certain people who, in the later history of the successful passage of the 1968 Fair Housing Act, were key players, either in their role in seeing that it was passed or in their leadership roles in opposition, in seeking to stop it from being passed. Specifically, I'm referring to Senator Dirksen and Senator Ervin.

Senator Dirksen in 1966 had a critical role in seeing that cloture was not passed, that debate was not shut down, and that the entire act was defeated, in substantial part because of the opposition that specifically focused upon the fair housing provision, Title IV of the 1966 act. Senator Dirksen specifically addressed his concerns about this model based on the NLRB, on the test for showing discrimination being an effect test, and on shifting the burden of proof to the person accused of having discriminated. Senator Ervin that same year expressed substantial concerns about the same issue.

I think it is important, in any kind of analysis of what is the test that Congress intended, to take a look at what was the act that was sought to be passed and was defeated in 1966, because it is the standards of that act that are presently being enforced in most of the courts. And the significance is that that would be justified had the 1966 act passed in the form in which it was then cast. But it was not passed. It was defeated.

In 1967 in committee hearings there was substantial discussion about the need to try to compromise,

to try to make the changes necessary to attract the necessary votes to pass a fair housing act. I won't go through the detail. It's spelled out in the paper.

At that same time, in those same hearings, Attorney General Clark, one of the spokespersons for the administration, made assurances to the committees which were considering the act that eventually would become the Mondale-Brooke amendment, Title VIII. His assurances were to the effect that what the new act, this new proposal to be given birth in 1968, had as its purpose was the barring solely of actions taken by people with respect to refusal to provide housing, which had as its basis racial reasons, racial motivation.

In 1968 Senators Mondale and Brooke introduced what would become Title VIII, the Fair Housing Act that is on the books presently. In quick succession they took actions on three fronts, which addressed this question of effect versus intent.

When they first introduced it, they had attached to it a statement of some 10 or 12 explanatory questions and answers, one of which specifically made assurances that the Secretary of HUD or a complaining party would have to prove discrimination, because there had been such concern that the burden of proof would so rapidly switch to the person accused of discrimination, that as a practical matter that person would bear the burden of proving they had not discriminated. So they went to great efforts from the time it was introduced to assure Members of Congress that this would not be the case with the new act in 1968.

The second thing, as I previously described, the focus of a great deal of comments and criticisms in the 1966 act, was the mechanism of a Fair Housing Board patterned on the NLRB. And the second thing which was done in this 1968 Brooke-Mondale amendment was to delete the board, and with it the concerns about the shifting burden of proof.

The third thing that occurred is that both of these Senators, as well as many others, made statements during the course of debate that the sole purpose of the act was to prevent a person from refusing housing to another because he is black. They can sell, they can rent to a friend, they can give it away to a relative, they can do anything that they could ever do with property; but they cannot do so based on discriminatory reasons.

That particular image of what you could do with housing, of how you could sell it to friends or how you could give it to relatives, was one that people on all sides of the issue in 1968 continually referred to. It became a central understanding, a unanimity of understanding as to what the act was about.

In terms of the passage of the act, internally, that is to say, within the Senate, the big factor was that Senator Dirksen, who had opposed the act in 1966, switched and became a supporter of it. And through his effort, as was openly acknowledged throughout the debate, cloture was invoked, and at that point the act passed.

It is interesting to note that this is the same Senator Dirksen whose opposition in 1966 was based substantially on the standard of liability on a results test, and is now supporting it when it's become a test of racial motivation, of discriminatory intent.

Now, in terms of the impact and the understanding as to what it meant to have Dirksen's support, in the view of Senator Mondale, one of the two principal sponsors, I think his own words speak best for what it was that he understood, as well as what the Congress understood, was being passed. He stated that with respect to the policy section, promotion of fair housing throughout the country, that section "was to be read in context with the entire bill, the objective being to eliminate discrimination in the sale or rental of housing for the housing described and under the circumstances provided in the Dirksen substitute." So Mondale himself, after Dirksen's substitute has come onto the floor and is being voted on, is saying that the policy section is to be understood in light of the Dirksen substitute.

One graphic illustration of the kind of switch and understanding that occurred, even amongst opponents of the bill, is represented by Senator Ervin. In 1966 Senator Ervin in floor debate made the statement that any time there was a negotiation over housing between members of different races, if it was not successful, that would create a prima facie case.

By 1968, after the Dirksen substitute is on the floor for debate—this is literally within hours before the final vote—Senator Jordan, who along with Senator Ervin represented some of the strongest opposition to any kind of a fair housing bill, tried to resuscitate this argument that: "Aren't we really getting into an effects test? There could be a prima facie case every time we have this transaction that breaks down between members of the same race."

And Ervin says, "No, that's no longer the case. If you want to sell to a friend, if you want to give it to a relative, and that is your motivation, there is no

violation of the act. You will only violate this act if your reason is racially motivated."

CHAIRMAN PENDLETON. Could you sort of wind up a little bit?

MR. STEIN. Sure. I think I can do it in 2 minutes or less.

My final comments on an overview have to do with the court decisions of the lower appellate courts on this issue.

I think what has happened is really rather fascinating. The courts have vigorously asserted that the standard that is involved is disparate impact, discriminatory effect, results, whatever name is attached to it. But I think everybody—Professor Calmore, people who have authored some of the major articles and books—agrees that for all of those statements, the majority of cases finding violations of the Fair Housing Act recite and go into detail in documenting the evidence that they have found of discriminatory intent.

I think in terms of this Commission's or Congress' evaluating the need to maintain the present congressional standard, that of intent, versus amending the act to reflect an effect standard, it would be enormously helpful to do the kind of sifting to find out what kinds of cases in fact found violations and whether there was an absence of evidence of discriminatory intent.

Thank you.

CHAIRMAN PENDLETON. Thank you. Professor Hetzel.

Statement of Otto J. Hetzel, Professor, Law School, Wayne State University

MR. HETZEL. Mr. Chairman and Commissioners, I appreciate the opportunity to appear today and to address some of these issues before you.

I'm afraid I feel in one part that Mr. Stein is disadvantaged, being pincered on each side by myself and Mr. Calmore on this particular issue of intent. As I indicated in my paper, it was not my original intention to deal with this issue, but I felt somewhat pressured to do so for several reasons.

I guess one has to recognize that one's memory may not always be the same as it is historically recorded; but as a participant in the process of the 1968 fair housing legislation, as departmental liaison for the U.S. Department of Housing and Urban Development, I was involved for literally 4 or 5 months in 1967 and 1968 with both extensive hearings as well as the day-to-day activities that were occurring on the floor. I even recall at one point that Senator Murphy from California was very upset because there were, as he suggested, a number of lawyers from various Federal departments who seemed to be generating a good deal of paper and support for the Senators that were in favor of the legislation. And it is my participation in that process that made it difficult for me to understand the particular perspective on legislative history that Mr. Stein was presenting.

The second difficulty I have is that, as a teacher of legislation and as an author of a legislation casebook, I find that the approach taken to the legislative history that is used, at least in my analysis, is not sufficient to establish his basic principle, his principle being that there is convincing evidence that in fact the legislative history demands that Congress' intention at the time of the enactment of this legislation was to impose an intent standard. I do not find, in terms of any consistent analysis, at least in a normal approach by which legislative history is handled, that any of the acts of 1966 or 1967 have provided a sufficiently convincing basis to suggest that Congress had in mind enacting only an intent standard.

Now, I have indicated—and I think it is a correct statement—that there is a particular piece of legislative history that Mr. Stein has developed from a statement of Senator Mondale, who clearly has stature and some weight as a principal sponsor of the act, that indicated there was an issue of the burdens of proof, and that the burdens were to be assumed by those who were making the complaint, whether it was the individual or HUD acting in its behalf. On the other hand, as I have suggested in my paper, that statement doesn't get you very far necessarily, because, although the burden may be there, there is still normally—and I think Professor Calmore has indicated—a burden which the plaintiff must meet to proceed. And in that context, it seems to me fairly clear that the plaintiff, or HUD, as it may be, does have to present some initial evidence of a prima facie case.

What we are arguing about is what constitutes that prima facie case. Does it have to be that there is specific discriminatory animus? I believe that is the term Mr. Stein uses. Or is it sufficient, as the Second, Third, Fourth, Fifth, and maybe the Sixth and the Seventh Circuit have held, to have an effects standard as a prima facie determination?

I will leave that issue for the moment, particularly given the Chairman's suggestion that he would like to give some opportunity for questions at the end, and address very briefly several of the other issues that I have in my paper.

The first of these is directed towards the question of Senator Orin Hatch's legislative proposal, which would do directly what Mr. Stein's analysis might do indirectly, and that is the question of whether or not an intent standard should be imposed on the legislation at this point through amendment.

I don't find any empirical evidence to indicate—at least I'm not aware of any and I'd be happy if somebody brought it to my attention—any substantial basis for or of any assessment of the cases which indicate that defendants who have been put in the posture of having to make a presentation of their nonracially motivated reasons have in fact been disadvantaged in attempting to sustain that reasonable burden.

My experience over the years in the litigation of these kinds of issues and in observing these cases is to the contrary. In fact, the courts tend to look at a reasonable doubt on the plaintiff's case; and when the defendant has made a presentation, although credibility may be a question as it normally should be for the trier of fact, that if there are reasonable bases for the action of the defendant on the basis of a nondiscriminatory motive, the defendant will not be found liable.

Mr. Chairman, I think my voice has just gone. I don't know if your General Counsel's Office indicated, but for about the last 3 days I've been in bed sick, but I came out for this session. I didn't expect for it to just suddenly leave me. But let me see if I can warm it up again, if you don't mind a high pitch for the moment.

The additional factors that I tried to discuss in my paper regarding civil rights enforcement, and in particular housing discrimination enforcement, is the fact that there is a necessity for a strong and effective enforcement posture. I think in the area of individual complaints, that has in fact occurred. In large part, however, I don't think the pattern and practice cases are brought as often or with as much gusto as I suspect could be justified, given general experience. On the other hand, we all have been suffering from lack of funds.

It is important, obviously, that with the Supreme Court's approval, the use of testers be supported in the process of enforcement. What I think is important is that we end up, in terms of enforcement, with some kind of a swift, certain, and relatively simple process. And, to the extent that this can be achieved—whether that means more funding for the agencies that are enforcing the law or whether it means making sure that the procedures are more simple and the process more certain so those who are involved and feel discriminated will, in fact, take advantage of the process—it seems to me important that our enforcement process provide support for those who in fact do have a question about whether or not they were affected by a discriminatory act by a lessor or a lender or insurance agent, etc., who may have impinged their right of access to housing.

Let me conclude with two quick points. I'm afraid I must waive, if I may, my last few minutes because I don't think my voice is going to hold out anymore, at least now.

CHAIRMAN PENDLETON. Thank you for your voice allowing you to bear up this long. We appreciate your testimony. We have a copy of your paper on record. Perhaps you can come back during the question period.

Mr. Kmiec.

Statement of Douglas W. Kmiec, Professor, Law School, and Director, Thomas J. White Center on Law and Government, University of Notre Dame

MR. KMIEC. Thank you, Mr. Chairman and members of the Commission.

I would like to try to address some things stated earlier this afternoon about the confluence of factors that results in racial segregation in housing, and I'd like to specifically put that in the context of existing law.

What we heard earlier this afternoon was that racial segregation in housing does result from a confluence of factors. I don't think any of us can deny that there is intentional discrimination in the marketplace. It can be found in the real estate, insurance, and financing industries. Intentional discrimination ought to be prosecuted. But it was just as clear from the testimony of the economists and the historians here earlier that racial patterns result because of the distribution of income, personal choice, and cultural and environmental preferences within the marketplace.

I think it is very important for us in addressing legal issues to keep in mind what our brothers in the other professions told us earlier, because it addresses the specific point of the limits of the law. The law

ought to be addressed specifically to that which it can accomplish, and that is providing a remedy for the human indignity of being denied housing intentionally on the basis of race. The law ought not to be about what it cannot do, and that is change the personal preferences of citizens of the United States with respect to environmental amenities or how close they want to be to work, school, or church. Certainly, the Federal courts, perhaps with the least of all resources, and certainly, no constitutional mandate to undertake such remaking of social policy, ought not to be involved in that regard.

What I'd like to do is place this observation in the context not of the individual sale or rental transaction, but of land development, zoning, and other land-use decisions. As the title of my paper indicates, I think there are two distinct problems. One is nonracial exclusionary zoning, and the other is the purposeful distortion of the zoning or land-use process based upon race.

First, with respect to intentional discrimination, I agree largely with Attorney Stein, who has done an eloquent job of laying out the legislative history of Title VIII. There is little doubt that what was in the minds of the framers of the 14th amendment or Title VIII was intentional discrimination on the basis of race.

Thus, the relevant questions for this Commission with respect to intentional discrimination are:

First, are the proper plaintiffs being allowed into Federal courts in order to redress intentional discrimination?

Second, is the burden of proof that has been asked of these plaintiffs reasonable?

And third, are we identifying with our prosecutorial resources the appropriate cases of intentional discrimination, and then, are we prosecuting them?

The first question relates to standing. Are the proper parties getting into court? Standing, as you know, is based upon the "case or controversy" requirement in Article III of the Constitution and the prudential limitations of the Court itself.

Standing was addressed in this context in the case of *Warth* v. *Seldin.* What the Supreme Court said with respect to intentional discrimination was that the plaintiff, in order to have standing, must allege specific, concrete facts demonstrating that the challenged practice has harmed him and not some third party, and that, again, recognizing the limits of the law, the court is in a position to provide the plaintiffs with a remedy.

In the context of *Warth,* there was no specific project. Instead, the plaintiffs were merely alleging a generalized grievance against the outcome of local decisionmaking. Quite properly, the Court held, in the absence of a specific project, plaintiffs lacked standing to sue.

It is significant that in its later opinion in *Arlington Heights,* the Court did address a specific project. The case involved a specific, low-income, federally subsidized project needing a rezoning from the local community. In that context, standing was allowed by the Court, both to the developer as well as to a potential resident who merely alleged in his complaint that he would qualify for the housing if it was built and that he would have an interest in moving there.

As a constitutional standard, the Court has articulated an appropriate standing test. The Court is charged under the 14th amendment to rectify the insult of intentional discrimination. The Court can only rectify that insult in the context of a specific, concrete case.

The standing under Title VIII or the Fair Housing Act, which legislative history indicates was intended to be as broad as constitutionally possible, is even more expansive than the *Warth* test, allowing standing to "all persons aggrieved." This statutory standing includes not just developers, but also potential residents and a variety of other associational plaintiffs.

So I conclude that the answer to the first issue pertaining to intentional discrimination is that proper plaintiffs are getting into court.

What about the burden of proof?

Both Mr. Stein and Professor Hetzel have touched on the question in terms of legislative history. Again, the 14th amendment is clear, and the Court's decisions have certainly been clear: In order for there to be a constitutional violation, there must be intent.

Now, does this mean that it is impossible for a plaintiff to prove his case? Again, in terms of the specific context that I address in my paper, the zoning, land-use, land development process, it is not impossible. In fact, intentional discrimination in land use is probably more amenable to proof because it is administrative in nature, and thus, so much gets on the public record.

Significantly, the Supreme Court has instructed us that in order for a plaintiff to meet his burden, it is not necessary for the plaintiff to prove that race was

the primary motivating factor in discrimination. It is enough for the plaintiff to prove that it was *any* factor.

Thus, on the burden of proof issue, the courts have correctly perceived their constitutional duty under the 14th amendment. They have not erected a barrier to the Federal courts to those who would want to prosecute intentional discrimination.

What about racial effect? Is effect relevant at all? Well, clearly, from the testimony prior to this, it is relevant, and the Federal courts have said as much. It is relevant but not conclusive. Racial intent may be inferred, says the court, from both circumstantial and direct evidence, including the racial impact of the decision, its historical background, the sequence in which zoning matters were decided, departures from normal procedures, and so forth. The fact that circumstantial effect evidence can be used to prove intent, however, does not change the standard of proof.

As to whether or not the standard is different under the Fair Housing Act, I defer to my colleagues, who have already exhausted that subject. I think, in fact, it is not different, and a correct interpretation of the law's legislative history would suggest that racial intent is the appropriate standard.

The last question on intentional discrimination is a point Professor Hetzel mentioned in his remarks, and that is: Is enough being done to identify intentional discrimination and bring it into court?

I think two things that HUD Secretary Pierce has done deserve attention on this score. First, he has a budgetary request currently pending for $10 million, $4 million of which would be used to underwrite the cost of testers within communities. There is no question but that the use of testers is a very effective mechanism to identify the constitutional affront that the 14th amendment is directed to. This "fair housing initiative" that Secretary Pierce has articulated should clearly be supported.

Secondly, Secretary Pierce had introduced, several years ago, a strengthened version of the Fair Housing Act. This legislation also merits attention. Right now the penalties under the Fair Housing Act are very, very meager, in the thousand dollar range. Most of the burden of prosecution is on the individual victim. The Justice Department is really prevented from acting, absent a pattern or practice of discrimination.

The legislation that was introduced by the Department of Housing and Urban Development not only would increase the penalties to $50,000 for the first violation and $100,000 thereafter, but also would allow the Attorney General to intercede and act in individual cases of discrimination. I think this legislation is long overdue.

Now, my fellow panelists would say all this is not enough. It's not enough to bring the right plaintiffs into court; it's not enough to give them a reasonable burden of proof that's reasonably clear and within reach; it's not enough to have vigorous prosecution and increased penalties, because we will still have segregated housing patterns. And that's what our economists told us, too, this morning.

They say we should substitute racial impact or racial effect for racial intent. In other words, we should invalidate local regulations, zoning, and other land-use measures, if they have a disproportionate racial impact.

I think several things would follow if we take their advice and adopt wholesale the racial impact standard.

First, as I indicated, I think such an interpretation totally ignores the intent of the Constitution and the intent of Congress in terms of the Fair Housing Act.

Second, I think we would be ignoring the information provided by the earlier panel; that is, we would be ignoring the free, nonracially motivated choices of both municipalities and individual citizens.

Third—and I think this is very significant—we will be asking the Federal courts to sit as a superzoning body, passing upon the wisdom of highly local and highly varied and voluminous economic regulations. The court supposedly has been out of that business since 1937, and I think they are well rid of it, and I think it's important that we not give them a new invitation.

Beyond that, and fourth, we will be displacing the constitutionally protected interest of the States to regulate their own economic affairs. I won't delay the Commission on this point, but I want to indicate that there is an extensive discussion in my paper of the types of things that States have done to address the exclusionary zoning question. As one commentator put it, "Had the Federal courts been so quick to intervene, we would not have seen that kind of varied response."

What Justice Brandeis tells us happens at the State level if we allow federalism to work is exactly what has happened. New Jersey, Michigan, New York, Pennsylvania, and California have all taken different

approaches to try to address the exclusionary zoning problem.

However, I think the worst outcome of adopting a racial effect standard would be that we would be making a false promise to both minority and low- and moderate-income families. That is, we will be saying: "If you just give the Federal courts this power, the court will remake society for you. The court will nullify nonracial personal choices, perhaps by assigning people to neighborhoods. The court may want to redistribute income in the sense that neighborhood choice can no longer be based on a family savings." And as already mentioned, the court will freely set aside the interests of both local governments and the States.

Now, this is a version of the Federal courts that belongs in a much different society. It is a society without personal freedom, it is a society that places the taxing and spending power in an unelected judiciary, and it is a society that is totally centralized. None of those characteristics describes America.

Because this vision is so antithetical to our country, to our Constitution, it is a vision that I suggest will not see the light of day, and hence, to hold out to those who are poor that a racial impact or racial effect standard will get them a better neighborhood is the cruelest hoax of all.

Now, this may lead you to believe that I ignore the issue of exclusionary zoning. In the paper it is clear that I do not. I simply recognize that to get a proper remedy one must assert a proper right. Nonracial exclusionary zoning does not violate Federal guarantees to equal protection. Nonracial zoning does not violate the Fair Housing Act. However, all too much zoning does exceed the reserved police powers of the States because it has all too often been used to impose a given esthetic standard rather than to protect the health or safety of the community.

Now, the remedy for this is largely to allow the States to amend their own land-use enabling acts, to redirect them, to protect, as one Presidential commission put it, our "vital and pressing governmental interests" related to health and safety. And indeed, attached to my paper is a model enabling act which may be used to start thinking about this subject.

Now, since that Presidential recommendation has been made, Secretary Pierce has again been about the business over the last 5 years of proving, on a case-by-case basis, that unnecessary regulation adds to the cost of the final unit production of a house by as much as 20 to 30 percent. He has done this in an excellent series of studies called the Joint Venture for Affordable Housing.

Well, how can this Commission help? I believe this Commission can clearly help by recommending that we do what the law can do best, and that is pursue the vigorous prosecution of intentional discrimination. Let us get that out of our marketplace. Let us use testers to do that. Let us get the Justice Department to intervene in individual suits.

And perhaps through its State Advisory Committees, of which I am privileged to be a member from my home State of Indiana, the Commission might suggest that each individual State examine the question of exclusionary zoning such that on economic, nonracial questions, people will start to recognize the interdependence between civil liberties and property rights.

Thank you very much.

Discussion

CHAIRMAN PENDLETON. Thank you.

We'll start the questioning with my colleague, Commissioner Guess.

COMMISSIONER GUESS. Thank you, Mr. Chairman.

Mr. Chairman, I will have to admit that after such a vigorous presentation by the professor from Notre Dame and a member of our State Advisory Committee, my breath has been taken and I'm going to have to pass.

CHAIRMAN PENDLETON. Get your breath back and come back.

Commissioner Bunzel.

COMMISSIONER BUNZEL. Mr. Chairman, I want the record to show that Mr. Guess' breath has never been taken away. I appreciate his courtesy, however.

COMMISSIONER GUESS. Mr. Chairman, while we're making comments for the record, I might also note that the professor from Notre Dame has also been associated with the Hoover Institution on War, Peace, and Revolution and as such brings tremendous credibility to the table.

[Laughter.]

COMMISSIONER BUNZEL. Thank you, Mr. Guess. We appreciate this. Flattery will get you everywhere.

I have been reading these papers. If not at my bedside every evening, I have been looking at them

with some care, and I happen to have an interest in this whole debate about intent versus effect. I am constantly puzzled because it seems as if we are touching on one of those issues that is really in the eye of the beholder.

I've looked at some of the legislation and gone through some of the history, and I could ask the question I'm going to ask of Mr. Calmore. I could ask it just as easily of others on the panel. But let me try to get at the problem that I'm wrestling with in this way, Mr. Calmore.

Assume for the moment, just for the sake of an example, that intent has been demonstrated to your satisfaction to be what the drafters of the legislation and the act wanted and meant. Assume you would say, "In terms of the history of this act, there is no question that intent was clearly what was motivating and indeed what threads its way through the act." I say that for the sake of an example.

Would your analysis, given that assumption and conclusion, be any different in terms of your prescriptions and what you want? That is to say, does your case, your analysis, rest on the history of the act? And if it were proved to your satisfaction that it was based on intent, would your case crumble?

MR. CALMORE. It would be substantially impaired. I would not want to admit it would crumble. I would be left with the kind of fallback argument that Mr. Stein criticized in citing the *George Washington Law Review,* an article which basically agreed with Mr. Stein to the point that the intent of the framers was to prohibit motivated discrimination, at least within the context of private transactions; but to impose that intent standard would so emasculate the statute, the burden of proof would be so heavy as to emasculate the statute, that it's all right for the courts to go ahead and, in an effort to further fair housing objectives, utilize an effect standard.

I think, though, that if I were boxed into the corner that you boxed me, I would be in substantial trouble, and I would be left with that fallback argument that Mr. Stein cites.

COMMISSIONER BUNZEL. The reason I asked the question is because, as I listened to your arguments today and your analysis and as I read your paper, there was little doubt in my mind—and I may be wrong, so you correct me if I am—that you are primarily concerned with some very urgent public policy issues, which you take to be serious and deserving of attention, and that the legislative history of the act itself almost seems to be peripheral.

I noticed, for example—and I think I'm right—that you never mentioned the discussions of 1966. And I'm wondering if whether or not, in overlooking that or simply not having time to deal with 1966, you found the conversations, the dialogue, the exchanges, the history which Mr. Stein and others have discussed irrelevant to the history of the 1968 act which you do deal with?

MR. CALMORE. No, I had intended to discuss it, but I saw a late-arrival paper, Mr. Hetzel's paper, and I saw that he had addressed it.

I think that Mr. Stein's interpretation, in relying on the 1966 history, sort of personifies Thoreau's dicta that any man more right than his neighbor constitutes a majority of one. The Supreme Court of the United States has said that the legislative history of Title VIII is not helpful. I have adopted that position. I don't think it's conclusive. I think that what you have to look at is, first of all, what is fair housing, and not just what is it in terms of the commentary, but what is it in terms of the numerous provisions that are within the statute.

I believe the legislative history that Mr. Stein cites primarily focuses on the concern of a private transaction and doesn't begin to address all of the violations that go well beyond one specific provision in the statute, that provision being primarily 3604(a). There's a whole lot more to the statute than that. And I believe the focus of Mr. Stein's critique is too narrow to build a large construction that he wants.

And I believe if you look at stuff like the *Laufman* decision, which I think is just as relevant, in looking at a response to the Civil Disorders report, that indicates something that is very contrary to the narrow focus that Mr. Stein would urge us to adopt.

COMMISSIONER BUNZEL. Mr. Chairman, in the concern with time, I won't pursue this.

CHAIRMAN PENDLETON. Mr. Abram.

VICE CHAIRMAN ABRAM. Professor Calmore, I may have misunderstood you, so I'll ask you: Did I hear you to conclude thusly: Proof of economic inequality is evidence of racial discrimination?

MR. CALMORE. Certainly it is. It can be.

VICE CHAIRMAN ABRAM. Is it or can it be?

MR. CALMORE. It depends on the context. It certainly can be utilized as evidence of discrimination as your prima facie case.

VICE CHAIRMAN ABRAM. Economic equality.

Now, let me ask you this. Do you believe that the civil rights laws enable the courts to redistribute on a racial proportional basis the economic and social benefits of the society?

MR. CALMORE. Generally, no.

VICE CHAIRMAN ABRAM. But specifically in what cases do they?

MR. CALMORE. Well, the cases that come closest have to do, I think, with low-income housing, specifically when there is some competition. For instance, in the section 8 housing program, you have an inflated definition of poor people. They can be up to 80 percent of the median for an SMSA. There may be an effort to target the subsidies to the so-called very low, defined as 50 percent of the SMSA.

And I'm saying that if you have a program that fails to make that targeting and thereby disproportionately impacts on blacks, browns, and other nonwhites, you would in effect be redistributing some power, some good, some benefits, if you prevail, by taking the housing subsidies that would go to the 80 percent group and redistributing them to the poor group.

VICE CHAIRMAN ABRAM. Let me tell you what I'm trying to find out. For a long time I served as the U.S. Representative to the United Nations Commission on Human Rights, which, of course, deals with the Universal Declaration of Human Rights. That document is divided into two sections, civil and political rights, which are rights that we know in this country customarily and traditionally as civil rights, and economic and social rights, which in the socialist countries are known as human rights. But it had never occurred to me that the American model of civil and political rights included as a civil right—maybe a public policy—as a civil right, the redistribution of income or economic or social benefits. Do you believe the civil rights laws in this country were intended to do that?

MR. CALMORE. No, but I would like to answer with more than just a "no."

VICE CHAIRMAN ABRAM. All right.

MR. CALMORE. When we talk about discriminatory effect and the relevance of social inequality, we're not saying that social inequality per se is illegal. We're saying that social inequality gives rise often to an inference of some type of racial discrimination. It's not some wild-eyed theory about redistributing wealth. In fact, on page 86, I quote Professor Schwemm saying specifically: "The legislative history of Title VIII affirmatively shows that it was not designed to guarantee housing to those unable to afford it, and the courts have recognized," etc.

So I don't believe that civil rights are necessarily economic rights or entitlements, but I do believe that when you are in America in 1985 and the country is functioning under an advanced state of racism, and one of the manifestations of that racism is to put 36 percent of black Americans in poverty, you have to look at that. You have to look at that, and you have to see in a given case whether that is evidence of racial discrimination.

And finally, let me say I think you're right about my concern for social policy. I believe that I quote Father Drinan, as you probably know, a former Congressman, who introduced the Fair Housing Amendments of 1980, and he asked a question that we really have to all get to if fair housing is going to be meaningful. He asks: "Can fair housing come about if economic disparity between white and black citizens is not first lessened?"

I think the answer is, "No." But I also think that in the long meantime, before we get to that point, we've got to, on occasion, look at economic inequality at least as evidence of racial discrimination.

VICE CHAIRMAN ABRAM. I understand what you're saying, and I appreciate your candor.

Now, let me take it just one step further, Mr. Chairman.

We now come, having carefully defined and delimited to some extent the thrust of what I thought you were saying, but still it's there, a difference between us, I would say.

I then turn to the organ of a society that is constituted in this country to deal with the problems of inequality. And I listened with great care to what Professor Kmiec was saying is the proper function of the court in the society, as opposed to the proper function of the more representative organs of the government.

Now, I put it to you this way: Let us suppose that this fair housing statute, as you read it—and I think you do read it—is designed to ensure fair housing. Suppose the statute on its face, not its legislative history, said that in actions thereunder the courts would use exclusively the intent standard.

Suppose that frustrates what you conceive to be the congressional thrust. You are sure, you are absolutely sure, that the substantive thrust of the act is frustrated by that curious statement, not in the legislative history, but in the body of that, probably put there for reasons to frustrate it, by some

nefarious Senator or Congressman who pulled the wool over the eyes of his colleagues who had the more generous thrust. What should the court do in that case?

MR. CALMORE. I'm not sure what sort of case is before the court, but certainly the court has to follow the standard. That's a clear case, it seems to me, that the court would have to make sure that the plaintiff proved intent or else the plaintiff would not have shown a violation of the statute. Maybe there is more to your question, but to me it's an easy answer that the court has to follow—

VICE CHAIRMAN ABRAM. But if the legislative history is clear—

MR. CALMORE. Well, that's the question. Is it clear? And it's not like it hasn't been before the highest court of the Nation and the next highest appellate courts. It just isn't clear. It isn't clear. And I think one indication that it's not clear is the fact that this is 1985, and we've had all this time, and Mr. Stein's position is still that of a minority of one.

VICE CHAIRMAN ABRAM. Mr. Stein, do you agree with that, that you're a minority of one?

MR. STEIN. I don't think I'm a minority of one. There are decisions in the Second Circuit, there are decisions in the Sixth Circuit, which specifically say intent is the standard. There are cases and comments which have also agreed with that.

First of all, I don't think the Supreme Court has dealt with this specific issue at all. What Professor Calmore refers to is a sentence in a paragraph in the *Trafficante* case with respect to the legislative history being unclear. There was a very specific discussion in *Trafficante* in that paragraph as to the legislative history of who constitutes an aggrieved person. I think everybody here agrees that the Supreme Court read the definition of an "aggrieved person" very broadly. I don't think the discussion in *Trafficante* stands for anything beyond that.

As to why courts came to that conclusion, I have had the experience of working for a Federal court of appeals. They are extremely overworked, and they essentially respond to the arguments that are made to them. I think that courts of appeals may well not have had the kind of argument presented to them which I lay out in my paper.

VICE CHAIRMAN ABRAM. I don't want to take up any more time. Thank you very much, Mr. Chairman.

CHAIRMAN PENDLETON. Let me yield to Commissioner Destro.

COMMISSIONER DESTRO. I just have a couple of questions. One would be along the lines—I forget exactly who used the quote from Oliver Wendell Holmes about the word being the skin of the living thought, meaning different things to different people. I find that to be an interesting quotation.

I guess what I'd like the members of the panel to address for me is: What right is addressed in your own mind by the term "fair housing"? There is a term being used, the Fair Housing Act, and that presupposes a number of different starting points, and I think various speakers have identified their starting points. What I'd like to do is get those fixed in the record and throw out a proposition, get your ideas on it and your definition.

It seems to me you could define it one way, meaning the processes which affect individuals' access to housing are unfair for one reason or another, or you could address it by virtue of the question of whether or not people are suffering discrimination, meaning racially motivated or some other kind of motivated, whether it's economically or with children, but some animus-motivated process going on. What is it in your own view?

CHAIRMAN PENDLETON. In your question about fair housing, could I add to that, fair housing for whom, whether or not it's fair housing for one who produces it or fair housing for one who uses it? I'm concerned about for whom is the housing fair?

COMMISSIONER DESTRO. I'm just starting from the proposition that I think the panel is. You may be injecting something else. I'm not sure I understand.

CHAIRMAN PENDLETON. I'm sorry; go ahead.

COMMISSIONER DESTRO. I'm starting from the proposition that Congress had in mind a group of people who were perceived to have a problem in obtaining housing. And starting from the proposition that that's who Congress had in mind, that there's a group of people—that's where I'm starting from, not the landlords or anybody else.

MR. CALMORE. I think when you ask what kind of right is involved, you first look at what generally is a right. You're talking about an empowerment on the one hand and perhaps a shield on the other hand.

I think fair housing encompasses both. The empowerment aspect of fair housing is reflected in the quote I gave of the Commission's definition. You're trying to increase the access to housing that has traditionally been denied to you on the basis of race.

I think, too, there's a nondiscriminatory shield aspect which basically says that, aside from equal

opportunity, you should be treated in a way that militates against the disparity that is usually the manifestation of discrimination. If I come to rent a house, I don't want to be treated differently than a white person. It's very similar to the right that 1982 confers, that blacks would have the same right to enjoy property as a white person would have. That speaks to the disparity; it speaks to the shield from discrimination.

So I think that the right to fair housing is at least twofold, the empowerment along the lines of equal opportunity and the shield aspect of nondiscrimination. And I might add, that would encompass both the intent and the effects of discrimination.

MR. STEIN. I think that Congress could pass legislation which would define fair housing as Professor Calmore has defined it. I think what Congress intended in 1968 is more limited to ensuring that every citizen is free of an intentional insult, of being refused housing on the basis of that person's race, religion, or national background.

Specifically, I draw that—I'll be very brief—from statements made by Senator Mondale, who I think everybody has conceded was really one of the two central spokesmen for the act. And I'd like to quote one sentence from something that is in my paper. He said what the bill permits, what the act is about: "It simply removes the opportunity to insult and discriminate against a fellow American because of his color. That is all."

I think this notion of barring anybody from being able to get away with insulting somebody on the basis of refusing them housing because of their race or religion is what the act is about.

MR. HETZEL. Professor Destro, assuming my voice holds up, perhaps the best commentary, I suppose, is something that I wrote previously with several coauthors, including Professors Mandelker and Daye, in the equal opportunities section of the book entitled *Housing and Community Development.* We commented that Title VIII is designed to provide fair housing, and then qualified that by saying, "Presumably a broader concept than simply prohibiting discrimination." And I would stand with that.

MR. KMIEC. Professor Destro, I think fair housing in my definition would be access to housing free of the invidious and immoral discrimination on the basis of race and the other prohibited categories that are mentioned in the Fair Housing Act. I would not concede, as Mr. Stein has, the point as to whether or not Congress could indeed enact legislation that was premised solely upon racial effect or impact.

While it's hard for me to even contemplate someone alleging that Congress' powers are limited, in view of section 5 of the 14th amendment and the Court's expansive view of the commerce clause, I think there's at least an argument to be made that in fact the 14th amendment deals with intent, and anything that would be enacted pursuant to section 5 ought to be limited accordingly.

COMMISSIONER DESTRO. One last question, and I think I'll address it to Mr. Hetzel. How do you respond to what I understand to be Professor Kmiec's point, that by addressing the question in effect as one of discrimination, you may miss the real problems, which may be the way the States are dealing with their land-use and zoning questions; that if you ask the wrong question, in effect you get the wrong answer?

MR. HETZEL. I'm not sure I understand your question exactly, although I think I get the gist of what you're saying.

Two points, I guess. First, I differ basically with Professor Kmiec on one point, and that is I believe in the *Guardians* case the Supreme Court clearly said the Constitution does not prevent the imposition of an effects test, at least in talking about Title VI.

Secondly, if one is talking about discrimination—I don't know that Professor Kmiec and I disagree on that aspect. I think both of us say that it is more than simply discriminatory practices. It is access, and that in a number of ways access is denied individuals, and that denial of access may be in different forms. It may be both by State actions, by local governments; it also may be actions of individuals or private institutions. I believe that in the concept of fair housing, at least, the intent of the original act was to cover all of those.

I don't know if I picked up your original point.

COMMISSIONER DESTRO. I don't completely think so, but I'm going to defer so others can ask some questions.

CHAIRMAN PENDLETON. Commissioner Berry.

COMMISSIONER BERRY. I have several questions. I realize the hour is late, but I think that this is important. And I just heard something else startling coming out of one of the witness' mouths, so I have to ask yet another question.

First, Mr. Stein, if I understand your argument correctly, it is that, first of all, the Third Circuit in *Arlington Heights* was wrong in *Arlington Heights II*—

MR. STEIN. Seventh Circuit.

COMMISSIONER BERRY. —when it concluded that the Supreme Court permitted the use of an effect standard in Title VIII, if I understand it.

MR. STEIN. Oh, absolutely.

COMMISSIONER BERRY. And that it is wrong in part because it misunderstands what the effect of a remand is, if I understand your argument on page 104, I think, of your paper—

MR. STEIN. That's correct.

COMMISSIONER BERRY. —in which you discuss the case of *Wolff Packing Company,* in which you point out that just because the Supreme Court in *Arlington Heights* remanded the case, and that the lower court had no right to assume something that the Supreme Court hadn't decided, it was all right for them to go off and use an intent test.

And when you quote from *Wolff Packing Company*—I was very interested in that case because whenever I see a case cited and I see little brackets with things left out, I always want to go back and read the case to see what it says. And when I did go back to read the case, which is at 267 U.S. at 562, I found that the court, instead of saying, "the contention is wrong," what the court said instead is on page 562 of the opinion. It said, "both contentions are wrong." What it said was that if you assume by reversing part of something, you have said that the whole thing is wrong, or if you assume by reversing part of something, you're saying the part you didn't reverse is wrong, that both contentions are wrong.

That's what the court says. Do you want me to read it to you?

MR. STEIN. No. I don't think that affects what I say.

COMMISSIONER BERRY. I'm going to proceed, but both contentions are wrong is what the language says in the opinion of *Wolff Packing Company.*

So what I conclude from that is that the inference that the *Arlington Heights II* court drew may or may not be wrong. They may be right or they may be wrong as to what a court may do later. Because the court in *Wolff* says that if the company was wrong, so was the Attorney General in that case; both were wrong. And that in your context of Title VIII, if it is argued that in remanding as to Title VIII the Supreme Court said you can't use an effects test, that is wrong; and if you say that in remanding the Supreme Court said you could use an effects test, that is wrong also. And the court didn't say whether you could or whether you couldn't.

MR. STEIN. I agree.

COMMISSIONER BERRY. So we are left with worrying about what the court is going to do later on. So the Third Circuit, whatever it did, the Supreme Court didn't say it could or it couldn't.

MR. STEIN. It's the Seventh Circuit.

COMMISSIONER BERRY. I'm sorry, the Seventh Circuit.

MR. STEIN. I have no disagreement with what you're saying.

COMMISSIONER BERRY. Because I read your paper as to admonish the circuit court for proceeding as it did.

MR. STEIN. That's correct, but I think my point is not quite the way you're describing it. If I may just for a moment—okay; I see what you're saying. The Third Circuit, in talking about the Seventh Circuit case, said the fact that the Supreme Court had remanded it for consideration of Title VIII was an indication that the Supreme Court had concluded, either implicitly or explicitly, that disparate impact would be sufficient to establish a violation of Title VIII. My criticism of the Third Circuit for doing that really is going to just what you said, that by remanding it the Supreme Court isn't saying anything.

COMMISSIONER BERRY. I didn't draw that inference from your paper because you went on to argue for the intent standard and that later on the court was going to decide it. I don't think we know that. That's my whole point.

MR. STEIN. Let me state clearly that—I think it does so in the paper. The Third Circuit relied upon that remand as one of the bases from which it concluded that a disparate impact test, standing on its own, was sufficient to show a violation of Title VIII.

COMMISSIONER BERRY. I understand that, Mr. Stein, and I'm not disputing that. In the interests of time, I am not disputing that at all.

MR. STEIN. Okay. That's all that I said.

COMMISSIONER BERRY. I just don't think you can draw an inference one way or the other.

MR. STEIN. I agree. I didn't draw the adverse inference. I simply said no inference could be drawn.

COMMISSIONER BERRY. The second point I think you made is that the legislative history of the 1966 bill that did not pass, and the hearing record in 1967 on that, on fair housing, are relevant legislative history—

MR. STEIN. Correct.

COMMISSIONER BERRY. —for what happened in the 1968 act.

MR. STEIN. That's correct.

COMMISSIONER BERRY. Now, if I understand that clearly, I wonder if you could tell me how far back in time do you go with legislative history? If an act is passed by the Congress this year on something that's introduced this year, how far back in time do I go with previously introduced measures to assume that that's part of the legislative history?

MR. STEIN. I think it obviously varies from statute to statute.

COMMISSIONER BERRY. Could you give me a general idea?

MR. STEIN. No, I don't think you can give a general idea. My reasoning there, which is supported in several of the law reviews and supported in Professor Schwemm's book, is that in 1966 a specific effort was made to pass the Fair Housing Act. That act was defeated for certain reasons, which are quite important.

In 1967 in committee, Senators discussed why the Civil Rights Act of 1966 failed. And in that discussion, looking toward 1968, to try to get a civil rights act in 1968, they looked back to 1966. This is not a perception that I'm creating. This is a perception that the Senators who worked on the legislation created.

COMMISSIONER BERRY. I'm not disputing that. I'm trying to find out from you—

MR. STEIN. So for this particular act—

COMMISSIONER BERRY. You want to go to 1966.

MR. STEIN. For this particular act, the Senators went to 1966, and discussed it in 1967, looking towards 1968, so I followed what they looked at.

COMMISSIONER BERRY. I understand you perfectly. Is there any reason why we shouldn't go back to the discussion on the Civil Rights Act of 1964 when they discussed the housing provisions under Title VI related to public housing, and there was discussion about the need to also have a fair housing law that related to private housing, and some of the same Senators were involved in the discussion? Should we go back to that legislative history?

MR. STEIN. Well, I would say in this particular case no, the reason being that these Senators, who in 1968 were involved in the passage of the act, did not look back to 1964. They looked back to 1966 in their committee meetings in 1967 getting ready for 1968. In other words, I'm not creating anything. I am following what they did.

COMMISSIONER BERRY. I understand. I just want to know. So you wouldn't go back to 1964.

MR. STEIN. They didn't go back to 1964.

COMMISSIONER BERRY. The other thing I want to ask is—I read the hearings this morning in the Senate Banking and Currency Committee because I was very interested in your citing of them, and also some of the citations from the Congressional Record. Are you aware—you must be aware—that in the Senate Banking and Currency Committee report, which you referred to, there is considerable discussion on the part of Mr. Mondale—Senator Mondale then—and other Senators, beginning at page 91 et seq., about the reason why the 1966 act was defeated, having to do not with standard of proof, but the fact that the riots that had occurred, the societal context. There is considerable discussion there about that. I just wondered if you were aware that that discussion is there.

MR. STEIN. I haven't read the legislative history and the particular reports for about a year. The discussion of events undoubtedly was important, and I think that in all these contexts, the Kerner report, certainly the assassination of Dr. King, were very important factors in terms of providing impetus to the timing of passage of the act, and I think there is no question about that. But I think that's a separate question from the question about what was the standard for violation of the act that all of the parties, both sponsors and opponents, understood it to be between 1966 and 1968.

COMMISSIONER BERRY. Mr. Stein, I'm not making myself clear. My question is not whether there was a discussion of standard of proof. I know there was such a discussion in the way you characterize it. But from reading your paper, I get the impression that you believe that a major reason why the bill was not passed earlier was because of the interest in the Baker amendment, the matter of motive, and that all of these compromises that were worked out earlier came back again in 1968, and that is one reason why the bill didn't pass at an earlier time.

MR. STEIN. I agree with that.

COMMISSIONER BERRY. And I'm suggesting to you: Don't you believe one could just as easily draw an inference—and I leave it to those to read it who want to—from reading the report, which I drew this morning from reading it, and reading the Congressional Record, 89th Congress, First Session, pages 14765, 20825, 20488–89, 20490, 20793, comments from Senator Javits, Senator Mondale, and other

people, that the societal context, including the disturbances and other matters, may have had just as much to do with it, and that this discussion you're talking about may have been irrelevant as opposed to the discussion about the riots being irrelevant?

MR. STEIN. Well, the conclusion I draw is that the events that you are describing were very important factors as to when a Fair Housing Act was passed, the timing of it. In terms of what specifically was going to be the test under the Fair Housing Act, I think that they are not relevant to the test.

Now, it may well have been that Senator Mondale, Senator Brooke, many of the people who were proponents—Senator Javits, etc., etc.—believed at the time—I think this is probably the case—that if you could ban intentional discrimination, you would end housing segregation in this country. I think there is clear evidence throughout the entire record that that is what they believed.

I think that the kinds of evidence, for example, that were heard in the prior panel about the resistance of racial segregation to change—whatever the factors may be, whether they are factors of prejudice or nonracial factors—it may well be that the belief of the sponsors did not come to fruition. That's a different question.

COMMISSIONER BERRY. I'm not even asking that question. As a matter of fact, I'm not even interested in it. I was only interested in establishing for the record that there is considerable discussion about a number of matters related to why this bill didn't pass, which take up much more space, by the way, than the discussions that you have cited. And I was only wanting to make that point, that at least we ought to take that into account.

But let me ask the final question, just so I understand your position. Are you saying hypothetically that if the Congress this year is about to pass tax reform, or if they think they're about to pass it, and they are discussing it, and they debate it on the floor and they pass it—just use that as a hypothetical example—and that 2 years ago they had a tax reform bill up, and it didn't go anywhere for a variety of reasons, and there were all kinds of compromises talked about on the floor and elsewhere, and it died; and then last year they had committee hearings in which Senators said, "Next year, by golly, we're going to pass a tax bill. Now, let's look this year at these hearings for what's going to happen next year."

And then when we got to this year—no bill passed last year, either. They got up on the floor, there was a bill introduced, there was limited debate on it, a little bit of discussion, and some Senator says, "I think we ought to look at the hearing last year for what this all means"—no consensus, no more than one Senator or three or four or perhaps none. And the bill passes. Should we look at the legislative history from the committee last year, or what happened the year before, to figure out what they meant this year when they passed the bill? If I understand you correctly, is that what you're saying?

MR. STEIN. I think what I'm saying is that what you have described occurred, plus a great deal more, which makes 1966 and 1967 relevant. The great deal more that is not in your hypothetical is that in 1967, in committee there were discussions as to why it failed in 1966, the need for compromise and change looking toward 1968, and a general agreement in every article I have read, including—there's an article by the administrative assistant to Senator Mondale—that the 1967 committee hearings were really the framework for the Mondale-Brooke amendment.

Now, given all that, I say yes, of course we have to look to 1966 and 1967. Those factors are not present in your hypothetical. If they were present in the hypothetical, I would say yes.

COMMISSIONER BERRY. Well, I'll put those in my hypothetical. Somebody up on the Hill writes a book, an administrative assistant to Congressman Rostenkowski. And she says, "This is what we did, and this is why we did it. And we were looking to 1985 to get this bill passed."

MR. STEIN. What I'm saying is the Senator said that, not just the administrative assistant.

COMMISSIONER BERRY. Senator Hollings or somebody?

MR. STEIN. Senator Mondale said it.

COMMISSIONER BERRY. We don't have time, so I won't even try to reach disputing or discussing what you say about 1966 and 1967. I only wanted to make the point that there is a lot in those hearings, and this was to me an interesting view of how you use legislative history. I find it very interesting indeed.

Mr. Hetzel, I appreciated your paper because you asked a lot of questions that I didn't have to ask.

MR. HETZEL. Thank you. I just wanted to indicate, however, that I do believe that the 1966–67 hearings are relevant. The only questions are to

what point and on what basis, and do they really provide the support for the syllogism Mr. Stein has set up. I don't believe they do.

COMMISSIONER BERRY. Thank you, Mr. Chairman.

CHAIRMAN PENDLETON. Mr. Destro has a question, and I want to be a little more brief. I think Commissioner Berry's questions are good ones, and they answer some that I might have come up with.

I don't know quite who to address this to, but there is some belief that perhaps this legislation passed and was agreed to about the intent test, and all along that the effects test would be the one that would prevail. Do you think that was the feelng all along of the Mondale people, that they knew this was going to be the case, that in practice we used the effects test even though we agreed to the intent test? That is not true only of the fair housing legislation, but I think it's true of some other legislation, too.

MR. HETZEL. I'll give it at least an initial response, Mr. Chairman. I think there probably was not any kind of consensus by the body on the kind of allocation of burden of proof to show discriminatory animus which Mr. Stein talks about. I think there probably was a general feeling—and I think some of the questions of the Commissioners have brought that out—that there was an attempt to prevent discrimination in housing. How far beyond that one can probe I think is doubtful, based upon the legislative history.

If you looked at the trouble that the court had with its *Otero* decision, for instance—and I'm sure the Chairman is familiar with that—just in terms of how one handles that issue of legislative intent in the context of Title VIII. You can see the basic disagreements in legislative history interpretation between the district court and the court of appeals. Thus, I don't believe one can pinpoint the specific kind of analysis or consensus on that issue by the members of the body.

CHAIRMAN PENDLETON. That's not quite what I'm asking. I'm asking: In order to get a political compromise, to get a bill out, was there agreement with intent, knowing that at some point effects would be the way the program would be handled? You have no feeling for that?

MR. HETZEL. I didn't see any evidence in the record when I looked at it that would indicate that.

CHAIRMAN PENDLETON. One other question. For whom is housing to be fair? There's a fairness in dealing with the people who have to live, and there's also a return on the investment from those who produce. In your estimation, how do those two situations balance out?

MR. KMIEC. Mr. Chairman, if it comes to intentional discrimination, no return on investment can justify intentional discrimination. So from that standpoint, from the standpoint of the producer or seller who wants to make a profit on the basis of race, he's beyond constitutional protection.

If it's a nonracial question, and it's a question of zoning and land-use control which may be denying a developer a reasonable return on investment, I think for the most part that is economic regulation. Our courts defer on those questions to elected bodies.

I think the important contribution that the Presidential Commission makes is that some of that regulation is way out of hand because it is imposing esthetic preferences rather than carrying out State police power. And I think an effort has to be made, perhaps from this Commission and many others, to get the States to recognize the cost such regulation has, not only to housing consumers but, as you say, to producers as well. And if it has an effect on producers, it means less housing, and less housing at affordable prices.

CHAIRMAN PENDLETON. Mr. Calmore, do you want to respond to that at all?

MR. CALMORE. Well, this may not be as directly in response to the last point made, more in response to the original question. But I think that when you look at fair housing, you are primarily looking at it as something that is fair for the victims of discrimination. You start with that premise. That's basic.

Beyond that, you look to what's fair in resolving the issue of who caused what to that victim. And then some other issues of fairness enter into the picture. And that fairness relates to the fairness of the burden of production on the defendant to rebut the prima facie case. And it has nothing so much to do with fair housing as with simple rules of evidence, and are they sufficient and are they fair?

But I think it's a mistake to see the discriminator as somehow victimized by the fact that a fair housing victim of discrimination need only prove effect to establish not an automatic victory, but merely a prima facie case subject to rebuttal.

CHAIRMAN PENDLETON. How do we resolve the conflict between economic discrimination and racial discrimination?

MR. CALMORE. I don't understand exactly what you mean by "conflict."

CHAIRMAN PENDLETON. Well, economic discrimination could be that I've got to put this unit up, and let's not get some—maybe density bonuses or something. Then it's very difficult for me to pencil this deal out so that I get a return on my investment and people are housed.

MR. CALMORE. I believe the court in *Rizzo* answers that fairly directly in the Third Circuit decision. It says: Now, the plaintiffs may come in and say that there's a disparate impact, but that developer still can show that he did not intend to discriminate, that he had a legitimate reason, as you just cite, and that there were no less discriminatory alternatives. All that that developer has to do is take race into account in the proper way, that there were no less discriminatory alternatives, and that racial animus or some illegitimate reason did not motivate the developer to do what he did.

I don't see where there's a problem with that, either in terms of your initial question of what's fair to whom or the burdens of proof. It just simply says you take into account racial impact, and you try to mitigate it.

CHAIRMAN PENDLETON. Does the rest of the panel agree with that?

MR. STEIN. I think the problems are really illustrated by the example that Professor Calmore uses. I think that if a developer goes into a project and says, "I'm putting up a project for the following economic reasons," and he has or she has no intention to discriminate, to be challenged by a suit 3 years into the project, tied to bank loans, in which somebody says, "If you had done a racial impact study 4 years ago when you first put your plan together, and a year before you got the money from the bank, he may have come to the conclusion, or somebody may have come to the conclusion, that this may have more of an impact on one group than another." Even though you didn't intend it, even though you didn't see it, you must now change that housing; you must now change your marketing, etc., etc. It's a pretty bad bind.

I think what Professor Calmore really illustrates is that what the Third Circuit decision—what *Rizzo* really suggests, but what we don't have in legislation, is that the Fair Housing Act, as administered by the Third Circuit, requires the equivalent of a racial impact study the way the Environmental Protection Act requires an environmental impact statement.

Now, there may be good reasons for doing that. Congress may sit down and hold hearings and come to that conclusion and pass such a statute. But it is not the statute that is presently in existence.

MR. CALMORE. Let me just note that I have read numerous decisions following *Rizzo,* and I've never heard a decision say that *Rizzo* required a racial impact study that's analogous to an environmental impact study.

CHAIRMAN PENDLETON. I'm sorry. Say that again, please.

MR. CALMORE. I said, I've read numerous decisions that have followed *Rizzo,* and in none of those decisions has there even been an implication that *Rizzo* required a racial impact study that's analogous to an environmental impact study.

CHAIRMAN PENDLETON. Mr. Destro, you wanted to make a comment before we adjourn.

COMMISSIONER DESTRO. I just wanted to offer Professor Hetzel an opportunity to tie up—I mentioned that I didn't think you answered my question. I believe I followed what you were saying. I guess my question is: If we are really talking about discrimination and we're calling it discrimination in the traditional sense—that's what I hear Professor Calmore saying, too—you can prove what you were doing really wasn't discriminatory—I'm talking about shifting burdens of proof back and forth. My question is: Why do we talk about that as discrimination which actually might be simply faulty social policy with respect to land use? But somebody is actually being accused of discrimination when maybe that carries a little bit more weight than an accusation that is just stupid social policy. Do you see what I mean?

MR. HETZEL. I think I understand your question at this point. I tried to address that in part of my paper by saying that I think, particularly as applicable to local government actions, what this does is provide an opportunity for the person who feels discriminated against to raise that issue on the grounds set forth in the statute, in a judicial proceeding; it gives them an opportunity to have the governmental action reviewed. At that point, as Mr. Calmore has indicated, what actually occurs is that even if there is a disparate racial impact from the action, an opportunity then is presented whether it's the government or a private individual involved as defendant, to make its response. And that response at that point, I think, gives a full due process opportunity for the defendant.

Now, what the real complaint has been, I think, is that somebody must, in fact, defend themselves in

that proceeding. I don't find that an anathema at all in a democratic society, to ask government, for instance, to explain what it's doing.

COMMISSIONER DESTRO. Thank you.

CHAIRMAN PENDLETON. I want to thank the panel.

COMMISSIONER GUESS. Mr. Chairman, I have a question prior to adjournment, please.

CHAIRMAN PENDLETON. Yes, sir.

COMMISSIONER GUESS. Mr. Chairman, this is not directed toward the panel; this is directed to the hearing.

Since it was brought up in our meeting today, and I had asked General Counsel and the Staff Director about this question earlier today—and I suspect they felt compelled to absent themselves, since they recognized this question was coming—earlier today, Mr. Chairman, it was brought out in our meeting that today's activities were the result of a motion offered by myself and seconded by Commissioner Berry as to a concept on a housing hearing.

Mr. Chairman, I spent the day frantically reviewing my notes and discovered, to my knowledge, we have never seen a project design or a concept, other than a concept that was delivered to us. And the response that I've had so far today, Mr. Chairman, is that it's the standard operating procedure, which tends to elude me in the process that I've discovered since I've been on this Commission. I would just like to get some answers as to how we got to today, sir.

CHAIRMAN PENDLETON. In the morning.

COMMISSIONER GUESS. Thank you.

CHAIRMAN PENDLETON. Thank you.

We are adjourned.

[At 6 p.m. the consultation/hearing was recessed, to reconvene at 8:45 a.m., Wednesday, November 13, 1985.]

Racial Occupancy Controls

CHAIRMAN PENDLETON. Good morning. My name is Clarence M. Pendleton, Jr., Chairman of the U.S. Commission on Civil Rights. I want to welcome you to the second day of the Commission's consultation/hearing on issues in housing discrimination.

Yesterday we heard from a number of experts on the causes of residential segregation and legal issues in housing discrimination. Today we will be hearing from other experts with regard to the use of racial occupancy controls and Federal enforcement. Following these two panels, we will hear testimony from Federal officials regarding Federal enforcement policy.

Since the agenda was printed, we have made a scheduling change. Assistant Attorney General William Bradford Reynolds will be testifying from 2:30 until 3:15. HUD General Counsel John Knapp will be testifying from 3:30 until 4:30. This change was to accommodate travel arrangements that had been previously made.

I would like to remind you that there will be an open session following the conclusion of these proceedings. Members of the public wishing to testify should sign up with the Commission staff.

If there is anyone here who is hearing impaired, please let us know by the proper method so that we can have our interpreter handle that situation, or if there is no one here, the interpreter can rest.

We are going to start with panel 3, which will address racial occupancy controls. The panelists are: Roger Starr, a member of the editorial board of the *New York Times* and former administrator and commissioner of New York City Housing and Development Administration; Rodney Smolla, associate professor of law at the University of Arkansas School of Law; Oscar Newman, president of the Institute for Community Design Analysis at Great Neck, New York; and Alexander Polikoff, an attorney and executive director of the Business and Professional People for the Public Interest in Chicago.

Good morning, gentlemen. We will ask you to briefly summarize your papers and your positions, and then we will have some questions from my colleagues.

We have Commissioner Destro, Commissioner Buckley, and Commissioner Guess just went out, so we are able to begin. Thank you very much for coming. We look forward to your testimony. Mr. Starr.

Statement of Roger Starr, Editorial Board, New York Times

MR. STARR. Mr. Chairman, when the United States Government in 1937 embarked on a low-rent publicly owned housing program, the issue of race lurked in the background. One of the problems that we had in New York City at that time—and I hasten to assure you that I was not then of mature years and part of the actual administration, although some people think I was—placed us in a peculiar position. We had a city that was very rigidly divided on racial grounds, although some would argue that it was not quite as widely divided as it is today simply because the black population was nowhere nearly as great as it is at the present time.

But the people generally who were supporting the housing program were in the forefront of the liberal spirit and believed very strongly in the advantages of nondiscrimination, and I suppose it can be said honestly that they looked forward to the day when integrated housing would be possible.

At the same time, it was unquestionably true that in the Congress of the United States some of the strongest support for publicly supported public housing programs came from the South, which at that time meant the white South. To them, the words "integration" and even "nondiscrimination" were fighting words. We hesitated to raise the issue as to how housing was not only not to discriminate but to integrate the races, because we were afraid it would weaken congressional support for a public housing program.

So the early projects in New York City were built either in white or in black neighborhoods. Without any positive policy in order to support the distinction and difference, the fact was that those projects built in black districts would normally fill up with nonwhite residents and those in the white districts would be white projects.

After the war, at the time when I became involved in housing, attitudes had greatly changed. And while we were still fearful of advancing the issue strongly in the Congress of the United States because of the nature of the support—Alabama, for example, being the State with the second largest number of publicly owned housing units after New York—we were afraid to raise the nondiscrimination issue very loudly until the sixties when the civil rights revolution made it possible to raise these issues.

Now, it is one thing to raise the issue of nondiscrimination and to enforce as best we can in publicly owned or publicly subsidized housing a nondiscriminatory policy. To go a step beyond this and to try by positive steps to create an integrated housing project—and I will leave it to my colleagues, my colleagues at the table with me, to define precisely what can be meant by an integrated housing project, how one can agree as to what that exactly is. It is much harder to achieve positive integration in a governmental or government-assisted setting than it is to adopt a plank of integration in words.

And as a housing administrator for the city of New York, I had the problem of trying to achieve the positive integration by solicitation of tenants from the group that was excluded. For example, we had middle-income housing assisted by the State and city of New York, sponsored by labor unions, in which the original co-op membership was made up of members of a labor union which at that time was almost entirely white. I might even go further and say it was almost entirely Jewish because these units were cooperatively owned, although assisted by the State. So it was the members of the union who had a tradition of cooperative ownership who were the first to buy into these projects for the nominal sum that was involved.

And once they were in, they established a pattern of a waiting list for future vacancies. The waiting list quickly filled up with the names of their relatives, their friends, or other people in the union, and you had a self-perpetuating, almost entirely—in some cases entirely—white membership, although that is not what we wanted.

Then you had the very difficult problem of figuring out how you were going to break down this pattern of segregated living once it had started. It was suggested that we establish a black waiting list, and that the black waiting list would take precedence of a sort, so that when vacancies occurred, we would take candidates from the black list, recognizing people by race, and assigning them a priority by a frankly avowed recognition of their race membership.

I find this very difficult personally to adhere to. I found this policy repulsive. I find that what I have looked forward to in housing and in the United States as a whole was a policy in which people's individual merit would be taken into account and not their membership in any particular racial or ethnic group. And I came from a tradition which believed that identifying people with a racial description was itself demeaning and not the kind of America I wanted. At the same time, one has a reality to contend with.

The program that I tried to devise for the housing development that was segregated—and I have one particular one in mind—was that we would advertise that there were vacancies or there would be vacancies, and that the policy of this housing company under State and city supervision was to be integrated and nondiscriminatory; and we would advertise in newspapers and on radio stations and by whatever other means we could for a readership that would be significantly nonwhite. And the applications that we would get in response to these advertisements would be matched by an equal

number of names from the top of the existing waiting list. All the names would be combined together and drawn out, and a new waiting list, which would be presumably interracial in its nature, would become the official waiting list.

And I feel very strongly that the waiting list situation for that kind of a segregated housing project is extremely important if we are to break down the segregated aspect that perhaps was not a result of racial prejudice, but that, at the very least, reflected the traditions of the original applicants and their desire to preserve a community.

Well, as the policies of the sixties were elaborated and the seventies came on to us, it was apparent that our program was not really enough to satisfy what was then the temper of the times. We had to take steps to see that the segregated aspect would not be present as an issue. And that led to a policy with which I find myself greatly troubled, and that is the notion that we have an integrated housing project from the beginning by identifying clearly the applicants by their race. We establish a quota system at the beginning on the theory that when the number of nonwhites reaches a specific tipping point, further applications by the nonwhites would not be honored or would be put on the waiting list in order to preserve the integration. This program was inspired by fear that if the nonwhite percentage of occupancy rose above a stipulated figure, the occupancy would tip, and the project would become a segregated project. Only those whites who suffered from complete or nearly complete immobility, usually as a result of age or economic status, would keep the project from becoming a totally segregated black project or nonwhite project.

I have great difficulty with this problem. Despite all of the desirable features that were intended to maintain the nature of an integrated housing project, the fear remains that it would become entirely segregated, and that such a change would spread to the local neighborhood. An integrated program based on excluding blacks above a stipulated percent—it was largely blacks we were talking about—is usually deemed necessary to preserve the surrounding neighborhood from turning.

It was also argued that the integrated project would help the school system by providing a mixed parental body, the whites presumably having more political experience and so on, and they would be able to assert claims against the board of education, which parents living in a black project would not be able to do.

It was also argued that integrated living—and I have no disagreement with this at all—between people of different races was very important to an understanding of each other's problems and would help to overcome even a long heritage of racial distrust and animosity, and therefore, it was very good.

With these values I have no quarrel. My quarrel as an executive charged with responsibility in this field comes down to the very simple thing that this program means: that I have to look a black family in the eye and say, "I'm sorry; you're the wrong color. We have our 35 percent" or "30 percent" or "40 percent," whatever was deemed to be the tipping point. And I argue in my paper that the tipping point varies so much that it is almost impossible to guess what a tipping point is going to be ahead of time because it depends on other amenities as well as on the racial balance.

In any case, as the government of the United States I have to turn to a black family and say, "Just because of your color and for no other reason, you are not now acceptable as a tenant."

This is exactly the pith of my disgust with American racial attitudes, the notion that people are to be treated as though their race were the single most significant fact in their lives and their relationships with those around them. And I found it personally impossible to take that position. I am not saying I resigned on account of that, but I certainly did not endeavor to accede to these policies; and actually a number of the projects involved, one being in Williamsburg, which my colleague, Professor Newman, covers in his paper, was tied up in litigation when I left the government, and so it did not have to be done.

The problem with this rockbottom attitude, that in the end you are identifying someone only by race and accepting or rejecting him solely on the basis of race, is that it seems to me it puts a government official—and I emphasize the fact of the government official—it puts the government, which should be the last intervenor on the theory that race is not the dominant characteristic that distinguishes between the values of people—it puts the government official who is the last intervenor in the position of being a partisan on precisely the wrong side.

I won't bother going into my personal history, but there was nothing new about this. I had reacted very similarly to the nature of the United States Army when I learned, through an article in the *Saturday*

Evening Post in June of 1940, that the United States Army was a segregated institution. I had no idea of that until Walter White wrote an article in the *Saturday Evening Post* and brought it to the attention of many like myself who could not easily accept that as a pattern for American living. And here we were again, with government, which I had always regarded as the impartial umpire, taking a position that race was the crucial characteristic.

So at the same time the values of an integrated project remain. And we have a problem of deciding what steps we can take to promote an integrated project without taking that fatal step of making the government take the position that racial characteristics are important. Because if we do it for a benign purpose today, there is no way I can see that we will not be put into a position where we will do it for a purpose which I might describe as malign tomorrow, but whose supporters and advocates will claim it to be benign. And this, as the phrase has so often been used, is a slippery slope on which I think there is nothing to grab onto. And actually, it is this identification that it seems to me is the worst.

So I would suggest, first of all, that we do everything in our power as government officials and as private citizens to enforce nondiscriminatory policies. We have committees in New York City on the fair housing program who go around and who solicit apartments, first for a black family and then a white family. And when the black family is told there is no vacancy and the white family in the same building is told there is an apartment, we take action. And I believe, as I look around New York City, that progress is being made.

I might also point out, as I point out in my paper, that we tend, not only in this country but it seems to me all over the industrialized world, to have indices of homogeneity as a sign of a good community. I remember being horrified when I was in college in the 1930s by a quotation from T.S. Eliot, who wrote an essay in which he said, "I think most people will agree that too many free-thinking Jews are bad for any community." I may not have the words exactly right, but that was the idea.

What he was expressing was, of course, not so much anti-Semitism, although there may have been that, but the sense that people living together may have to have some common ground of homogeneity, and if they haven't got the train of work and economic interrelationship that were characteristic of the older village economies, then they reached out for other indices of homogeneity, for the most part voluntarily. And we have in New York City, and have had, German neighborhoods, Jewish neighborhoods, Russian Jewish neighborhoods, German Jewish neighborhoods, Italian neighborhoods—and they have been very natural. And people reach out from these neighborhoods, once they have established a political base, and make common cause with the adjacent neighborhood on political issues.

I don't find anything unusual about that. But what I do want is an element of choice so that people can have the choice between living in one of these or being willing to make a certain kind of sacrifice for the purpose of achieving integration.

So I would say that what I come out with is a program largely intended to create an integrated community through the exercise of active nondiscrimination enforcement and encouragement on the positive side to racial integration.

I do feel that if it is essential in order to offer choice of at least some integrated project in a neighborhood, occupancy controls—although please don't ask me to enforce them—provided they are sharply limited in time, as one of my colleague's papers indicates, has been the policy of the Supreme Court, and that they are undertaken only for the purpose of offering a choice of an integrated development in a city that otherwise lacks them, and only for a short time, because if they do not become self-sustainingly integrated, they have accomplished nothing.

It is relatively easy, I suppose, to force racial neighboring in a prison environment, but I don't think it's significant, because it is totally involuntary and forceful. But if it is necessary, in order to achieve one or two or several integrated projects, to rely on it for a temporary period, I will understand that, if it has the blessing of the highest legislative and judicial authorities.

But I say this with the greatest reluctance. Even surrounded by the constitutional and legislative limitations that I am describing here, it seems to me I find myself up on the roof beginning to slide off.

I think we are making progress. I see a pattern emerging in the apartment house in which I live that it is interracial—not largely interracial, but there are a number of black families in this building, which would not have been the case in a similarly located building in central Manhattan 20 years ago.

Progress in this area is going to be very slow. But it will be helped most, it seems to me, by vigorous

enforcement of laws that prevent people from discriminating on the basis of race in the selection of tenants for apartment houses and purchasers for housing. It is a difficult area to work in, but not really so difficult as trying to achieve racial integration by saying to people, "You are of the wrong color. We have enough of you people already. We are not taking any more. And this we are doing, not because we hate you but because we love you." It's a statement I really can't stomach.

CHAIRMAN PENDLETON. Mr. Starr, thank you very much.

Mr. Smolla.

Statement of Rodney A. Smolla, Associate Professor, School of Law, University of Arkansas

MR. SMOLLA. Thank you, Chairman Pendleton.

I want to preface my legal analysis with three matters which I think will set it in some degree of context. They involve the terminology of integration maintenance, the politics of integration maintenance, and the philosophical underpinnings of integration maintenance.

I want to first turn to terminology. When I was a kid, like most kids when I got a box of Cracker Jacks, I was much more interested in the prize than I was in the Cracker Jacks. My favorite prize was a little ring that you'd sometimes get. It would usually have an image of a cartoon character on it, like Popeye. And you'd change it slightly and instead of seeing Popeye, you'd see Olive Oyl.

And maybe you'd really be lucky and get one with three images. You'd see Popeye, you'd see Olive Oyl, and you'd see Bluto.

It is interesting to me that the terminology of integration maintenance sometimes seems to partake of that same quality. There is a proliferation of terms, and they mean very different things to different people. Just look at how many phrases we have to examine one problem—fair housing, goals, quotas, integration maintenance, integration management, affirmative marketing, benign steering, special outreach, racial occupancy controls.

That ought to alert you to something. First, it ought to alert you to the fact that there is a great danger in this area, that gerrymandering of definitions can project outward the prescriptive analysis we will ultimately come down to. I heard Commissioner Bunzel talk about this yesterday, how a social scientist's prescriptive decisions can sometimes lead to prescriptive analysis. Well, certainly in the area of legal reality, there is that danger. How one defines a critical term like "fair housing," for example, will have a great deal to do with what one ultimately decides about a number of fair housing issues, including integration maintenance.

The second thing it ought to alert you to is a sort of anthropologist's suspicion that there must be some very deep and difficult conflicts underlying integration maintenance, conflicts that are to some degree so raw that they are too hot to handle. And so we inevitably dissemble into a whole potpourri of euphemisms.

If you look in suburban areas or in housing projects where integration maintenance is debated, you will hear the following sort of dialogue: "What we are doing is great. It is affirmative action," or "It's affirmative marketing."

"No, what you're doing is bad. It's integration maintenance."

"No, what we're doing is good. It's benign steering."

"No, what you're doing is bad. It is racial occupancy controls."

It's as if somehow the labels decided the matter. So I think the Commission needs to be alert as it addresses this issue to this danger: These labels are pliable, meaning different things to different people.

I also want to very briefly touch on the politics of integration maintenance. We waited for a few moments this morning so we could have both Democratic and Republican Commissioners on the panel to start. What is interesting about integration maintenance is that the traditional political alliances in this country do not seem to tell us much about where one will come out on the issue. There doesn't seem to be a consensus among Democrats or Republicans, or liberals or conservatives, or even among ethnic groups as to how integration maintenance ought to be handled. The traditional alliances don't seem to hold up in this area. And that leads me to the third contextual element here, the philosophical underpinnings of integration maintenance.

This Commission is always struggling to some degree with the tugging and pulling of two very different notions of equality, both of which have great pedigrees in the history of the United States.

Most Americans tend to be dominated by what I like to call process equality. You may have different names for it. But it is the simple idea that the basic purpose of the equal protection clause is to ensure that the game is fair, that the process is fair, and then

one simply lets the chips fall. At that point we all are sort of social Darwinists, believing in survival of the fittest. As long as the rules are fair, the outcomes are irrelevant, and government ought not worry about the outcomes.

I suggest that there is some of that social Darwinism in all of us, even in President Reagan, who for other reasons might not like to invoke Darwin's name, but who nonetheless adheres very strongly to this idea, that the chips ought to fall on the basis of merit and that that is the only purpose of the equal protection clause and our government policy in this area.

The competing notion of equality in American life, which also has a very strong history, might be called substantive equality or outcome equality. And it starts from the premise that it is not merely the role of government to ensure that the game is fair, but to some degree to ensure that economic benefits and other benefits throughout American institutions are shared in some way among all different groups.

This outcome-equality notion and this process-equality notion have been at large in American society since *Brown* v. *Board of Education.* And my guess is there is sort of almost a dominant gene-recessive gene tendency in all of us. Some of us are primarily process thinkers, but we always to some degree return in certain instances to outcome versions of equality, and others start from the opposite perspective.

I want to suggest to you that those two notions of equality are very critical philosophical backgrounds for the integration maintenance debate, and I want to show that to you, if I can, by contrasting the philosophical conflict that exists when one examines affirmative action with a very different philosophical conflict that exists when one looks at integration maintenance.

The members of this Commission probably have very different views as to affirmative action, as do Justices of the Supreme Court, as do Members of Congress, as does the American society at large. Some of you will take the position, because you tend to be process-equality thinkers, that government ought never intervene on the basis of race, that color is always irrelevant to merit, and therefore, it ought not ever be a factor. But even process-equality thinkers are usually willing to make some compromises in their positions.

Take, for example, preeminent process-equality thinkers like Chief Justice Burger or like Justice Powell. Both of them believe primarily in the process notion of equality, but Chief Justice Burger, for example, in the *Swann* v. *Charlotte-Mecklenburg* case, said that when presented with a loaded game board, a Federal district court is empowered to use a whole plethora of race-conscious remedies to correct the prior skewing of the process, to make the game—the game of life for those children—equal from now on.

In affirmative action the conflict is whether or not one is willing to say that members of a majority race may be made to suffer some disadvantages in order to give other advantages to members of a minority race. Now, if you are a process-equality thinker, your going-in position on affirmative action usually tends to be moderately hostile to it, because it doesn't seem reconcilable with your basic process notion. You say, "No, that's outcome thinking and I don't think that way."

But even some process-equality thinkers will at times say affirmative action is okay. If you can show that that there is a loaded game board, and if you can show some linkage between the particular preference device going on here and some past discrimination, it's okay.

Integration maintenance takes this matter one philosophical step further and presents a much deeper and sharper conflict. For integration maintenance forces us to ask not whether in some situations a majority group member may be made to suffer disadvantages so as to provide a classwide remedy to blacks or other minority groups that have suffered discrimination, but rather it asks us whether individual members of that minority group that have, as a class in the past, suffered discrimination, may be made to bear the social cost, whatever it is in the particular integration maintenance plan, of the altruistic goal of integration.

So I want to look at that philosophical conflict: Whether you can force, to put it in stark terms, a black person to bear the social cost of the benign goal of integration in a specific instance. And I want to look at the legal context briefly by touching on five areas.

I want to look at the ends and the means utilized. Those are areas 1 and 2 under the constitutional equal protection analysis. I want to look at Title VIII and the affirmative enforcement of Title VIII issues. And I want to look at the continuum of different types of integration maintenance plans. There are as many as the imagination can come up

with. We have seen it in the papers, and you can see it in other literature, plans that haven't even been discussed in some of the presentations. And I want to look at where on that continuum a constitutional violation or a Title VIII violation is triggered.

Let me first begin with the constitutional analysis.

Yesterday the Commission discussed the intent versus effect standard under Title VIII. Of course, we know that intent is required to create a constitutional violation. It is safe to say that for the most part, that issue is irrelevant to the integration maintenance debate. Whatever your view on *Washington* v. *Davis* and on the intent versus effects debate, most integration maintenance plans are explicitly or implicitly race conscious, so the 14th amendment is at least triggered as well as Title VIII. The issue then is: Can the governmental entity or can the private developer justify a plan under the substantive standards that apply?

All equal protection constitutional analysis involves an assessment of the governmental objectives and an assessment of the means utilized. Every second-year law student can tell you that. No second-year law student can tell you the proper test to be applied to affirmative action because no one really knows. The Supreme Court has never made it clear precisely what equal protection test ought to apply. We know that the Justices are split. There are a block of Justices that apply so-called intermediate scrutiny to affirmative action plans; we know there are Justices that apply strict scrutiny, and we know there are Justices that have announced they won't tell us.

We do know that all lower courts that ever deal with this issue tend to apply strict scrutiny. I think they tend to apply strict scrutiny on the theory that one is better safe than sorry, and if the Supreme Court wants to prescribe the lower level scrutiny, it can ultimately grant review in these cases. Whatever the level of scrutiny, however, I suggest to you that both on the ends side and on the means side of constitutional analysis, integration maintenance will fail.

Now, most of the lawyers that deal with this area and most of the judges that deal with this area do not want to talk to you about the ends. They don't want to talk to you about the ends because the ends analysis is just too hard, and it poses conflicts that are just too sharp. So you see district court opinions frequently say, "Assuming, *arguendo,* that the ends are legitimate, that integration is the end and that's okay, I'm going to strike this plan down; I'm going to hold this plan unconstitutional because of my means analysis."

I think it's incumbent on you, though, to take the risk and look at the ends. It is easy to say, "Well, of course, the end of all integration maintenance plans must be compelling. You have to be a racist to say that integration is not a compelling national goal." The problem, of course, is that it depends on how one defines integration.

If you look at the sorts of plans that have proliferated, you see a number of different analytic models by which communities or housing projects try to determine the ideal racial composition for that particular area. The most common is what has often been called a mirror sort of approach.

If you look at a general demographic map, if you look at Chicago, for example, you see the number of blacks that live in Chicago, in the entire metropolitan area. And then you say, "The ideal racial balance in any housing project or in any community in the Chicago metropolitan area would reflect that balance," that that is what fair housing would be. So if your balance is 20 percent black and 80 percent white in the entire area, that ought to be your balance for University Park or for Cleveland Heights or for Oak Park. Or it ought to be your balance for Starrett City.

Sometimes one sees the ideal level of integration maintenance looked at in some more fluid terms. You try to determine empirically what the tipping point will be, and you set the integration maintenance level at that point. Sometimes there is just an arbitrary number picked out, 40 percent black and 60 percent white, or as HUD appears to do, 50 percent black and 50 percent white.

I am worried about the implications of all of those ends. Let's take the simple idea of a mirror quota. Why is it that a community says, "Our ideal racial composition is 20 percent black and 80 percent white"? What does the word "fair housing" mean if a community says that?

Well, it can have a number of different meanings. Maybe by "fair" those community leaders mean, "We are outcome-equality thinkers. Our belief is in a shared culture; our belief is an evenly dispersed ethnic culture; and therefore, it is good for its own sake for this community to be 80 percent white and 20 percent black." That's one nominee.

A second nominee is that there is somehow some fairness in not burdening this community with more

than a 20 percent black population. Its a very different use of the word "fair." Chairman Pendleton talked yesterday about fair housing, "Fair to whom?"

This second belief is very dangerous because it leads to the idea that somehow blacks are a sort of class of Typhoid Mary carriers of social ills, that clusterings of blacks, that large concentrations of blacks, are automatically evil. And that worries me. For indeed, if the third possible nominee is that we want to prevent the deterioration of a community in some palpable way—we want good schools; we want good community services; we want good police, fire, and sanitation services—you then have to ask, "Why don't you operate directly in those terms? Why are you using race as the surrogate for bad schools or bad community services?"

Notice that when a community engages in integration maintenance, when it tells a district judge, for example, what its goals are, it is on the horns of a constitutional dilemma. If it chooses goal number one, "We want a shared culture for its own sake," it runs smack into the consensus in *Bakke* and *Fullilove* v. *Klutznick,* the two great constitutional affirmative action cases, that racial preferences for their own sake, for no other reason, are always unconstitutional. The government may never be a pure outcome-equality thinker, at least with regard to race.

If they choose one of the other formulations, "Well, blacks in concentrations are a burden, a social cost, and we choose only to have our fair share, or they tend to bring with them in large concentrations other social ills," they fall into trouble on the means side of the analysis, to which I will now turn.

The means side of the analysis proceeds this way: Even if you are willing to postulate—and as you can see I am not—that the goal of integration is a compelling governmental interest and that what these communities or projects mean by "integration" satisfies that test, you then have to ask, "Can an individual member of the community be made to bear the social cost purely because his race is of a color no longer thought desirable in that community?"

And rather than duplicate the passionate remarks of Mr. Starr, I will simply say it worries me to tell a member of a class that has been historically disadvantaged: "We understand that throughout American history private and public actors have combined to discriminate against you in housing, but now, because of some altruistic vision we have of ideal racial balance, we are going to discriminate again; but it's nothing personal—it's nothing personal; it's nothing individuated. But the number of persons with the color of your skin has reached its limit. We have our fair share now."

I find that very troubling on the means side.

If you look to those Justices on the Supreme Court that have been the most permissive with regard to the use of race-conscious devices, if you look to the Brennan group in *Bakke,* for example, you will see that all of them repeatedly say, "We are not dealing with a racial control that operates as a ceiling." And that to me is the tipoff that you cannot possibly survive the means side of this constitutional analysis, because you are asking members of minority groups to bear the social cost.

There's a secondary debate I want to very briefly touch on, which is whether or not integration maintenance plans are in effect acquiescence to white prejudice. I think they are, but I want to be very careful about what I mean by that. I don't meen to imply that Mr. Polikoff or Mr. Newman are in any sense acquiscers in white prejudice or that any of the social planners that deal in this area are themselves harborers of any racial animus, nor do I mean to imply that on any kind of conscious level the communities or the projects that they defend are.

But think about it: Why do you need racial occupancy controls? Because if you don't have them, whites will leave and they will not return.

Well, I've got the solution. When we reach 20 percent black population, let's have a rule: No whites can get out—unless you have a doctor's certificate, "I've got to go for health," or "I'm being transferred." But if your reason for leaving is racial, no, you can't do that.

That seems to make everybody's skin crawl just to think of that possibility. Yet, we don't seem to have any trouble making members of minority group races the fungible pawns in what amounts to the same sort of thing, "You can't come in because we are afraid that with your increased entry whites will leave."

Very briefly, Title VIII and the affirmative enforcement of the act. I can combine this with my very last point, which speaks to the range of integration maintenance plans and the kinds of things that I think are permissible and that are not.

I confess my own ideological bias in my paper, that I tend to be to some degree a very strong outcome-equality thinker and I endorse affirmative

action for the most part, but I vigorously oppose integration maintenance. I believe very deeply in HUD's affirmative duties to affirmatively enforce Title VIII, but I disagree with integration maintenance. I think that affirmative duties under Title VIII are what I would like to call racial jawboning. The point is that if you simply return to absolute color blindness in the housing market, you will not open up communities. You need to go farther than that. You need to encourage members of groups that have been discriminated against to enter. And you need to make the message very clear that we will not tolerate at all any public or private discrimination against them.

That is what I think the affirmative marketing principle in Title VIII means, and that is perfectly permissible under the Constitution. But when one goes beyond that, even subtly beyond that, to counseling those who want to enter to go look elsewhere, to steer them to go look elsewhere, or to have some more rigid system that forces them to go live elsewhere, you've gone beyond affirmative enforcement and into the area of prohibited action, both under the Constitution if it's a public actor and under Title VIII if it's a private actor.

CHAIRMAN PENDLETON. Thank you.

It's quite a morning.

Mr. Newman.

Statement of Oscar Newman, President, Institute for Community Design Analysis, Great Neck, New York

MR. NEWMAN. Thank you, Chairman Pendleton.

I find myself in a peculiar quandary. I find myself agreeing very firmly and adamantly with the previous two speakers, even though I feel that neither of them have addressed anything of substance in the real problems that our society faces, and as a consequence they contribute to the accomplishment of absolutely nothing. Yet, I still feel emotionally, intellectually, and morally drawn to everything they have said; and I'm sure that, given a little time, Mr. Smolla will find still another label for my peculiar position, and it will no doubt be appropriate.

Let me present my argument, which will probably make me appear like a racist, although I have been working for integration and black equality all of my adult life. I will read my summary quickly because it covers a lot of ground, and I'm not sure that I can do that without that kind of structure.

Title VIII legislators had as their goal the removal of those discriminative barriers that kept black families locked in their ghettos. They anticipated that, absent these restrictive covenants, some of them government-imposed, blacks would be able to compete equally with whites for housing, that integration would follow as a direct consequence of nondiscrimination, that the restrictive and incapacitating ghettos would dissolve, and that blacks would not only find new housing but new educational, employment, and social opportunities, and that the races would enjoy the benefits of mutual association. Any reading of the legislative history of Title VIII brings all these points out rather strongly.

However, the implementation proved problematic. Blacks were not able to avail themselves of the advantages of Title VIII in an evenly dispersed pattern throughout the fabric of white society. Instead, they concentrated their moves to those areas most open to them: residential communities whose prices they could afford and which were often located adjacent to black ghettos, and assisted housing that provided rent subsidies which covered costs above 25 percent of a family's income.

The sought-after integration proved short lived. Pent-up black demand was so great that it overwhelmed the communities most open to them. Whites, who had more housing options available, móved away. A pattern of resegregation followed. Other white communities found ways to resist black influx, including use of the Mrs. Murphy exemption to Title VIII. The feared-for consequences materialized: The ghettos expanded; integration remained elusive; the stably integrated communities became the anomaly.

And there was another totally unanticipated consequence that resulted. As assisted housing became all black, funds for assisted housing eroded as they did for vouchers that allowed blacks to enter white communities. And we have produced in our society what is similar only to what we have in South Africa, and, that is, we have apartheid housing. And, of course, when you have a government in place that does not feel itself as having been elected by a black community, funds for such housing programs, apartheid housing programs, disappear.

Communities and housing agencies wedded to the concept of integration found themselves on the defensive. The regulations that were promulgated by Title VIII had no specific stipulations requiring the creation and maintenance of integrated communities, only those that ensured nondiscrimination.

Many integrated communities and housing agencies threatened by these changes argued in court that integration was an equal if not greater intent of Title VIII. They claimed that the requirement to integrate does not appear in the regulations, because the legislators expected integration to follow naturally from nondiscrimination.

Strangely, the ensuing court decisions that tried to resolve the conflict between integration and nondiscrimination often did so in an isolated framework: absent a sense of history, in apparent disregard of the prevailing socioeconomic differences between blacks and whites, and unconcerned about the geographical patterns of residential occupancy or the history of neighborhood change. It is as if the very reasons that prompted the passage of Title VIII were no longer in existence or of consequence. The courts found either for integration or for nondiscrimination, responding to the nuance of local circumstance. And regardless of which way they found, they qualified their findings with caveats. The substantive issues were not addressed, the unforeseen conflict between integration and nondiscrimination not resolved. Many of the court remedies, if implemented to the letter, would have produced greater inequities than the court hoped to redress. Not surprisingly, implementation did not always follow court rulings.

I should say that one of the things I did prior to coming here was to call up the various housing agencies and communities that were subject to court orders on integration and that appeared in my paper and in Mr. Smolla's paper and other papers, and found, much to my surprise, that a lot of communities were not implementing the court orders to the letter as directed, or were implementing only parts of them, and those that were implementing court orders were suffering rather devastating effects. That is to say, the consequences of implementing the court order were sometimes producing very high vacancy rates in housing developments, were subjecting people to trauma that often resulted in deaths, particularly when the elderly were forcibly moved out of housing and had nowhere else to go and would not accept the court's decision as to where they should move.

So that when we evaluate court decisions and debate their merits or demerits, or get into the nuances and subtleties of whether they address the very questions and philosophies that Mr. Smolla suggested, you must also look very carefully at whether these court decisions are really implementable, whether people really accept them or not.

In the *Williamsburg* court case, the judge said, "You cannot force a community to adopt a pattern that it will not accept." And he is right. In that case, it was a consent decree. But even in the case of Williamsburg, they were not able to live up to the letter of the decree.

There are really two questions that emerge from past experience: Given the conflict between integration and nondiscrimination, is integration all that important a goal?

I would conclude from Mr. Smolla's argument that integration was not at all an important goal. I conclude that because nothing in what Mr. Smolla has presented will ever create or maintain integration. To accept Mr. Smolla's arguments—and I agree with them morally—is to kiss goodby the notion of integration. It cannot be accomplished that way.

Now we have to ask ourselves: Is integration an important goal? For blacks? For whites? For American society in general? And if it is all that important, how is it best achieved and in a way with a minimal burden on those freed from discrimination?

We live in a strange society in America, one in which it is possible for new Asians and white Hispanic immigrants to advance more rapidly in a decade than native black Americans are able to advance in two generations. It is possible for white Hispanics and Asians to become better integrated into the entire fabric of American society, including the residential patterns, than it is for black Americans.

It is clear that the burden of past slavery, not carried by our new immigrants, is still borne by black Americans. A brief examination of the socioeconomic figures reveals significant differences today between black and white societies, and we see them being aggravated instead of being lessened with time, differences that cannot be dismissed if we are seeking a remedy.

Blacks may form only 11.7 percent of our society, but they form a perceptibly lower income group. Blacks earn 56 percent of what whites earn. Virtually half the black households are headed by females. Fifty-five percent of black babies are born to unmarried mothers. In metropolitan areas, 83 percent of blacks live in the inner core of cities, in contrast to only 42 percent of whites. Blacks live in communities deficient in housing quality and city

services. Children in predominantly black schools perform less well than children in predominantly white schools. There is significantly more crime in black neighborhoods than in white. Property values in black communities do not rise as quickly as they do in white communities. And in many areas, as I said earlier, there has been a decline in these circumstances rather than an improvement.

As to the benefits of integration, an ongoing 15-year study in Hartford, tracking thousands of black children, found that children educated in an integrated society were more likely to graduate from high school, were more likely to attend predominantly white colleges and complete 4 years of college. These black children perceived less discrimination in colleges and in other areas of adult life. They were involved in fewer instances with the police and got into fewer fights as adults. They had closer and more frequent social contact with the whites as adults. They were more likely to live in desegregated neighborhoods, and they had more friends in college. Women in that group were less likely to have a child before the age of 18.

Regarding benefits of integration to whites, studies have shown that interracial contacts not only erode black fears, but white myths about blacks and black performance, and they enable both races to come to appreciate and benefit from mutual contact.

White fears that black presence in communities in high percentages will increase crime, reduce performance in schools, and lower proper values have substance. In controlled percentages these effects do not occur. In an environment of opportunity and one that is created, the antagonism born of the "us-them" syndrome does not materialize.

Integration appears to be one of the quickest and surest ways out of our current quandary.

What, then, does it take to maintain an integrated community? The research of social scientists has found that white willingness to live with blacks is a slope that declines steadily with increases in the percent of blacks. Only 30 percent of whites expressed a willingness to live in communities that are as much as 25 percent black. By contrast, however, most blacks say they would be willing to live in communities that range anywhere from 15 percent to 85 percent white. This does give us an area in which we can create integrated communities that remain stable over time.

The combination of black and white willingness to live together showed that the easiest form of integration to maintain naturally is at 22 percent black. The experience of most housing developments and communities is that beyond 15 to 20 percent black, there is a marked increase in the rate of black occupancy. This is called the tipping point. Its most crucial measure is whites' unwillingness to continue to replace those whites who are moving out. The 5 to 15 percent residue of whites who are most often found in projects that have tipped usually prove to be poor white elderly who have no other options available to them.

In sum, therefore, tipping is a factor both of pent-up black demand and white disinterest. If a neighborhood or housing development that is open to blacks is affordable or subsidized and is also close to existing black communities, it will be overwhelmed with black applicants, causing tipping.

Also, if a neighborhood or development begins to lose its middle-class ambiance in terms of quality of schools, commercial and public amenities, and low crime rates, whites will begin to abandon it.

White prejudice is still another factor in the equation, and all three work together to cause tipping. White fears that tipping is inevitable can cause whites' flight with the moving in of just one black family. Quotas limiting black entry at a high but acceptable percentage, 22 percent, which is twice the percentage of blacks in our society, can serve to reduce fears generated by uncertainty about the future.

In other words, quotas can serve to create stable integration by predicting the future. The biggest problem we have is whites' fears about what the future will bring. A quota at a higher percentage than most whites would find acceptable actually keeps whites from fleeing.

However, integration maintenance, such as will be described by Al Polikoff, which is a technique I strongly advocate, has a lower percent limit because it cannot guarantee the future. Within its recognized limitations, it is an excellent program. But if you want to go beyond 15 percent black, other mechanisms are required.

Because others have discussed court cases at length, I will limit myself to comment. *Shannon, Otero,* and *Williamsburg* all recognize the obligation to integrate as equal to if not a greater obligation than the one not to discriminate. They accept that individuals of a race may be declined housing to further the greater societal goal of integration.

These courts, however, have placed a burden upon those using race-conscious selection criteria. That burden is that they demonstrate that tipping will otherwise surely occur.

The *Williamsburg* consent decree is important for two additional recognitions. First, it chooses to spread minority applicants evenly through six housing projects rather than concentrate them in one project so as to avoid the tipping of the entire area. Second, it recognizes that it is impossible to impose a solution on a community that is not one of its own design.

In *Burney* v. *Beaver,* the court rejects the previous decisions, finding in favor of an individual's right to nondiscrimination over the societal goal of integration. The *Burney* court, however, did not choose to resolve the conflict between integration and nondiscrimination, and instead found that the defendant's failure to meet its burden of proof on tipping sufficient, in and of itself, to establish a violation of plaintiff's rights under the equal protection clause of the 14th amendment.

I explored the outcome of these decisions and found that many communities were simply not implementing them. Those that were implementing them often suffered very severe consequences, consequences so severe that if they were brought to the attention of the court, I have no doubt the court would be appalled and would seriously reconsider its decision.

HUD's own views and regulations suffer confusion from a duality of intent to both integrate and not to discriminate; that is, to serve the residents of a community equally on the basis of race while not producing the instability and economic loss resulting from tipping. HUD's support for integration versus nondiscrimination has varied from administration to administration, depending on the overall commitment to housing subsidy programs and the urban communities.

In an era (as we have now) of no new housing, the sentiment of the Equal Rights Division of HUD takes over. In an era of new housing construction, the forces concerned with stability, the soundness of investment, push for integration maintenance.

Looking at HUD's many activities, regulations, interpretations, and proposed regulations, there is no question that HUD views integration as one of its very important mandates. In its proposed site-selection criteria and in its 50–50 reorganizations of segregated housing authorities, HUD has used race-conscious controls to integrate communities—and proposes to continue to do so. In other instances, HUD has shown a preference to support all forms of affirmative marketing techniques just short of those that use quotas to maintain integration.

What HUD will do when these communities tip is open to question. HUD is currently reluctant to resolve the conflict between integration and nondiscrimination, preferring to walk the tightrope and hope that things will somehow work out.

In both HUD's actions and in courts' decisions, there seems an unwillingness to recognize the full extent of the problem, and there is an insensitivity to the consequences of proposed remedies.

There may be an answer in this dilemma that both addresses the needs of all parties and meets courts' concerns. As blacks form only 11.7 percent of our Nation's population, and as white tolerance levels under assurances of a commitment to stability are at about 22 percent black, black populations can be accommodated if integration is dispersed evenly throughout white society. There are some problems created by black concentration, but the slack between 11.7 percent and 22 percent white willingness and variations in black interest in integration can readily take up these differences.

Since the most telling measure of tipping is whites' refusal to replace themselves in communities that have become too black, instead of using a fixed percentage quota, an expanding limit, which is responsive to white reaction, can be used instead. Thus, all the variables affecting tipping that Roger Starr recognized can be allowed to enter the equation, including black and white growth and acclimatization. The percentage of blacks can be allowed to continue to increase incrementally as long as white demand persists. As white demand dwindles, the existing percentages can be held in place for a while and begin to be increased again when it is felt warranted. Or as Smolla has suggested, we can use the technique of simply preventing whites from moving out, which I don't think is very nice, but perhaps just.

Such a practice should be applied openly so as to allow the community to benefit from a higher percentage of integration that comes with a commitment to maintaining stability, an interest of both black and white residents.

The above system addresses most of the expressed courts' concern about strict scrutiny, narrow tailoring, and temporary use. This practice has, admitted-

ly, an element of stigma in it, but I know nothing in any race relations that is not stigmatizing, including Title VIII itself which speaks to and recognizes the stigma, and is a stigma.

The opportunities provided the races through contacts of integration have been shown to be too beneficial to dismiss integration as a goal because it is claimed to erode black political power base or it's thought to be stigmatizing. Too many black politicians have been elected in communities in which blacks are minorities to belie that argument, and a far greater racial stigma and deprivation have been shown to result when programs are put in place that force communities of people into doing things they don't want to do and when government withdraws from the support of housing for minority groups.

In the end, it comes down to a political decision. If the white majority overwhelmingly feels that it best serves its and American society's greater purpose to keep blacks as a separate, nether class for as long as possible, this can be best accomplished by recognizing only the nondiscrimination intent to Title VIII. If, on the other hand, white society sees it necessary for its own and the general good to intervene and accelerate black entry into the American mainstream as true equals, the integration intent of Title VIII must be given a greater priority when it comes into conflict with nondiscrimination.

CHAIRMAN PENDLETON. Thank you, Mr. Newman.

Mr. Polikoff.

Statement of Alexander Polikoff, Executive Director, Business and Professional People for the Public Interest, Chicago, Illinois

MR. POLIKOFF. Thank you, Mr. Chairman.

I was advised that the oral presentation should be a summary of the major points of one's paper or of other points that I might wish to make.

CHAIRMAN PENDLETON. Please be advised that I don't think that any hearing or consultation has ever been a real summary. There's always been a way to discuss things that are not discussed in the papers. We have been lenient in that respect so please be so guided.

MR. POLIKOFF. I was going on to say that I was going to do rather less of summarizing my paper and rather more of making some other points because I have been so stimulated by the discussion of yesterday and this morning.

COMMISSIONER BERRY. Oh, good.

MR. POLIKOFF. And also, of course, you can read my paper.

CHAIRMAN PENDLETON. Something new is always refreshing.

MR. POLIKOFF. I'm going to try to succinctly make seven points.

The first point has to do with the nature of our subject matter. We are here in this consultation/hearing; you've told us to discuss issues in housing discrimination. This is not the problem of the so-called underclass. We can't look to the solution to housing discrimination to solve the problem of the so-called underclass any more than we can look to it to solve the problem of arms control or any of the other major problems that face our society.

There was also mention yesterday of the separate problem of inadequate housing supply for low-income people. I want to suggest, as part of my first point, that we can't expect the issue of inadequate housing supply for low-income people seriously to be solved, even should we solve the problem of discrimination. There's a little overlap there. I would hope that once we got rid of housing discrimination, there would be an opening up in the housing supply, but not all that much for the low-income people whose shelter problems are the greatest in our society.

So we have a limited—not less important but limited—focus for this hearing. And in my view, at least, the problem of the underclass, if the Commission wishes to discuss that problem, merits a separate consultation.

The second point: Why are we so concerned with the issue of housing discrimination? It may seem like a silly question to ask when we all really know the answer, but I think, at least as a predicate for some of the other things I want to say, I would like to state succinctly my understanding as to why housing discrimination concerns us. And it relates to something Professor Smolla said.

My answer is a twofold one. We are concerned about housing discrimination for fairness reasons, and we are concerned about it because we think if we deal successfully with the issue of housing discrimination, it will help our society move in the direction of racial desegregation.

The first of those two concerns is what I think Professor Smolla refers to when he first talks about our procedural interest. That is a vital one. So long as we have discrimination on racial grounds in the

housing market, an important part of the American population is being treated unfairly. And on process grounds and on procedural grounds, we need to eradicate such unfair treatment. And that, standing alone, is reason enough to be vitally concerned with the issues of housing discrimination.

But the second reason, more akin to what Professor Smolla calls substantive outcome-oriented thinking, is also in my view a reason to be concerned. I think we have a felt need, widely shared in our society, to move toward better residential patterns than we now possess. I think we have a felt, shared understanding of the undesirability of the intense spatial separation along racial and other lines that now characterizes residential patterns in the United States.

And I think for the reasons I set out in my paper, some of them at least—and I won't repeat those here—that all of us feel good about moving in the direction of less segregation, more desegregation in our racial patterns of this society. We think it would be good for the American experience if we could accomplish that, provided of course we do it in a nondiscriminatory, fair way. And I accept that proviso. But we have, in my view, those two reasons for being concerned about the issue of this consultation.

My third point: What do we mean by housing desegregation? It's a tough definitional question, not easy for any of us to answer. Indeed, we shouldn't expect a full—to coin a phrase—"Websterian lexicographic" definition that all can agree on. It's a question of process. We're in an experimental stage in history. American society, as I indicate in my paper, is perhaps further along than any other major society in the world in attempting to grapple with the issue of what do we mean by living together in peace and harmony in a desegregated way?

But we don't mean, in my opinion at least, the salt and pepper, numerically precise, distribution of different elements—racial, cultural, ethnic—in our society. I reject that as an appropriate definition of housing desegregation.

What I think we should mean—and I state this deferentially and in the sense of conducing to dialogue—I think we mean something like true freedom of informed choice by all members of our population, free of the constraints of an institutionalized dual housing market, to choose where they wish to live.

That includes, in my view, white neighborhoods for whites—and I'll speak for simplicity throughout here as if we had a black-white problem, though what I say with respect to blacks and whites can be said with respect to whites and Hispanics and blacks and Asians, etc.

That includes, in my view, white neighborhoods for whites who prefer, as a matter of choice, to live in predominantly white neighborhoods. That includes, in my view, predominantly black neighborhoods for blacks who choose to live in such neighborhoods. It also includes long term integrated neighborhoods for both whites and blacks who choose to live in such neighborhoods.

I would observe that in American society today we have a lot of choice for the first two groups. Whites can find white neighborhoods all over the country. Blacks can find black neighborhoods all over the country. But those of the populace, white and black alike, who would like to live in a neighborhood whose desegregated status will persist over time, call it what you will, have a difficult time finding neighborhoods to choose to live in, because they don't exist in large numbers in our society.

I suggest that what we are about—and as a part of the second reason why I stated we are legitimately concerned with the issue of housing discrimination—is fostering more of such communities, such long term, stably biracial communities, so that we can thereby enhance the housing choices of the members of our population who want to live in such neighborhoods and don't find them existing today.

By the way, parenthetically, as a subset of my third point, a number of the speakers yesterday and a couple this morning have focused in their remarks on subsidized or assisted housing, governmentally provided housing. That is a subset of our larger problem. It's an important subset.

But we ought, as a matter of clarity of communication, to understand that there are obvious major differences between the private real estate market in all of its aspects—the real estate industry, the financing industry, etc., etc.—which is the market the vast bulk of our population goes to and through to acquire shelter, on the one hand, and the relatively tiny—it's important and we should talk about it—segment of the totality of the shelter question that is provided by government-assisted housing. And I note that not to dwell on different troublesome questions that arise in one section versus the other, but simply to point out that we

ought to be aware when we're talking about subsidized housing, and we ought to be aware when we're talking about the private market, because the issues vary considerably.

My fourth point: Why is housing desegregation, in the sense in which I have just described it, an expansion of choice, the fostering of the opportunity to move into desegregated neighborhoods for those who choose to do so—why is that? Again, I refer you to my paper on that, which I won't summmarize. I want to say here that I assert an admittedly subjective value when I express the importance of that. I think that an expansion of choice alone is a legitimate justification for viewing housing desegregation as important.

But I think the concerns about increasing strains of separatism—not only racial, but cultural, language—ultimately producing divisiveness in American society will be increasingly—as we move closer to the end of the century, as our minority population grows in this country—an important justification for the American experiment, so to speak, to address in a serious and positive and nurturing way the need to create persisting models of racially harmonious communities in our society as examples of what can be done in this area.

My fifth point: What is it that prevents us from having what I say is desirable for us to have, long term desegregated neighborhoods? We heard yesterday a discussion of a number of factors. Discrimination was one of them. Economics was another. Self-selection or individual choice was a third. A couple of the speakers said it's a mistake to talk about any one factor—the three I mentioned; there are others—as being dominant or conclusive, that we have a complex housing market operating out there, and it's the interaction of these various factors that determines housing choices among hundreds of thousands of persons per year in America, a very mobile society.

If you believe, as I do, that discrimination, racial discrimination, institutionalized discrimination, particularly in the real estate market, is a major persisting factor in preventing us from fostering long term desegregated communities, you don't need to get the answers to those tough questions that were posed yesterday about how much of the cause is attributable to choice, how much to income or other aspects of economics, and how much to discrimination, and how much to what combinations of those.

I say let's work on and get rid of discrimination. That is, let's work on and get rid of the racially dual housing market. And then we'll learn a lot about causation that we don't know now. Maybe it will turn out that getting rid of discrimination won't conduce to the result I think it will conduce to, because of economics or self-choice or self-selection. Maybe it will turn out the reverse. Let's get rid of discrimination, which is what we can control to a higher degree than we can control choice or economics, and find out.

And since, I would hope, we want to get rid of housing discrimination on the procedural ground that I mentioned anyway, an important objective, we wouldn't be wasting our time if we focused on discrimination and let the academics fight about how important economics or choice was in the equation, because even if housing segregation survived the elimination of housing discrimination, we would have achieved one of our important goals, getting rid of discrimination.

My sixth point: What to do about getting rid of housing discrimination? That's the question Chairman Pendleton asked some of the panelists yesterday: "What are your recommendations?"

This is a complex subject that again could merit at least a separate miniconsultation. I'll make a brief response to the Chairman's question, again in the spirit of stimulating further dialogue, not in the spirit of suggesting a definitive answer.

There are two parts to my recommendation. One is to beef up Federal enforcement. There are a lot of different suggestions for that. Probably any one of them would be better than doing nothing. My second suggestion has to do with my felt belief that however much we beefed up Federal enforcement, it wouldn't be enough. At least it wouldn't be enough in the foreseeable future, given the scarcity of Federal resources and the need for them to cover so many areas.

So my chief suggestion is to beef up private enforcement. In the long run, in my personal view, though Federal enforcement beefed up is very important, we have hundreds, maybe thousands of people out there who would, with the right incentive structure, become private enforcers of the public policy behind the fair housing law.

For example, we ought to increase the level of punitive damages.

For example, we ought to have generous attorney's fees given to provide an incentive for attorneys to take housing discrimination cases.

For example, we ought to have more money to foster testing by private groups on the lines of HUD's suggested program.

A final example. We ought to have a focus on what I call transition specialists in the real estate industry, many of whom, as I have described and gave an example of in my paper, focus on areas that are ripe for or just beginning rapid racial transition, and specialize in getting listings from sellers in such areas, and they specialize on prospecting for buyers among minorities exclusively or largely exclusively.

So with obvious inevitableness, given that pattern of doing business, they direct large numbers of solicited minority buyers into areas that are beginning or ripe for racial transition. And we need to make clear that that's a violation of law to do business that way; and if it isn't a violation of law, the law should be amended in that respect to make it easier for those private attorneys general out there who could become a major enforcement device to do the job.

Parenthetically, a footnote here, there was an interesting interchange yesterday between Commissioners Ramirez and Berry on the one hand and Professor Muth on the other. I read, as the two Commissioners did, Professor Muth to be saying that if you have an economic motivation to do business in a way that it amounts to discrimination, that's sort of tough—it may even not be discrimination. And you both properly got Professor Muth to acknowledge—properly in my view at least—that the motive of making more money on the part of a real estate broker, the nonracial motive, if you will, of making more money, and the motive on the part of a customer to discriminate are neither of them justifications for discriminatory conduct on the part of the realtor.

My seventh and final point. Here I make some references to Professor Smolla's remarks today and in his paper.

Apart from antidiscrimination, we are—it's implicit in my paper, and I'll make it explicit here now orally—legitimately also about the business of directly fostering the third kind of community to enhance choice, the long term desegregated community. There are techniques discussed in my paper, experimental, just being begun. This is a whole new area—it doesn't date back more than 25 years, and most of it doesn't date back more than 10 years—where communities who responded positively to the 1968 Fair Housing Act opened their doors, figuratively speaking, to minorities, treated the Fair Housing Act as an act to be followed, not subverted. A whole bunch of those communities—a whole bunch meaning 25 of the thousands in America—have begun to face the problem of resegregation and begun to experiment with nonchoice-limiting ways to foster and maintain the racial diversity they have achieved. And we need to consider how to help those communities, not to burden them with lexiographic confusion and not to question the legitimacy of those efforts.

I'm a little bothered that, having spent the whole of my paper making a plea for lexiographic clarity, if you will, Professor Smolla this morning talked, with the exception of a single sentence that I noted, exclusively about integration maintenance without defining that term for you, but implicitly using his definition of that term which is "quota," which is "denial of tangible benefits," which is telling somebody that because of his skin color, "You can't have this house or apartment," or "You are going to be delayed in getting this house or apartment."

I do not believe it aids our dialogue here for us to use that terminology, i.e., integration maintenance meaning quota, to also describe affirmative marketing, equity assurance, housing counseling, and the other techniques that are being experimented with, although affirmative marketing has a long history, that do not involve the restriction of choice, the choice limitation, that a quota does.

The second part of my seventh point—I don't want to go to eight points so this is a subpart.

CHAIRMAN PENDLETON. 7(a) or 7(c)?

MR. POLIKOFF. No, it's 7(b). And that's my last point, and then I'll conclude, and it's labeled "Conclusion" and not labeled "Point 8."

The legitimacy of direct fostering, if you will, of the belief in long term biracial communities, I find in one of our Supreme Court cases, quite explicitly. That's the *Gladstone Realtors* v. *Bellwood* case in which Justice Powell wrote the opinion.

Briefly, in the *Gladstone* case—Bellwood, by the way, is a western suburb of Chicago—the subject matter of the case was a little neighborhood inside of Bellwood, an integrated neighborhood. The court described the target neighborhood, as it was called in the case, as "an integrated area of Bellwood."

Now, four white people living in that integrated neighborhood of Bellwood were the individuals who were found to have standing by the court in that case. *Gladstone* was a case about who had a

right to sue. And the court said those four individuals living in the integrated neighborhood had a right to sue, and Bellwood itself, the municipality, had a right to sue.

The focus of the discussion in the court was on what was alleged to be happening with respect to the so-called targeted or integrated neighborhood in Bellwood, not elsewhere in Bellwood and not elsewhere in the metropolitan area.

Here is what the court said about what was happening—and these are quotations: "Some whites who otherwise would purchase homes there"—that is, in that integrated neighborhood—"do not do so because petitioners"—who were real estate brokers; they were the defendants in the case—"refrained from showing them"—that is, the whites—"what is available. Some Negroes purchased homes in the affected area because petitioners"—that is, the brokers—"falsely led them to believe no suitable homes are available elsewhere. This conduct is replacing what is presently an integrated neighborhood with a segregated one."

The four whites and Bellwood claimed that the transformation of their neighborhood from an integrated to a predominantly Negro community was depriving them of the benefits of living in an integrated society.

And Justice Powell said that claim, under those circumstances, entitled them to sue to redress the harms that they were being caused by being deprived of an integrated society. And he noted in a footnote, by the way, an earlier case where a segregated community was prevented from becoming integrated. That was the allegation involving a white apartment complex where blacks were being denied access. The claim was deprivation of interracial contacts.

And here Justice Powell said the claim is different. It's that an integrated community is becoming segregated. And he said, "We find this difference unimportant to our analysis. In both communities the deprivation of the benefits of interracial association constitutes the alleged injury."

Thus, the focus of this *Gladstone* case is upon an area with respect to which housing practices were designed to keep whites out and to direct blacks in. And the focus is on the harm caused to residents of that integrated area that results when whites are steered away and blacks are steered in.

Gladstone is, thus, an exceedingly strong case for the proposition that I am submitting to you as my seventh point, Mr. Chairman, namely, in our society it is legitimate, it is important, it is justified, it is validated by the Supreme Court, albeit in a standing case, that we may strive, through nonchoice-limiting devices, to foster stable desegregated communities in our country.

Since I think I've taken more time than I should, I won't give you my conclusions.

CHAIRMAN PENDLETON. I thought you had seven conclusions.

MR. POLIKOFF. Oh, no, I had seven points, and a summary restatement of the whole thing. But I'll give you the conclusion if you'd like. It will take half a second.

CHAIRMAN PENDLETON. Why deprive us?

[Laughter.]

MR. POLIKOFF. First, we ought to recognize the importance of figuring out how to foster long term desegregated residential communities. It's important that we try to do that.

Second, we ought to work hard at strengthening our tools for dealing with one of the major causes of our lack of success so far, namely, discrimination, without pausing to figure out whether that's 80 percent of the problem, as I believe, or 20 percent of the problem as some of the others believe.

Third, we should also work hard at the other techniques, apart from eradicating current discriminatory practices, to foster such long term desegregated communities, such as the kinds of techniques I mentioned in my paper.

And finally, let's not confuse our dialogue on these matters by using the same terminology we use for quotas when we discuss these other nonquota-like fostering techniques.

Discussion

CHAIRMAN PENDLETON. Well, the morning has begun to be interesting. I'm certain that my colleagues appreciate your appearance, gentlemen, and we will have questions.

As I move to Commissioner Ramirez, I just want to ask one overall question: How many housing units are we talking about, and how many people are we talking about in some general national term, where racial occupancy controls are a factor? How many people out of the housing universe?

MR. NEWMAN. Have been or are now?

CHAIRMAN PENDLETON. Are now, if we have controls.

MR. POLIKOFF. I'll answer that question by saying—and this is a guess—it's 0.05 percent.

CHAIRMAN PENDLETON. 0.05 percent we're talking about?

MR. POLIKOFF. When you're talking about racial occupancy controls, meaning quotas—

CHAIRMAN PENDLETON. No, just the term "racial occupancy controls."

MR. POLIKOFF. But, Mr. Chairman, racial occupancy controls mean quotas. It means denying people apartments because of race. And the only place I know that happens is in government-supported housing, except to the extent it happens where nobody acknowledges it through racial discrimination in the private housing market.

CHAIRMAN PENDLETON. That's not quite what I'm asking. I'm saying: How many people that want to be housed in this country are subjects, right now, of racial occupancy controls? What percentage of the population to be housed are not being housed that we talked about?

MR. POLIKOFF. 0.05 percent. Those are the only people, in my opinion, who are subject to quotas.

MR. NEWMAN. Just a second. There are a couple of million units of assisted housing in the country.

CHAIRMAN PENDLETON. That's what I mean. This is all publicly controlled housing; is that right?

MR. POLIKOFF. Or assisted.

MR. NEWMAN. There are a variety of programs. They are either under the effect of a desire to integrate or under the effect of quotas, or are segregated and are about to be forced to integrate or desegregate through the use of race-conscious decisions. That is assisted housing.

CHAIRMAN PENDLETON. Commissioner Ramirez.

COMMISSIONER RAMIREZ. I'd like to make two comments, one to Mr. Polikoff, but first of all, I'd also like to extend my appreciation to all the panelists for accepting our invitation to present testimony.

I just want to say to Mr. Polikoff that in 1969 or 1970, as a very, very young and inexperienced and uninformed leader in a school district, the poorest school district in the State of Texas, and the site of the *Rodriguez* case, we were faced with a situation where a model cities program was benevolently planning to install some 13,000 new units of multiple-family housing in this school district which was so resource poor. We were fighting the battle with city hall rather vigorously, and all of a sudden I happened to read some publication that described *Latrobe*. And knowing nothing about the law, I suddenly found something that I could use to try to prevent that dumping, which is what it amounted to, of all these people with tremendous human needs and all of one color, into this one area that just could not serve them. So I want you to know that was very helpful to me, and I am delighted to meet you.

Also, as I was listening to the discussion, the thing that kept coming to mind was that one of the things that I think we often fail to realize in this Nation as we think about desegregation and civil rights is that, as a Nation, we are lucky, and we ought to count as a blessing the fact that minority persons as individuals and as members of groups keep wanting to be integrated.

As one looks at how difficult that struggle is, and as a member of a minority group, I often ask myself whether I would not do better for that which I care so much about, which is the development of those members of my community, by ceasing to want to integrate and seeking to go back and spend all of my energies in developing from within. My training and my philosophical upbringing keeps pointing me in the direction of seeking to want to become a full-fledged member of this country and of our system of government.

I think that's a blessing. I think that regardless of where we wind up on different sides of this debate, it is important that this country, as a whole, count as a blessing the fact, especially as minority populations grow in number, that the values of those minority groups are still focused towards integration, towards becoming full participants and full contributors.

Now, after that statement I have two questions.

One, Mr. Polikoff, you talked about consequences. I believe you said that if the consequences to those communities which were engaged in affirmative marketing or in integration maintenance or whatever were known to the courts, the courts might change their position.

MR. POLIKOFF. Mr. Newman said that.

COMMISSIONER RAMIREZ. What were you talking about?

MR. NEWMAN. What was I talking about specifically? Well, a recent court decision required a housing authority in Texas which had two projects, one in a black community that was all black and the other in a white community that was all white, to desegregate, moving 50 percent of the whites to the black project and 50 percent of the blacks to the white project. Those who would not move would be evicted.

The consequence of that is that some 30 percent of the units are now vacant. Most of the whites were elderly. Five of the 62 chose to move. The rest either moved into rooming houses, moved to other towns, applied for housing, or went into old people's homes. The trauma was so significant that there were numerous deaths among the elderly within a 6-month period.

COMMISSIONER RAMIREZ. Was it mostly white elderly?

MR. NEWMAN. Yes. The court did not, for instance, consider the fact that the all-black project housed families with children and the all-white project housed elderly. It was impossible to move all of the black families into the white project because it consisted mostly of efficiencies and one-bedroom units. So a lot of families in both projects were simply displaced.

The black elderly that were moved into the white project are on a waiting list to move back into the black project because that's where their friends are, that's where their churches are, and that's where their families are who take care of them.

The housing authority is now going broke because of the high vacancy rate. And the story goes on and on from housing authority to housing authority. I won't belabor you with the details.

But HUD is currently planning to embark on a nationwide program to desegregate housing authorities on the 50–50 model in Texas, and without full awareness of the consequences. The situation is much more complicated than HUD would like to believe. One has to be aware of the full range of subtleties and nuances that come into play before one acts to either desegregate or integrate existing housing.

If I may just comment on Al Polikoff's statement. He began by saying that integration is not a measure that should be directed at remedying the problems of a deprived class, nor is integration something that should be done because we are concerned about the erosion of Federal housing programs. And I would strongly disagree.

Integration is so difficult to accomplish because most whites simply don't want it. There is only a small percentage of whites who will accept some of it. Because integration is so very difficult to achieve, if integration does not serve to radically improve conditions for a deprived class, it would be better if we stopped fooling with trying to achieve it. In my view, integration is important just because it is one of the most hopeful ways of bringing blacks to full and equal status in American society.

My second point of disagreement with Polikoff relates to the consequences of not being able to maintain integrated projects. As integrated projects become increasingly all black, our studies indicate there is a direct effect on the abandonment of subsidized housing programs on the part of governments. The white majority takes a look at who is being housed and the effects of all-black projects on their surrounding neighborhoods and says: "Let's forget about that program."

All I'm saying is either integration has a fundamental social purpose, a greater purpose in helping a deprived class and in helping to produce housing, or we should simply stop fooling with it.

COMMISSIONER RAMIREZ. I have one more question. I don't know whether Mr. Newman or Mr. Polikoff can answer this, but we have talked about affirmative marketing, and it seems to me that there is room for affirmative development—and maybe you're looking at it as the same thing—but it seems to me that there are, particularly in my part of the country, large central cities with much undeveloped land within the perimeter of what would be called—well, of the city limits. And city government promotes or allows or extends privileges for development which moves development away from the central cities.

If higher quality development were promoted within central cities, both with undeveloped land and with the reuse of land or buildings in older cities that could stand new development, it would seem to me that there would be greater potential for affirmative marketing. Do you have any comment on that?

MR. POLIKOFF. In some cities with which I am familiar, there is a lot of private development going on, much of it without any formal public subsidies, although privileges are not irrelevant, as you say. Much of this housing is luxury housing for the wealthy—high rises. Much of this housing is what the Chairman yesterday called gentrification, selected neighborhoods in major central cities being redeveloped, rising from a disadvantaged condition to a more affluent one.

In both of those contexts, in my experience, a small amount of integration takes place; a relatively small amount of strong affirmative marketing goes on. And there undoubtedly could be more.

I must say, Commissioner, I don't see that context as the principal one for dealing with the issues of

housing discrimination and of fostering opportunities for communities to become and remain biracial that we are really here to talk about. The high-rise luxury housing, the rehab, gentrifying neighborhoods in central cities, are important phenomena, but they certainly aren't the mainstream of the underclass problem that Oscar referred to, and they aren't in the mainstream of the developing opportunities for fostering integrated living which come about largely, not exclusively, from the still small but growing movement of minorities from central cities to the surrounding suburban ring. And it's there, if we can learn how to avoid replicating the rapid racial transition syndrome that characterized so many central city neighborhoods, that we have our greatest opportunity to foster the opportunity for integration.

CHAIRMAN PENDLETON. I want to try to save some time if we can here.

MR. NEWMAN. I have a very quick comment. There are instances where people have been trying to build affordable housing and housing with government subsidies on sites that you have identified. We are currently talking with communities about what they would entertain in the way of integration if they could guarantee a certain racial mix at a certain percentage. When HUD told them they could not provide such guarantees, those sites were withdrawn. So we find that to a large degree, the very availability of sites for housing is racially motivated.

COMMISSIONER RAMIREZ. The notion of development and this process is a complex one in the sense that there are few minority persons participating in that private pipeline, if you would, from banks to commissions to whatever. And it seems to me that if we want to look at the role of the private sector, which I think ultimately we have to, there is a lot of capacity building, if you would, within that private sector that could also be done that would be less adversarial and more developmental, in terms of developing the human infrastructure for participation in that whole area.

MR. POLIKOFF. As a footnote to what you're saying, it would help a little bit if, for example, anytime there was a public privilege that went along with a new development of any significant sort, we imposed a requirement that they couldn't discriminate against section 8 certificate holders, so that people who have those certificates would have access.

CHAIRMAN PENDLETON. Mr. Starr, you've been chomping at the bit.

MR. STARR. Well, I am a little confused. I mean, this session is about racial occupancy controls. It seems to me that has nothing whatever to do with private and purely private development. Any private owner who tried to impose a racial occupancy control in the city of New York would immediately be subject to action by the New York City Commission on Human Rights because it would be altogether wrong.

Racial occupancy controls apply only to government housing where the government has a position with regard to trying to achieve integration. And the question that we are really dealing with is whether government, by its very nature, should be exempted from the kind of restrictions that we place on invidious discrimination when it is engaged in by the private sector because government allegedly is following a higher purpose here in limiting the number of minority people who can enter into a dwelling.

MR. SMOLLA. Mr. Chairman, I disagree with this whole tenor very strongly. It seems to me that when the government intervenes to try to skew the private housing market in a race-conscious manner, the same philosophical and legal issues are raised, and the debate is much broader. And although a small number of units may be affected, they tend to be on the leading edge of demographic change in major northern cities, and they are setting patterns in our thinking in this area. So I wouldn't want to overly narrow the debate in that sense.

CHAIRMAN PENDLETON. Commissioner Bunzel.

COMMISSIONER BUNZEL. I must say that very splendid discussion this morning proves that individuals of very different opinions and tendencies with respect to affirmative action, integration maintenance, and whatever can all be committed to equality as a democratic value. This is not the kind of issue, nor are any of these issues, that divides those who are evil from those who are virtuous. There has been a tremendous mistake made in the definition of this by the press. There has been a very bad set of assumptions promulgated on the American people in terms sometimes of those who take one position, as if it were the monopoly of legitimacy. And somehow those who don't share that vision must defend themselves as illegitimate.

I think one of the services of this panel is that it has brought to our attention, as did the panel

yesterday, that these issues, because they involve ethical questions, legal questions, moral questions, economic questions, political considerations, are complex in the extreme. They don't lend themselves to simplification.

I am frequently asked what label I use to describe myself when I deal with these questions of equality and discrimination and so on. I used to say that I was an agnostic and that I'm still trying to work my way through many questions. Now I use the term "complexifier." I'm a complexifier rather than a simplifier because I'm distrustful of those who try to reduce complicated matters to simple "right-or-wrong" categories of analysis.

May I say, incidentally, that the diversity that is represented here on your panel is also represented on the Civil Rights Commission. We don't agree on a great many things, particularly on those questions that go to values and deal with fundamental assumptions. Those are the difficult problems. The easy questions are the ones which are right and wrong. If right versus wrong is all we had to deal with, we'd all do the right thing.

Which leads me to suggest that when Mr. Smolla and others today have talked about the means-ends relationship, they were touching on a very real problem and a very sensitive one. I suspect that we could probably cut through a good deal and say that virtually all of you on the panel and all of us sitting at this table agree, by and large, on the ends this society should be working for.

We might have a different set of emphasis, you might say. You might emphasize this rather than that. But we share the democratic value of equality. The challenge for a democratic society is the decision about what means to use. As I listen to this debate, it is perfectly clear that what is at issue more than anything else is not simply goals. But even when there are goals, what means are appropriate?

Mr. Starr has been very eloquent, not only as a public figure for so many years and as a writer, in elucidating an ethic of nondiscrimination to which he is committed and has been for so many years of his distinguished career. It's one of those things that he feels deeply about. Today, one also sometimes feels he has to be defensive about it. Fortunately, I don't think anybody at that table or this table feels that way.

But I also want to ask Mr. Starr, and then Mr. Polikoff, a question.

If I understand part of what Roger Starr has said, after having said why he opposes the use of governmental discrimination to deprive others from becoming tenants in Starrett City, that this simply goes against his grain. He ends up saying, "Well, don't ask me to enforce it, but I can understand others doing it."

I am not going to suggest that that's a copout, but I am going to ask him whether or not this is wanting to have it both ways. He doesn't want to be a participant or an actor, because on the one hand it affronts him, but on the other he's made a very forceful statement of why the program of Starrett City as an experiment might be one worth considering.

MR. STARR. Commissioner, I spent many sleepless hours troubling about this compromise—not compromise but the inconsistency between my basic position and the position I ended up with in this particular paper.

That is, what I really believe in is a society that offers choices. I think many people who belong, and all of us, I guess, belong to some ethnic or racial or religious group with whose identity we tend to affiliate ourselves, hold that affiliation is important, and we want to live in an area in which that affiliation is important. We want to live in a German neighborhood or a Jewish neighborhood or an Italian neighborhood. And many others of us prefer to live in an area in which that identification is secondary. We want to live in an integrated neighborhood.

My city, New York, I think does provide integrated neighborhoods. But I can imagine other cities that haven't got quite the liberal tradition that New York City has had where there is no integrated neighborhood and, therefore, one lacks this choice altogether.

For some part of the people of that neighborhood, I would be willing, reluctantly, as a temporary expedient, to devise a measure of choice, to consider the temporary installation of a racial quota for providing for some people who particularly choose it, the opportunity to live in an integrated area; but only with the understanding that this would be limited, that there would be other housing opportunities for people so that they would have a choice, and that the amount of time over which the controls would be operative would also be stipulated ahead of time, so that if this did not produce an integrated community, the thing would lapse.

I am really fascinated that what I took to be Professor Smolla's ironic suggestion that people would be prevented from moving—I would love to see a housing commissioner enforce that provision—was taken seriously by other people here, unless they were kidding.

COMMISSIONER BUNZEL. I noticed this, too, but I don't really know whether or not Mr. Newman is dead serious about this. It was a long list that Mr. Smolla referred to in terms of the words we are now using, and perhaps we ought to add another one here, "coercive integration," if that, in fact, were to be a policy. I assume that Mr. Smolla was being ironic, and that he was not entirely serious. Maybe I'm wrong.

Let me ask Mr. Polikoff a question because I think in one of your 7 points—I've forgotten which one; as I listened to them, they really turned out to be about 13, all good points.

One of your concerns is whether or not we are talking about quotas improperly, and when a quota is not a quota, and we ought not really be befuddling ourselves with this term. I don't know when a quota is not a quota. Sometimes I figure that some people say when it's a goal, it's not a quota. And maybe we ought to come up with a term like "quoal" and simply use that as another euphemism.

You are familiar with the whole Starrett City concept and so on, and I don't know whether you support the position there or whether you are opposed to it. My question is going to be whether or not you find that there is a quota that is employed in the Starrett City experiment, and whether that makes you a supporter of it or whether you oppose it for those reasons or other reasons.

MR. POLIKOFF. Yes, and I oppose it.

COMMISSIONER BUNZEL. Okay. Last question.

MR. POLIKOFF. Let me say, I don't accept your phrasing of the question, "When is a quota not a quota?" I find that a phrasing of the issue that is not helpful, because it confuses rather than clarifies terminology.

When is a technique designed to foster biracial living opportunities a quota, and when is it not? I would think that is a more helpful phrasing of the question.

COMMISSIONER BUNZEL. Every time I read discussions about quotas and goals, I find that one of the distinctions that is made is that we are all opposed to quotas. Numerical goals are not quotas. Quotas are forbidden by law. Numerical goals are not quotas. I don't want to get into a long discussion about when numerical goals can or cannot become the functional equivalent of quotas.

MR. POLIKOFF. I'd like to make it clear that the techniques I discuss in my paper involve neither quotas nor goals.

COMMISSIONER BUNZEL. I understand that.

Mr. Smolla, I want to ask you a question here because I want some clarification with respect to what I thought was really a very fine discussion of some of the choices and some of the problems regarding how one defines and approaches the issue of equality.

If I understand it correctly, in your commitment to a kind of outcome-oriented equality with respect to affirmative action, you would accept your position as result oriented.

MR. SMOLLA. Yes.

COMMISSIONER BUNZEL. But integration maintenance, or by whatever name you want to call it, you're more process oriented and certainly not result oriented.

MR. SMOLLA. That's exactly right.

COMMISSIONER BUNZEL. And you're drawing the distinction between the two. But I want to ask whether, in distinguishing between affirmative action and integration maintenance—and in your suggestion that in the latter, one of the problems is that there is a kind of group-think approach that is working here, and that it works against the individual and his rights. But isn't this also true of many of the affirmative action programs themselves? That is, can an individual, for example, be asked to bear the cost of being turned down for a job because of past discrimination in which he played no role whatsoever? And isn't that also an example of where the group think is taking something out of the right of an individual who may happen to be a nonminority?

MR. SMOLLA. The answer is yes. There is no question that there is, to some degree at least, a facial inconsistency in that regard. I think I can resolve it in this way.

You can defend affirmative action. And its defenders, even when they are process-oriented thinkers, will defend it—if they believe there is a relatively strong nexus between a particular type of group think, to use your phrase, being employed in this program, and some definable past discrimination by that particular administrative body, by the particular governmental entity, or with regard to access to those institutions.

Now, we tend to disagree on our views on affirmative action because of disagreement as to how strong that nexus is. If the nexus is very clear and very palpable, most of us are willing to be color conscious because it looks like any other traditional legal remedy. As it gets more attenuated and more class based, many process thinkers can no longer accept it.

To me, I am able to encompass many affirmative action plans, even some that involve strict quotas, like the minority business set-asides that the Supreme Court approved in *Fullilove* v. *Klutznick*. I can't do that, however, for integration maintenance, because there you cannot say to me that a black person who has been discriminated against in the past is now the beneficiary of the program, rather than say to me that person is now bearing the social cost of the program.

And I might say that as far as I know, the Constitution does not draw a distinction between quotas and goals. Some quotas are constitutional and some goals are not. And many of the more porous, flexible, subtle plans that Mr. Polikoff describes, I think, are unconstitutional because I think the effect of the plans and the intent of the plans are to engage in race-conscious steering, although often very subtle, very difficult to pick up.

So, if that wasn't clear, I would like to make it clear. We go well beyond quotas in declaring many of these programs unconstitutional. I stop at the point of affirmative marketing, which I see as a different kind of thing from steering.

COMMISSIONER BUNZEL. But as a constitutional lawyer, I assume you accept the notion that rights inhere to individuals in our society, not in groups?

MR. SMOLLA. Yes. And it's clear that the Supreme Court's view of equality is, to that extent, individually based.

COMMISSIONER BUNZEL. Thank you.

Mr. Chairman.

COMMISSIONER BERRY. I have some questions.

CHAIRMAN PENDLETON. I know you do. We have 20 minutes left for three of us.

COMMISSIONER BERRY. I have a number of questions. First of all, I wanted to say that in the discussion by the panelists about HUD and its programs and whether HUD imposes integration maintenance or racial quotas, when the Chairman was asking you about how many units were affected by this, as I understood the answer, it seemed to be that HUD imposed integration maintenance or quotas in its projects or in its assisted housing.

Another paper that we have up here—and maybe I misunderstood, but just to clear the record—shows that what HUD, in fact, does is have freedom of choice in its policies, and they only impose quotas or any kind of remedy like that when there is segregated housing and there has to be a response in terms of a remedy. So, it's not that HUD has a policy that in every program they have there has to be a quota of so many people in each one. I may have misunderstood you, but I heard people saying that.

Now, let me get to my questions.

First of all, I didn't know we were going to discuss affirmative action, but since my colleague, Mr. Bunzel, has raised affirmative action in employment, I just wanted to point out that while rights might inhere in individuals, as Mr. Smolla pointed out, remedies under the employment cases in Title VII which have been upheld by the court are group remedies very often and have been so upheld simply because the wrongs were group wrongs.

I might also say that I am a little puzzled when people can't tell the difference between quotas and goals in the employment context, but they can tell the difference in ordinary contexts, as if I have a goal of going 25 miles a day in my car. I may get there or may not. Everybody knows what that is. But when you use it in the employment context, they suddenly think, no, that goal turns into a quota. But I don't want to use up all my time discussing that.

I just want to say on the question of housing, when I read your paper, Mr. Starr, and when I listened to Mr. Polikoff—and I did read all your papers—it seemed to me what Mr. Smolla said was quite correct, that blacks who had borne the burden of segregation were primarily now required to bear the burden of integration. If they wanted to get it, they had to be excluded from some housing and bear the burden of that, which is a double burden.

And my colleague Commissioner Ramirez is right, that most minority people want integration, but they would also like to have some housing. So, what you are forced to choose between under integration maintenance as quotas—Professor Polikoff, I understand your distinction—is your desire to have housing or your desire to be integrated.

It is much like in the school desegregation context in which magnet schools, we have discovered—in Prince Georges County and other places around the country—require blacks who bore the burden of segregation to bear the burden of being excluded from some schools because there are too many of

them, and they want that school to be integrated. And yet, that school gets all the resources in the school system, and the bulk of black people are left out altogether.

In housing, the bulk of black people, if I understand it correctly, are left out of these integration maintenance schemes as quotas in this context. Yet, there are others who are left out of these projects, too, because of the fact you want to have integration maintenance.

So I'm just wondering: Is desegregation of housing such a value in your minds, any of you, that blacks should willingly suffer the burden of being excluded from certain places in order that whites can be comfortable and have integration? And what is this value we are trying to promote that in fact makes it worthwhile to accept that exclusion, Mr. Starr, or anybody else who wants to answer?

MR. STARR. As to what is the value of integration, I would answer it primarily—I know we're talking about integration rather than antidiscrimination. I think we both agree that antidiscrimination is prima facie valuable. We don't want people to discriminate invidiously.

If I want to live in an apartment house that only admits chess players because we like to play chess all day and all night, I do not consider that invidious discrimination. Discrimination on the basis of race, color, or ethnicity, I do consider invidious discrimination, and I'm opposed to it. We both agree on that.

The value of integration, to my taste, is simply that many people or some people desire—they prefer—the living of people together with different skin color, different ethnicity, different languages, because they like the experience of diversity. And it seems to me that in a country as multifaceted and as wealthy as ours, we can and should offer some opportunity for people who want to practice that type of living an opportunity to do so because I can conceive that, in a Nation which is multifaceted, we should try to do both things: encourage the development of the individual ethnicity or the group ethnicity, and also encourage those who wish to supersede the ethnic differences because they find some value in interethnic and interracial living.

Now, to my taste, as I tried to explain to Commissioner Bunzel, I am willing to and really could forsake my distaste for invidious discrimination only in those circumstances in which there is no such integrated choice available in a city otherwise, by relying on discrimination, invidious discrimination—which I find loathesome—for a temporary, marked-out period in advance, because I think it may be in those cities the only way to give people the choice of integrated living.

COMMISSIONER BERRY. You state at the end of your paper, Mr. Starr:

> To the extent that occupancy controls establish the principle that integrated occupancy can only be achieved by restricting the freedom of choice in housing for one group or another, they will achieve whatever short term goals they do achieve only at the cost of making black-white cohabitation seem ever more strange and less welcome.

And that, I suppose, would also apply to schools. If you have a school, say a magnet school, where blacks are restricted in entering on the same basis, that whites wouldn't be there or too many of them—does all of this thing make black-white cohabitation, when it does occur, seem evermore strange and less welcome? And if we don't want to that to happen, it would be better not to do it.

MR. STARR. Well, there are places in this country where the invidious discrimination patterns are so strong that people have no choice at all. And only to that limited extent would I be in favor of doing it because what this limitation really says—and as was said quite explicitly by some of my colleagues here on the panel—is that certain kinds of difficulties, hardships, and social problems occurred among blacks who were very hypersensitive.

That suggests to me that the limitation is intended to lighten the burden, and I find that intolerable—lighten the burden for whites of the black presence. I find that an intolerable thing for a government agency to say or accept.

COMMISSIONER BERRY. Let me ask you this—and I'm asking Mr. Polikoff this now. In your paper you talk a great deal about the continued existence of discrimination. You talk about steering, and you give some examples and so on. And in the papers we heard yesterday—you say you were here, so you heard some of them—there was talk about how little discrimination there is. There was one paper in which a man said that by a stroke of the pen in 1960 or something all the housing discrimination was eliminated. But you emphasize the continued existence of this.

First, do you think that as the Civil Rights Commission our primary concern ought to be, whatever the public policy issues are, trying to

figure out how to end whatever discrimination still exists in housing? Do you think that would be an appropriate thing for us to concern ourselves with?

MR. POLIKOFF. Yes. I also heard it said yesterday by others on the panel that in their belief there continued to be a lot of discrimination. Studies and personal experiences that I've had lead me to agree with the latter group rather than the former.

COMMISSIONER BERRY. Then would you agree that one way to promote less discrimination and provide more choice—I'm now going to a policy concern—and perhaps increase the value of integration would be to adopt a policy that was suggested yesterday of giving subsidies to whites who are willing to live in black neighborhoods?

I keep mentioning blacks because yesterday we had some papers that said while it's a problem for Hispanics and Asians, for Hispanics more than Asians, that whites seem to be more willing to pay more money to not live next to blacks than they do next to Asians and Hispanics, and that the major problem is that they really don't want to be around blacks. Do you think giving a subsidy or payment or something to people, or giving them a tax credit or whatever, would be an appropriate way to try to promote integration rather than using occupancy control, etc.?

MR. POLIKOFF. One of the techniques that I mentioned in my paper, and I gave a little bit of information about it, is just such a program. The Ohio Housing Finance Agency with revenue bonds has some money available for people who can use it to get long term, low-interest mortgages. And the Ohio agency decided to set aside 10 percent of those proceeds—it turned out to be about $6 million—for first-time home buyers in Cuyahoga County, a deeply segregated county, who were willing to make what were carefully defined as prointegrative, nontraditional, or desegregative moves.

Mr. Smolla keeps telling us there's a lot of different terminology here, and he's right. He says we ought to be very cautious about it. It's almost as if there were a nefarious inference to be drawn from the fact that we have a lot of different terms. I see it less pejoratively. I see us as blind men and women groping toward solutions to what is a relatively new problem in terms of fostering racial diversity. And understandably we have a lot of differences of terminology as we work toward solutions with new ideas. Now, this is one such new idea.

COMMISSIONER BERRY. Mr. Polikoff, I want to shorten your answer because I've got another question. Would you agree that using a subsidy might be a good idea?

MR. POLIKOFF. A lot depends—as I think we have heard from the panelists here today—as Winnie the Pooh would say, on the how of what you're doing. I don't want to, in blanket fashion, endorse a subsidy.

Mr. Smolla says he finds a lot of specific programs that I've talked about unconstitutional. I wish we had more time to discuss it because I really can't believe that he would adhere to that view if we had laid out before us the specifics of a half-dozen of the techniques that I mentioned.

But I find, to take one illustration—

COMMISSIONER BERRY. Please, Mr. Polikoff, they're going to cut me off. I want to see if Mr. Newman agrees with the idea of a subsidy as opposed to occupancy controls.

MR. NEWMAN. The subsidy will work to get blacks to move into white communities, but it will not work, regardless of how hard you try, to get whites to move in with blacks.

COMMISSIONER BERRY. It won't? Why?

MR. NEWMAN. It won't because the factors affecting choice of a community are the quality of the schools, the likely increase in property values, and the level of crime. The amount of money that you will pay to subsidize a white family to move into an all-black or predominantly black community will never be recovered in comparison to what that white family will gain by moving into an all-white suburb just from the natural increase in the value of their house over time.

MR. POLIKOFF. One sentence?

CHAIRMAN PENDLETON. We have to cut the debate off.

MR. POLIKOFF. I have one sentence.

COMMISSIONER BERRY. Go ahead, Mr. Polikoff. One sentence from Mr. Polikoff.

MR. NEWMAN. I wanted to just say another thing, if I could—two things. Blacks desire to move into white communities for the opportunities that are presented, the real estate value opportunities, the educational opportunities.

COMMISSIONER BERRY. Not to be the first one is what we heard yesterday.

MR. NEWMAN. The first one is difficult. Nobody wants to be too brave. But then, nobody is suggesting that it be done by one family acting alone. We are engaged on Long Island in a major fair housing

effort that is helping black families to move into a community from which they have been excluded for generations. I think there are real opportunities there. The problem is that whites will act very strongly and very conservatively to restrict them; politicians, Realtors, homeowners, community groups act in conjunction and in a very subtle way so that one can't catch them. But if you say: "Look, blacks form only 12 percent of the U.S. population. We're not talking about flooding every community. We're talking about opening up all the communities together and to nowhere near the point where you will begin to feel threatened." Doors open up. And that's all I'm talking about, is opening up doors, doors of opportunity. And when blacks move in and people see that their own previous fears were unjustified, you don't have to fool with quotas anymore. You're just trying to show people, "Your fears are unjustified."

MR. POLIKOFF. My one sentence is that without any assurances of the sort that Mr. Newman is talking about, the Ohio Housing Finance Agency set-aside has so far been subscribed about equally by black and white families.

COMMISSIONER BERRY. And Mr. Starr.

MR. STARR. Well, I can only be specific about New York City, and at the present time there seems to be considerable fear in the Harlem community that white families are going to move in and buy up some of the houses in Harlem and integrate the community against the will of some of the people who live in Harlem. Not all blacks want whites to move in and not all whites want to have blacks excluded. I mean we live in a very, very diverse and interesting society. I'd like to tell an anecdote, which I think is very revealing of the kind of movement that does take place, and there's a word in this anecdote which I have to use, which is a very unpleasant word and I apologize for using it before I start.

A friend of mine lived in a community on Long Island. He was in the supermarket one day, and he ran into someone else who lived there and said, "Riley, you're going to have to move out of here. I'm about to sell my house and you'd better do the same."

"Why?" said Riley.

This is a true story.

The friend said, "Riley, the man across the street from me sold his house"—and now we're coming to the bad word—"and a nigger is moving in."

Riley said, "Well, that may be true, but frankly they're going to move in everywhere sooner or later, and we might as well get used to it. I'm staying."

Four months go by. Riley goes to the supermarket and sees the man who told him he was selling his house and moving out. Riley said, "What are you doing still here? I thought you were going to move."

"Why was I going to move?" said the man.

"Well, you told me a nigger was going to move into the house next to you."

"Oh," he said, "I made a big mistake. He wasn't a nigger at all. He's a dentist."

[Laughter.]

MR. STARR. The point I was trying to make is that we can't always distinguish between racial feeling, socioeconomic feeling, and other kinds of feeling. In this case, when the man found out that despite his skin color he was talking about someone on the same or perhaps a superior socioeconomic level, he forgot his original prejudice. We can't afford to overlook the complexity of both the individual and the group feelings that are aroused in this whole business of discrimination and integration.

COMMISSIONER BERRY. I will yield, Mr. Chairman, although I have at least 20 other questions.

CHAIRMAN PENDLETON. We all do.

Commissioner Destro.

COMMISSIONER DESTRO. A couple of short questions, and then one for Mr. Newman and Mr. Smolla.

First, for Mr. Polikoff. I read your paper and found it very interesting. I wanted to focus on one small example you gave in your paper. You talked about the suburb of Markham in Chicago, and you mentioned the Markham Human Relations Commission. My question for you is: What was the function of that human relations commission?

MR. POLIKOFF. To foster good relations among people of diverse backgrounds, including race.

COMMISSIONER DESTRO. And did it have any kind of fair housing—?

MR. POLIKOFF. No.

COMMISSIONER DESTRO. It didn't?

MR. POLIKOFF. No.

COMMISSIONER DESTRO. You said they issued a report applauding what great integration strides had been made and everything else.

MR. POLIKOFF. Yes.

COMMISSIONER DESTRO. Weren't they involved at all in trying to see that things were kept going in that direction?

MR. POLIKOFF. It was a commission that did not function, as we use the term today, as a fair housing body. In fact, when the commission was established, there was no Federal fair housing law.

COMMISSIONER DESTRO. I don't mean to interrupt, but at least they were a societal force, if you will, talking about what a good idea it was?

MR. POLIKOFF. That's correct.

COMMISSIONER DESTRO. The reason I asked that is: Why did it go out of existence, then, as Markham began to, if you will, to borrow the term, tip? Wasn't there even more need, as the suburb became more and more black, to keep it in existence and see if you couldn't get people to come in?

MR. POLIKOFF. Let me take a leaf from Roger Starr and give you an anecdote.

I was talking about this subject a year or so ago to a group of public officials from municipalities all across the country. It happened to be in Kansas City of all places. And we were talking about the racial diversity issue, and there was an evident lack of understanding of what we meant by that. We kept going over the same ground.

And toward the end of the session, some lady from Union City, California, stood up and said, "I finally understand what you're talking about. I'm a human relations official in Union City, and I spend my time trying to figure out how to make it possible for Hispanics and blacks and whites and Asians to live together harmoniously. What you're saying"—you, Al Polikoff—"is, if I don't address the issue of fostering racial diversity that you're talking about, I'm going to be out of a job eventually because we're going to be a uniracial Union City."

It was like a light bulb that suddenly went on in her head.

And I think the answer to your question, which emerges from that anecdote, is that when Markham became predominantly black, they didn't need any longer, at least as they saw it, to perform what we all think of as traditional interracial human relations functions.

COMMISSIONER DESTRO. I guess that's my question. Doesn't that start from a starting point that an all-black community doesn't need the same kind of human relations commission as some other community does?

MR. POLIKOFF. Oh, not at all. I doubt that you will find in segregated all-white communities very many human relations commissions, either. When you have a uniracial society, people don't talk—maybe it's a nomenclature problem.

What human relations I believe has meant is fostering harmonious relations among races. Unless you're about the business of trying to create a multiracial community when you don't have one, you're unlikely to put into being a human relations committee. In that case, there's no need for it. And in Markham they gave up.

COMMISSIONER DESTRO. I'm taking longer on this particular question than I wanted to, but doesn't this run counter to the polling data that seems to indicate that the black community, by and large, prefers to live in an integrated community—especially if you're going to start to allay—

MR. POLIKOFF. It doesn't run counter at all. It's a distinction between what is desired and what is realistic. Blacks are no less realistic than whites. Blacks know when a community has gone from predominantly all white to predominantly all black, in our American society, there ain't no way it will go back the other way.

COMMISSIONER DESTRO. I don't want to belabor that discussion anymore, but there is still something in all of this that troubles me. Some of this also goes to the concerns of why it might be harder to get white folks to move into black neighborhoods, but that may be another topic.

MR. POLIKOFF. There's no way of going back the other way except for the relatively new phenomenon of gentrification, and the price we pay for that, as we know, is the exclusion increasingly of low-income people from that neighborhood.

COMMISSIONER DESTRO. Just a short question for Professor Smolla to make sure I understand the legal position he comes from.

When I read your paper I enjoyed it, and I'm just going to pull a line out of the abstract rather than the paper. You say in the introduction of part B of your outline, and I quote: "Since minority group members bear most of the social cost of integration maintenance, such plans should be subjected to 'strict scrutiny' review." Is the distinction that you're making more or less based on the Brennan footnote in *Bakke* that if it's invidious, it's bad, but if it's not, unless you can prove it's invidious, it's not necessarily suspect?

MR. SMOLLA. Yes. I think it goes beyond that because both in that opinion and later quotes from that opinion in *Fullilove,* members of that coalition on the Court say, "We are not talking about quotas in the sense of a ceiling." And my impression from that is they would ratchet upward their review to

strict scrutiny if that were how the program were to proceed.

COMMISSIONER DESTRO. In other words, as long as you are an historically definable minority and it's operating as a ceiling, then that's invidious, but if you're not and it's operating as a ceiling, then it's not invidious?

MR. SMOLLA. No, I'm not saying that I necessarily agree with the Brennan group's approach to *Bakke.* All I'm saying is if you're counting noses at the Supreme Court, you can be sure that even the liberal Justices, to be crude, are probably going to apply strict strutiny to something like this, although they would not necessarily apply strict scrutiny to the kinds of programs that were at issue in both *Fullilove* and *Bakke;* we know that.

COMMISSIONER DESTRO. Right now I'm just asking for your opinion, not your projection on theirs.

MR. SMOLLA. I agree that whenever some definable group that has been a discrete minority in the past is made to bear the social cost, strict scrutiny is appropriate for all the classic reasons that we invoke strict scrutiny, that we are suspicious of majority interests setting policy that disadvantages others that are not majority.

COMMISSIONER DESTRO. Then the question I have for both you and Mr. Newman—and the others have addressed this, too, and if you have anything to say, please feel free. It strikes me that we are dealing with government-funded housing in most of this. Dr. Bunzel raised the question of—I think he used the term "coercive integration." One of my waggish friends used the term "vanning" as opposed to "busing" as an alternative in the housing context.

But I guess the question I have is: Isn't all of the notion of either controls or coercive usages or steering—because I put those in the more coercive or invidious category myself, as opposed to the affirmative opening up of the market—isn't all of this really just directed at the poor and the ones who don't have any control over where they go, that the government is making the resource available, whether it's schools or whether it's housing, and that you would never get away with it if you were going to look at influxes into white neighborhoods or steering white folks into black neighborhoods? You would never get away with it, and the whole thing, the whole edifice, the support for it then depends on the fact that you're dealing with what is, in effect, a captive population that doesn't have any choice.

MR. SMOLLA. I think your observation points out the difference between Mr. Newman and me. He is a social engineer. He sees a problem. It's like landing a man on the moon. "Yes, I can lick that. I've got ways I can handle it, and I'm going to take care of it." And his method will work.

I'm a constitutional lawyer, and I say there are things the Constitution doesn't permit. And not only does the equal protection clause intervene here but the old right-privilege distinction idea, that just because these people need governmental assistance they can be subjected to manipulations that others would not be subjected to. That is a long discredited notion of constitutional law.

So I would say, although your engineering works better in that context because you have a sort of captive group that you're working with, that's all the more reason to be suspect of it.

MR. NEWMAN. First, let me say that in complex societies like ours, everything is social engineering, even doing nothing. But that aside, to some degree he's right. I always have trouble disagreeing with him because he's right. My problem is when I go out on the street and have to do my work, none of the constitutional baggage he gives me is any use.

To some degree it's true that because government provides a subsidy, it can set some rules, and because people are the recipients of such a subsidy, they have to accept it—so much so, in fact, that when Title VIII served to turn much assisted housing all black, government decided, through referendums in some instances, sometimes through pressures from Congressmen, to simply curtail programs. A series of referendums in New York that took place over a 15-year period showed that as projects became increasingly black, the majority voters turned down the housing referendums. Once the projects reached 40 percent black, the public said no permanently to bond issues for assisted housing. So that where it should be true that where government provides a subsidy, it should have no more right to ask things of people than the private sector can ask without subsidy. However, we have seen that if government doesn't ask and get these things, the subsidy program disappears.

What I'm saying is that if blacks form a small percentage in our society, and if housing programs end up serving them and them alone, they are not likely to get continued housing programs for very long. We have already witnessed that.

If you want to open up opportunities to blacks not only in existing housing but in new housing and in new sites, you're going to have to satisfy the fears—justified or unjustified—of the white community that is the majority and votes, who pays the majority of the taxes, and provides the sites outside the ghetto.

But it is also true that we are not just talking about 2 million units of assisted housing. We're talking about opening the whole private sector of housing to black entrants. And there are communities in the suburbs out there that simply devise all sorts of stratagems to prevent that from happening.

Now, an awful lot of help, through additional HUD supplements to the private sector fair housing groups, would be very useful. But that is the stick, and we need some carrots, too. Another thing that would prove even more useful would be to provide assurances to white communities that there is no intention to overwhelm any particular community. The numbers of blacks are so small, and white tolerance levels—however low and reprehensible they may be—are twice that of the percentage of black population.

The assurances are not a big number. People just want to make sure that their investment in their housing and the quality of their schools will remain—and that crime rates will remain low. These are, in fact, exactly the very same concern that the black families that are moving in want to see addressed. They want to see the property values in the community go up and the quality of the schools to remain high. That's why they're moving in. They're tired of a succession of moves to communities that then resegregate, become all black, and their investment plummets.

Now, the question is how big a constitutional price does society have to pay to grant those assurances? What we are asking for doesn't meet any constitutional and moral test; I know that. I find this process revolting, but far less revolting than the maintenance of a polarized society that is not going anywhere very fast and paying a high price in the process. Given the methods I am advocating, I can in two generations put an end to the mess we have lived with for 200 years. And that is something I find too enticing to be concerned with the *temporary* infraction of constitutional questions.

CHAIRMAN PENDLETON. Just one question.

As one who is concerned about the production of housing, all I've heard this morning is that if I want to invest in the bonds or I want to produce housing that may be controlled, that might be good public policy. But tell me why, as a developer, I should take the cities—take Commissioner Ramirez' question about making land available. There are all kinds of reasons why land is not going to be available in the inner cities, because the land is too valuable. By the time you put the unit up, and the cost of the land and everything else that goes into it, you wouldn't be able to move low-income people in anyway. So therefore, we tend to move people to the suburbs because the land may be a little cheaper, and you can get HUD subsidies on the rent.

Why should I invest my money in occupancy controls?

MR. NEWMAN. As a developer?

CHAIRMAN PENDLETON. As a developer. Tell me why you said I should subject my dollar in the long term investment to occupancy control—in public housing. I'm not talking about the private side now. We know HUD doesn't have enough money to build units, so they entice me to build the unit, and in a sort of a backdoor way they say, "I'll give you 30 years of rent subsidy," which is not a mortgage, but I can still take that 30-year certificate to the bank and I can get financing. It's gerrymandering the words again, Mr. Smolla. I don't have a mortgage guarantee, but I have rent subsidy for 30 years.

So I do that, and I say, "Okay, I'm going to build a unit with these interests at hand." Why should I do that when at some point down the line I might not get my money back; the rent might not increase so I can make my money back; I've got all these problems. I'm getting myself in suits. Why should I invest?

MR. NEWMAN. Well, if you make it the law that says you can, in fact, have the quotas, or the flexible kinds of quotas I am advocating, then you wouldn't be sued. In the current atmosphere, the law is unclear. In places like Starrett City, you'd be a damned fool to invest, given the Justice Department's current hanky-panky. And that's just my point: We are going to see a retrenchment from government and private investment from housing programs which can benefit blacks.

CHAIRMAN PENDLETON. That the law is unclear right now?

MR. NEWMAN. The law is unclear. And why should you, as a developer, take a chance?

CHAIRMAN PENDLETON. Is there any other response to that?

MR. POLIKOFF. The program you're talking about is dead now, of course.

CHAIRMAN PENDLETON. Of course it's dead.

MR. POLIKOFF. And the techniques that I was talking about as distinguished from quotas, they did exist in the section 8 program. Affirmative marketing, for example, was a requirement for any developer who took advantage of that program, so long as it existed. The affirmative marketing requirements were poorly enforced and administered, but in theory we had—and they were not quotas; they were not goals; they were affirmative marketing.

CHAIRMAN PENDLETON. I still don't know why I should or shouldn't invest. Is it for the social good that I should invest?

MR. NEWMAN. No developer ever invests for the social good. You know that as a developer.

CHAIRMAN PENDLETON. That's on the record.

MR. NEWMAN. The point is if you are trying to get a site in a white community for assisted housing which, under Justice Department suits will turn all black without quotas, you won't get that site. The community won't give it to you. If you said: "It will not exceed 22 percent black, and the law is behind me," the community would say, "Are you saying that 78 percent of the units will be for people here and 22 percent for those from outside?" You will very likely get that site.

Now, in this procedure, there is no question that you're putting a burden on black families by restricting their percentage. That is one way to look at it. On the other hand, you are creating an opportunity for black families because housing that does not exist will be created, and they will have access to it at about twice their ratio in society (i.e., 22 percent), and in just the same way as sites in private sector housing will open up for black families—sites that don't now exist.

Now, you can also say that you are putting a burden on these black families that are trying to move into the suburbs by saying, "Yes, you can move in, but no more than 10 to 15 percent." That sounds like a heavy restriction. But you're talking about opening up tens of thousands of units to black families that are currently not open. So what sort of a burden is that? A choice between nothing at all or a significant something. The burden is saying, "Yes, but not too many." So when you talk about burden and you talk about immorality, you really have to weigh—

CHAIRMAN PENDLETON. The burden goes far beyond the unit itself. I expect if I invest in a unit the property value will increase, and I'll make a profit down the line. But if what you're saying is true, I may not be able to sell that unit at a profit.

MR. NEWMAN. If you move into a community that is going to turn predominantly black, you're not likely to be able to sell it for what you paid for it. But if you bought a house in a predominantly white community and it remained predominantly white, you could sell it for five times that price in 10 years.

MR. POLIKOFF. I would like to comment on that?

CHAIRMAN PENDLETON. Sure. Tell me how to invest my money and I'm ready to hear.

MR. POLIKOFF. Just to put it in perspective. You would invest your money in many real estate markets, because it's the only game in town. You would invest your money for that reason alone, and you would accept very surprising burdens, paperwork, regulation, because there's no place else to go, given the private market conditions. And this happened over a period of many years until HUD killed off the section 8 program.

What I would like to add to that observation is that—I don't like to say anything negative about my good friend Oscar Newman—

MR. NEWMAN. Go ahead.

MR. POLIKOFF. —but I'm going to—not about you personally, of course, but about your thesis.

The point I want to make is that, in my opinion—and I'll bet Professor Smolla and I are in accord on this one—there is virtually no likelihood within the lifetimes of the people in this room or their children that the Supreme Court would accept the kind of arrangement Mr. Newman is proposing. And in my opinion, to spend a lot of time discussing that as a realistic option—it's not to waste our time because the discussion is interesting, but in terms of realistic recommendations for action that the Commission can make, that is simply not one of them.

MR. NEWMAN. That's your opinion.

MR. POLIKOFF. That is my personal opinion.

I would also add that there is another kind of burden that goes with this recommendation, and I will mention it specifically, and that is, the cost of implementing his recommendation would involve, through our legal traditions—it would be a marked departure in a fundamental philosophical stance that this country has taken where we implement the kind of recommendation Mr. Newman is making.

COMMISSIONER BERRY. Let me say something, Mr. Polikoff. I disagree with you, and I think it may be very likely that the Supreme Court might uphold what Mr. Newman is proposing, if the Court can say that it's all right to have magnet schools that exclude a certain percentage of blacks that want to get into the school because you're trying to desegregate, and therefore, it's all right when you get whites in, and when you get a certain percentage of whatever it is of blacks, no more can come to the school.

MR. POLIKOFF. I know of no magnet school that has a racial quota.

COMMISSIONER BERRY. Yes, they do, in fact.

CHAIRMAN PENDLETON. I know of one.

COMMISSIONER BERRY. They have lists. That's part of the plan. When the number gets to be a certain percentage, then they try to balance off the number; that's the way we try to desegregate. We have one over in Prince Georges County. There are magnet school programs all around.

The Court has not specifically, as far as I can recollect at this time, said whether that by itself is all right in terms of desegregation. But if courts can say that that's fine, I can see where they might say that Mr. Newman's proposal—I'm not saying I agree with it—because it's for the overall purpose of trying to desegregate housing, in the short run is an appropriate way to do it.

But I want to say one thing while I have the floor.

CHAIRMAN PENDLETON. Just a minute. The source of the money to put up the school is different from the source of funds to put up the housing.

COMMISSIONER BERRY. Oh, I understand that. What I'm talking about is publicly assisted housing.

COMMISSIONER BUNZEL. Would you let Mr. Polikoff answer your question. I'm interested in hearing it.

COMMISSIONER BERRY. Which question?

COMMISSIONER BUNZEL. Before you go into your other point, let him comment on your point.

COMMISSIONER BERRY. Oh, I see. Because I didn't ask a question. Go ahead, Mr. Polikoff.

MR. POLIKOFF. I know of no system that has an explicit racial quota in a magnet school or other context. However, I agree with you that such a quota arrangement would be lawful in light of what the *Swann* case has said. There is an important reason, however, why that principle could not be transferred to the housing sector. That is that in the schools context, we can give everybody a place. Therefore, according to *Swann,* we can achieve the legitimate governmental goal of racial diversity in educational contexts by assigning places on a racial basis, the Supreme Court said. Until we could give everybody a place in public housing, we wouldn't have a comparable situation; and a consequence of a quota in the housing, as distinguished from the schools context, would be absolute exclusion.

COMMISSIONER BERRY. Does that satisfy you, that he's answered, Mr. Bunzel?

If I may say so, we are all sitting here hypothetically trying to figure out how the Supreme Court will come out. We understand that as lawyers. But arguably, one could say that the Court would adopt Mr. Newman's rationale and one that I think Mr. Smolla is going to give because he's nodding his head, which is that if you're talking about publicly assisted housing and you're talking about what is available in the context of whatever that case is that would be before them, and they might very well find some reasons to uphold it. I'm not saying they should. That isn't my point. But I wouldn't just dismiss out of hand Mr. Newman's suggestion that at some point this might be upheld.

But I had a point I wanted to make. Like Bill Raspberry, who is a columnist for the [Washington] *Post,* often gets advice from cabbies and they tell him what the real issues are, I had a lay person suggest to me what she thought the real issues were here. I'll just lay it out.

She said, on the one hand, the underlying thread in the employment cases and the housing cases dealing with racial quotas is the belief in the inferiority and the undesirability of having minorities around. But that's the thread that runs through it. In the employment context, people who oppose goals, timetables, and quotas do so because they don't want more minorities in the workplace. One, because they want the jobs themselves; two, because they have some beliefs about what they'll do if they're there and all the rest of it.

And in the housing context, since housing is a good that ostensibly is more available in various forms than employment, they say it's all right to have some minorities there, but not too many. But the underlying thread is the same in both cases.

So, I just wanted to say that. That made perfectly good sense to me when I heard it said. Does that make any sense, Mr. Newman?

MR. POLIKOFF. I don't—

COMMISSIONER BERRY. You're not Mr. Newman, Mr. Polikoff.

MR. NEWMAN. Educational and job quotas are justifiable because they are inclusive. They serve to include blacks. Housing quotas by comparison are exclusive; they serve to limit blacks to a certain percentage. They both grow from exactly the fears in whites that you recognize, that blacks are different, and they have also been deprived for so long that open a door and they'll overwhelm you.

My feeling has always been that there is no purity in this world, and there is no objective morality—as much as the law may seek to find and uphold it. And I certainly don't want to disparage the law, because without it we would be nowhere. But I see a mechanism for opening doors and accomplishing things that bows briefly and minimally to white concerns and opens up opportunities. We are involved, in fact, in a process not only of opening doors to blacks to what is legitimately theirs; we are involved in creating opportunities for them that will allow them to grow and expand as they themselves perceive opportunities opening to them from which they have been restricted.

I am suspect of the very mechanism I am advocating. That's why it can only be used temporarily. Not only is it temporary, but even in its temporary time frame, it doesn't have a fixed percentage. If the white concerns are legitimate, then the percentage stops. If the white concerns were really not legitimate and whites don't flee when blacks come in, then the quota can expand incrementally until you don't need it at all.

CHAIRMAN PENDLETON. Mr. Starr, do you have a response?

MR. STARR. I just wanted to say that, based on practical experiences in the construction industry, it is my impression that the fear of black occupancy—at least in the city of New York, which I know intimately—is by no means the controlling fear that would discourage Mr. Pendleton from investing.

We have many other bars and bans that make life difficult. We have zoning; we have landmarking; we have costs of land. We have problems of a site where people don't want an apartment house even though legally under the zoning an apartment house can be built. And it's not only because people fear that an apartment house will bring in blacks, which is a fear that I don't understand at all, but because an apartment house brings in apartment-house people, and apartment-house people are different from homeowning people.

We have all kinds of prejudices and fears, so just allaying the fear that blacks are going to come in—and in New York City I don't think that's a significant thing except in those parts of New York City which are suburban in character and which happen only to be in New York City because we absorbed a great part of our suburbs a number of years ago. From my point of view, we have advanced in New York City far beyond the kinds of fears that we are talking about today. And my guess is that we are going to continue.

And to come back to the question you were originally asking, Commissioner, which had to to with why do I permit a practice that I frown on so vehemently. It's only because I think there are places in the country which haven't advanced to the point we are, and it may be on a temporary basis this kind of exclusion, semiexclusion, or limited acceptance, is a way to get acceptance, generally faster than otherwise.

CHAIRMAN PENDLETON. Mr. Guess would like to have the last words before we adjourn.

COMMISSIONER GUESS. Thank you, Mr. Chairman.

Mr. Chairman, I was only going to observe that this is a very interesting panel, one which I think has lived up to the observation made by my colleague, Commissioner Bunzel, that we are dealing with an issue of extreme complexity. And that it is our role in many instances to complexify as opposed to simplify, I believe he said. And as one tries to approach these issues without his mind made up, I have discovered, listening to this conversation this morning and having read these illuminating papers, that I once again leave without my mind made up. And it would appear to me that the charge, as exemplified by this panel, that this Commission should embrace is how we can take this complex issue, which deals with, in many instances, values, and build a platform—using an analogy which has been prevalent in our conversation today, Mr. Chairman—broad enough for at least the vast majority of the American people to stand upon on this issue of open and fair housing, even though the majority of the members of this Commission may fall off the end. And I would, Mr. Chairman, in our approach in that particular process, ask that we would do so with the understanding that we have extracted a good deal of feeling and emotion, and I think in many instances, very reasonable and rational thought from these gentlemen.

CHAIRMAN PENDLETON. Thank you.

COMMISSIONER GUESS. Mr. Chairman, may I remind you that that was the last word.

CHAIRMAN PENDLETON. This is the afternoon's schedule. This is the last word.

We will reconvene at 1 o'clock. From 1 to 2:30 will be Federal enforcement. We have to have Mr. Reynolds on at exactly 2:30. We will have Mr. Reynolds from 2:30 to 3:15, take a break at 3:15 or 3:30, and from 3:45 to 4:30 we'll have Mr. Knapp. And I think we will have some public comments.

Thank you very much for coming.

[A luncheon recess was taken.]

Federal Enforcement

CHAIRMAN PENDLETON. I would assume that there are hearing-impaired people in the room and that they are responding to the interpreter. If there are such people, would you kindly raise your hands.

In the absence of seeing anyone, the interpreter may rest.

And while I said it that way this morning, I said, "If there are any hearing-impaired people, please raise your hand," and I don't know if they could hear or not.

We come to a panel this afternoon that will deal primarily with Federal enforcement. The panelists include Thomas Hazlett, professor in the Department of Agricultural Economics at the University of California at Davis; Irving Welfeld, senior analyst at the U.S. Department of Housing and Urban Development; and Jane McGrew—is she here?

STAFF MEMBER: She's coming.

CHAIRMAN PENDLETON. —who is a partner in the Washington, D.C., law firm of Steptoe and Johnson.

We will ask you, if you will, for the sake of the afternoon schedule, to take about 5 minutes or so to summarize what is a continuation of very excellent papers. We saw that yesterday, and we see it today. We are certainly appreciative of the time that the panelists have put into responding to the Commission's request, and we'd like to be able to ask some questions and have some dialogue, have more time for that than we would have with a continued summary of papers—not to put those down at all, but just that we want to have some dialogue.

Mr. Hazlett.

Statement of Thomas Hazlett, Professor, Department of Agricultural Economics, University of California at Davis

MR. HAZLETT. Thank you very much. I'll try to cut things down as much as I can here and summarize. I hope my performance isn't too shaky. Last night I found my hotel room surrounded by the Puerto Rican national men's basketball team's rooms, and they seemed to play a much livelier game in the corridor last night than they had earlier in the evening against the Georgetown Hoyas.

CHAIRMAN PENDLETON. They had a small fight or something like that?

MR. HAZLETT. Yes, a little altercation.

CHAIRMAN PENDLETON. For the record, altercation.

MR. HAZLETT. I have recently been engaged in research into rent-controlled housing markets generally throughout California and specifically with respect to Santa Monica, which has an interesting and rather sweeping rent-control ordinance. And I'd like to share with you, today, some of my findings and concerns about housing discrimination problems, in particular in rent-controlled markets. I should say at the outset that rent controls actually cover about 10 percent of the national rental market and as much as 50 percent in the State of California. So, this is a significant part of the housing market and brings up specific problems that I believe are quite interesting and challenging for members of this Commission.

Interestingly enough, discrimination under rent control springs from both the supply and demand

sides of the market. I will briefly run through the landlord discrimination problem, which is generally the way economists look at the discrimination problem under rent controls.

The essential fact of the rent-controlled market is that the rental price is being suppressed below a market-clearing level. This is the intention of an effective rent-control scheme. This has the automatic intended effect to produce what economists would call excess demand. At the controlled price, there are more people willing to take the apartment than the apartment can house. This gives you a queue of prospective tenants, and also suppresses the price the landlord can get below what would be available in an open market.

Landlords must, by nature, choose some discriminatory filter to figure out who is going to get the apartments under these conditions. Whereas, a free-market consumer may, indeed, be the victim of racial or other discrimination, a natural limiting factor in an open market is the following: Should an individual, being the highest bidder for an apartment, be turned down due to the ethnic predilections of the owner, both parties to the failed deal have lost something. The prospective tenant has, of course, lost a preferred residence due to racial discrimination, but the landlord has also lost that unit's highest bidder. Where fellow tenants are lacking in prejudice, this imposes a cost upon discriminating owners not borne by unbiased or so-called colorblind landlords, leading to the increased profits and competitive superiority of colorblind landlords.

A regime of effective rent controls, however, reduces the implicit cost of indulging in some on-the-job racism to zero. As a host of prospective renters willing to pay in excess of the controlled price queues up, the landlord is free—indeed, he or she is forced to employ some discriminating filter; and these filters are likely to take one of two forms, neither of which should lessen housing market discrimination.

Firstly, the landlord can choose renters purely according to the racial or personal predilections of the owner. Tenants selected thus are likely to be racially similar to the owners of apartments.

Secondly, the landlord can select the low-cost tenant. Who will the low-cost tenant be? Well, in Santa Monica the market I have looked at rather closely and where the so-called BMW factor is a sociological fact of rent-controlled life, the incentives are quite clear cut.

According to one apartment owner, he bluntly declares the situation thus:

> I am interested only in prospective tenants rich enough to pay the rent on time without trouble and whose lifestyle will produce the least wear and tear on my apartment—affluent singles. With them there is never a problem collecting the rent on time. They are not home much, so water bills are lower, and wear and tear on property is reduced.

And, indeed, in Santa Monica, the term "yuppieization" is rather widespread today. There has been a mysterious disappearance of children from the community in the 5 years that rent controls have reigned, and there are widespread reports on both sides of the rent-control controversy on this very obvious effect of landlord discrimination.

Another way in which landlords can make life a little more bearable under rent controls is to make life miserable for the long term or low-rent tenant. Under open markets, landlords profit by making things desirable for the long term tenant who stays put, doesn't create much of a fuss or cost for the landlord.

However, under rent controls, the problem is that the landlord always wants the tenant to move, and the reason is very clear. The one shining moment for a landlord in a rent-controlled market is when they get to deal that open apartment to a tenant who really wants it, given the economic shortage created by controls. In such a situation the landlord is free to again exercise personal preferences, to rent to the son or daughter of a business associate, or to take under-the-table bribes and payoffs which are common features of effective rent-controlled markets.

Additionally, landlords can profit under rent controls by effectively lowering maintenance expenditures; and again, widespread econometric studies and anecdotal evidence confirm that in rent-controlled markets deterioration spreads very quickly. As a matter of fact, interestingly enough, Santa Monicans who favor rent controls also tell opinion surveys that they have noticed a widespread deterioration of neighborhoods since the 1979 controls were put on.

Now, the interesting aspect of this scenario is that there will be competition amongst investors to take over buildings in rent-controlled markets. There are no controls levied in the capital markets in which people compete to gain access to these assets, and it is very straightforward to hypothesize that the sorts

of people who will assume control and make the most profit—in other words, be willing to pay the highest price for rent-controlled buildings—are the most ruthlessly economic men. Ruthless profit maximizers, who will forego any nicety and exploit any legal, or thereabouts, opportunity to increase the picture on the bottom line, are likely to be the highest bidders for rent-controlled buildings.

As good sports quickly lose their shirts under controls, tougher players will come to dominate this market. Indeed, the "nice guys finish last" observation is glaringly borne out by the pro forma control procedure whereby rents at an existing point in time are used as the base for all future allowable rent hikes.

Federal data clearly show that the rental market, which is tremendously deconcentrated and boasts of many small scale family or retirement-money buildings, is slower to adjust to inflation than other markets; and we may presume this lag has something to do with some friendly landlords rewarding their long term customers with moderate rent hikes. But it is just this landlord, of course, who first goes broke when controls freeze rents at levels previously set, up to market-clearing levels, by landlords. This not only punishes compassion, it capitalizes the loss by perpetuating it.

Well, in summary, the bottom line on this "selection of the coldest" is that (a) landlord-tenant relationships become increasingly hostile and litigious, and (b) the tenants most likely to lose their housing opportunities under such circumstances are likely to be disproportionately poor or elderly. Such tenants live in older, less expensive housing, which most quickly depreciates when maintenance is abandoned. Moreover, these groups generally have little information regarding their legal rights. Even where access to legal aid is available, it will be difficult to continually protect renters' rights where preemptive landlord action or calculated intimidation has proven successful in raising landlord profit.

That's the landlord side, and so far so good. The analysis seems to be fairly straightforward.

However, I think an interesting observation is that these predictable aspects of landlord behavior under rent control, that is, supply side discrimination, are, in fact, foreseeable, not only to economists and to landlords, but to tenants and local officials who themselves vote for or implement rent control policies. And it is my argument here today that, in fact, these antisocial discriminatory consequences of rent control may not be unintended liabilities of rent control, but may actually be positive selling points aiding the political momentum for rent controls.

First, consider the essence of rent control as a policy. Existing tenants face rents that are increasing and, importantly, expected to go far higher. The reason that rents are increasing, however, is, on the demand side, increasing competition from outsiders, tenants elsewhere who would like to relocate to existing units in a particular community. As bids from rival renters go up, incumbent tenants must either increase their offers—their rent—or move.

Well, having to pay higher rent, of course, is utility decreasing in any framework, but the option to move to cheaper quarters, thus allowing higher bidders to acquire existing units, is particularly interesting.

While the argument is sometimes made that rent controls are necessary tenant protection because it is costly to pick up and move should an unjustified rate hike be imposed, it is curious that the two strictest rent-control measures in California have been instituted in cities having abundant low-priced housing nearby. Santa Monica borders the Venice, Mar Vista, Inglewood, and southwest Los Angeles neighborhoods, while Berkeley borders Oakland.

The inescapable observation is that affordable housing does exist in nearby neighborhoods but in areas which are less affluent and less white. If renters in Berkeley and Santa Monica did, indeed, feel hostage to their landlord, they must concomitantly have felt that the move to adjacent, lower priced residences was a very threatening state of affairs.

This sort of a political equation was brought home very clearly in the case of Los Angeles City's rent control ordinance. The city of Los Angeles adopted rent controls in mid-1978 due to pressure from residents in affluent west Los Angeles and, to a lesser extent, the San Fernando Valley. The leading antagonist of Los Angeles' rent control has been and remains a black councilman from an inner-city district, David Cunningham.

As an advocate of lower income tenants, Cunningham sees his mandate not as a mission to suppress rising rents, but to promote the creation of new housing opportunities altogether. Yet, the "chilling effect," as he puts it, of rent controls on new rental construction is well documented. Hence, Cunningham sees controls as an essentially antiblack public policy designed to allow affluent whites the privi-

lege of staying in homogeneous white neighborhoods without having to pay for the privilege.

Now, I quote here from Councilman Cunningham:

> There is another issue that underlies this—there is a lot of racism involved. In the community I represent, rental housing is a good deal. Rents are very reasonable; there are a number of vacancies. When I go to buy a pair of shoes, I shop all over the city to find where the best bargain is. But there are some people who want to feel safe in their own racial enclaves and are not willing to take advantage of some economic deals in rental housing that are available.

It should be noted that Cunningham's position on rent controls is not anomalous. In an interesting political exchange, Los Angeles Mayor Thomas Bradley was caught helping council member Cunningham in a move to derail rent controls shortly before Bradley's gubernatorial campaign in 1982. While the behind-the-scenes decontrol movement involved much of the city's downtown black political establishment, Bradley unceremoniously heeded the advice of his wealthy westside, largely white and Jewish political contributors to publicly disavow the antirent-control reforms once the political maneuvering became public. Moreover, when given the chance to vote on the issue in the debate over Los Angeles County rent controls, blacks and Latinos voted against the rent-control measure.

I think it's interesting that if local voters and governments are truly interested in alleviating the plight of the moderate- or low-income renters, and rent controls are simply a desperation measure implemented to deal with the housing market crisis, we would expect to witness additional policy measures taken to encourage housing opportunities by municipalities facing severe supply problems.

In this light, then, it is noteworthy to point out that, only a few months into its rent-control program, Santa Monica imposed a blanket moratorium on all new construction in the city. This appeared to add fuel to the fire: Demolitions of apartments totaled 1,294 units in 1978, the year of a losing rent-control initiative, and in 1979, the year the initiative passed, a 592 percent increase over the previous 2 years. Further, over 500 rental units were converted to condominiums in 1978–79.

It is dubious that policies which encourage this sort of divestiture from rental housing investment are a benefit, net or gross, to hard-pressed, moderate-income tenants. The city's 1983 report, 4 years after rent controls were implemented, was led to conclude:

> It is believed that Santa Monica today has fewer low- and moderate-income people than any time in its recent history, and it is unlikely that the private sector and government action can restore the previous economic diversity of this community in the next ten years.

Now, in the paper I introduce some interesting evidence, and that is this: It is curious that in the years immediately preceding rent controls in cities which have implemented them in California—and there are 13 such cities which implemented them in the 1978–80 period—that housing construction (this is multifamily housing construction, which would be what we want to look at in terms of alleviating a rental housing crisis) actually went down in the years immediately preceding the rent-control implementation.

If city governments are truly interested in providing housing opportunities for hard-pressed renters as a class and not simply protecting incumbent residents of a particular community against competition from market forces, that is to say, from outsiders who would like to live in that community (some of whom may be of a different color than existing tenants), then you would expect to see some positive action by these cities to actually increase housing opportunities for renters as a class. The evidence, I think, rather dramatically points out that these communities that implement rent controls are not inclusionary in their intent or in their policies, but explicitly exclusionary.

Given the time limits, I'll stop right there. Thank you very much.

CHAIRMAN PENDLETON. Before you leave that, would you please explain chart 1.

MR. HAZLETT. Table 1?

CHAIRMAN PENDLETON. Table 1.

MR. HAZLETT. This is the evidence I referred to in just the last instance here. I looked at the 12 California cities for which housing data is available, with this hypothesis: If rent controls were implemented in these cities in response to a "crunch" in the housing market, particularly the rental housing market, that was hurting renters as a group—not just existing incumbents, but all renters who wanted to live in this particular city—then you would expect that the city government would not prevent a supply increase, which the market would tend to automatically provide, in the construction of multifamily

dwellings. That is, as the market "tightened," you would expect to see increased building in the private sector to take advantage of increasing rents in these cities that are facing the so-called rental crises. These are cities that end up putting on rent controls to cope with the rental crisis.

So, what I did was look at a control period, 1970–75, and looked at the percentage of all California multifamily construction built in these particular cities during those years. I then looked at the 3-year prerent-control period, relative to State trends, which took into account all interest rate fluctuations and the state of the economy and regional development trends throughout California. These time periods just immediately before rent controls were implemented varied from city to city, but the rent controls were put on between 1978 and 1980 in all 12 of these cities.

It turns out that in 8 out of the 12 cities construction of multifamily units actually went down in the precontrols period. It, moreover, went down *severely* in both Berkeley and Santa Monica, cities which, quite clearly, have the most severe or effective rent-control programs in California.

So, it seems from this evidence that cities that are interested in rent controls have generally exclusionary policies which seek to keep new building from the market. There are all sorts of explanations for this, and people who have done work in zoning and land-use policy over the years are not at all surprised by the fact that local communities would use building codes, land-use plans, planning departments, and zoning authority to keep out residential construction, particularly for low- to moderate-income housing, which tends to be housing that existing tenants in a community or existing residents, in general, do not consider as favorable.

So, what I'm saying with this data right here is that it looks very strongly that the cities that end up putting on controls are cities that have been fighting housing opportunities, in general, for renters as a class.

COMMISSIONER BUNZEL. Mr. Chairman, following up on yours—I liked that question—would you be willing, please, to take Berkeley at the top and just talk us through your figures and explain what it says in simple English. Use the figures, take us through.

MR. HAZLETT. I'm sorry it doesn't seem more straightforward, because the numbers—

COMMISSIONER BUNZEL. Well, it's straightforward, but I want you just to give us Berkeley.

MR. HAZLETT. Berkeley put on rent controls in 1978. That's what's in parentheses there. In the 1970–75 period, they built 1.07 times 10 to the minus 3—in other words, 0.00107, of the State's housing. That proportion of all California multifamily housing was built in Berkeley.

In the next column you see their proportion of all California multifamily construction has gone down enormously in the 3-year precontrols period. Rent controls were put on in September 1978. September being in the last half of 1978, the 3-year precontrol period would be 1976, 1977, and 1978. In that 3-year period, they only constructed, of all multifamily housing built in California, this figure: 0.0000488. That was the proportion of all multifamily California housing built in Berkeley.

What I have in the last column is the ratio of the percentage of California multifamily housing built in Berkeley in the first period, the control period, 1970–75, divided by the proportion of housing built during the second period, the immediate precontrol period. In other words, there was effectively 21.9 times as much housing built in Berkeley in the control period, 1970–75, than just before rent controls.

So, it seems as though their zoning, or whatever the local land-use policy is, is getting much, much tighter. There's been about a 95 percent restriction on the number of units built relative to all California multifamily construction.

CHAIRMAN PENDLETON. Thank you.

Mr. Welfeld.

Statement of Irving Welfeld, Senior Analyst, U.S. Department of Housing and Urban Development

MR. WELFELD. I'd like to thank the Commissioners for extending a personal invitation rather than a departmental one. Since I do not speak for the Department of Housing and Urban Development, my views represent only my own and some members of my immediate family.

CHAIRMAN PENDLETON. The disclaimer is so noted, for the public and for the record.

MR. WELFELD. There is universal agreement that HUD has done a fairly bad job as far as integrating its own stock of subsidized housing. In fact, it usually only acts when it's a case of last resort, namely, the courts have ordered them to do something.

Now, some have seen this as a question of bad guys in the bureaucracy and see a lack of good intent at HUD. I would just like to complexify the matter. [Laughter.]

At an organizational level, there have been seven Secretaries in the 18 years HUD has been a department, and although all were intelligent, most were initially ignorant about subsidized housing. They came in facing legislative changes in the programs, and in their ignorance they were determined to make them work.

Given the desire to make their mark in a short period, each incumbent was much more interested in going to groundbreakings or to start a new enterprise rather than to dig in a graveyard of difficult problem areas such as desegregation, especially since almost all of them viewed that these were problems of prior administrations and they would never have to face that kind of issue.

On a more substantive level, there is also the problem of a lack of appropriate remedies. Many proponents of integration—in fact, strangely enough, Secretary Weaver was quoted as saying that HUD's poor response is purely a case of the Federal Government not carrying out its responsibility. But if the typical response that is asked for is to cut off the funds of the housing authority or to cut off community development funds, one has to go to the next level, and ask if that occurs, who is hurt by that situation? It's not the Commissioner's roof that will leak. It's the tenant's roof that will leak, and it's the tenant's apartment that will go unheated.

The same thing is true in community development funds. Cutting off the job-training program will certainly not help to integrate a project.

There are also two unique aspects of subsidized housing that I think have been overlooked. The first, unlike public education, which is a universal subsidy program, public housing and all subsidized housing are only available to a relatively small portion.

For example, in the discussion this morning, there is a very real distinction between telling a black pupil that he cannot attend a particular school because, "We're trying to integrate it." He may not be able to go to that school, but he will still have other public schools to attend.

In the case of public housing, if you tell someone that they can't be admitted for the purpose of integration, he is losing a substantial subsidy. Whether it's worth the same to the tenant as what the government pays for is a whole different issue.

The choice the administrators of the program have often faced is between segregated or no housing. Senator Taylor commented during the 1949 debate on an equal housing amendment to the public housing legislation, "We cannot be too self-righteous and be ready to let other people go without housing in order that we may stand by our principles."

We can imagine the administrator or a parent who had to choose between an integrated Head Start program or no Head Start program.

Second, in the usual case the minority is not getting its fair share of jobs or opportunities. There are too few black policemen or too few firemen or too few black medical students, or even in the case of housing, there are too few blacks in the community, if income were the sole criterion.

Subsidized housing, however, is a completely different ball game. Minorities are more than equal, at least in the numerical terms. Of the 1.1 million occupied public housing units in the United States, whites occupied only 35 percent of the units. And this actually understates the issue, since it includes the elderly, who make up close to 45 percent of the total in public housing. And of that group, approximately two-thirds are white.

A more accurate picture is gained by looking at the nonelderly families moving into public housing. And the last set of figures we have is 1979, where only 26 percent were white. And in the case of the rent supplement program, which serves approximately the same income class, only 25 percent were white. And although it's true that 36 percent of the blacks are poor, whites constitute over 60 percent of the poor in the country. So, if one actually wanted to apply an effects test, one could make a strong case that the whole system discriminates against whites.

If we wish to desegregate in the case of subsidized housing, the traditional plowshares of minority improvement must be turned into weapons against minorities. If integration is to be achieved, goals and quotas have to be used to limit the number of blacks. The target of affirmative marketing must be the white community. In these cases, integration, if it is to be achieved, must be achieved at the expense of poor blacks rather than at the expense of whites. Whose ox is being gored? What is fair housing in such a different context?

The Federal Government and HUD haven't adjusted to this reality, that helping minorities and integration are not the same thing. The *Starrett* case is a perfect example of this confusion. The NAACP

moved against quotas because in this case it doesn't advance the interests of black people who have an opportunity to achieve subsidized middle-income housing. The NAACP moves beyond ideology to self-interest, leaving many white supporters, to say the least, surprised.

HUD is still stuck on ideology and objects—well, at least, HUD didn't even know what to do and stayed out of the case. The Justice Department is still stuck on ideology and objects to a settlement that the NAACP and the developer can live with quite happily, namely, integration through a quota system at Starrett and advancement through integration at other State middle-income projects.

The *Starrett* case is conceptually difficult, but could be easily dealt with as a practical matter. It is actually the exceptional case. It is the conceptually easy case and typical case, the urban project which, because of its location, is minority dominated, and the housing authority whose waiting list is overwhelmingly minority, that is, as a practical matter, impossible. Tenant assignment policies are actually exercises in irrelevance.

As Robert Kolodny has written: "As a result of the self-segregation of nonelderly whites who have generally moved out of public housing altogether, even good-faith efforts are helpless to reintegrate the housing since there are so few majority residents."

Metropolitan solutions are of no avail. Even putting aside the race question, no one wants the city's poor.

As Eli Wiesel, speaking of his townsfolk in Transylvania, wrote: "Although my townsfolk would help the poor, they did not want to live near them."

Even if a substantial number of subsidized units were built in the suburbs, there is no shortage of poor people already residing there. In 1983 there were approximately 2 million poor families living in suburban areas.

To make things worse, substantial amounts of new construction of subsidized housing in suburban or any other areas are a thing of the past. The huge costs of building new housing for the poor, $6,000 a unit a year for 30 years, has finally put the program high on the budget cutter's list. From a high point of 560,000 units in 1972, forcing the Nixon administration to move to a moratorium, new construction has dwindled to a little over 10,000 units, and the Reagan administration would like to have a moratorium in fiscal 1986.

In terms of integrating public housing, the government's only tool is the granting of housing vouchers to current residents to be used for renting decent housing in nonminority areas.

This takes us back to the *Gautreaux* case. To summarize that quickly, Mrs. Gautreaux and her family of six were living in a one-bedroom apartment in Chicago. She applied to the housing authority seeking a unit in an integrated building. All Chicago had, in 1968, were 60 projects containing 29,000 units that were 99.55 percent black and 4 projects that were 95 percent white.

In the ensuing legal controversy, which went on close to a decade and finally went to the Supreme Court—it was settled in 1976, by HUD and the attorneys, primarily Mr. Polikoff, who undertook a series of activities that were characterized by HUD as "one of the most significant and visible Federal efforts to explore ways of providing metropolitan-wide housing opportunities for low-income Americans."

What was involved was the granting of something like 800 or 900 subsidies to the families. And although these households did move out to the suburbs, there is really much less to this case than meets the eye. Mrs. Gautreaux, had she lived, would not have qualified for the program because they could only find small units in the suburbs. And the participants in the program also had to have a car. Only 12 percent of the eligible families in public housing showed an interest in moving to the suburbs.

So, what we are really talking about is less than 1 percent of the total universe that moved out, and of those who moved out, we have to remember the real issue was, there weren't any whites to move in to integrate the public housing in Chicago. In fact, what, in effect, has occurred is that the case had gone on for so long the participants forgot what the issue was.

If we must presently forego the possibility of integration in large portions of public housing, are there any measures that can be taken?

Well, in a recent interview in the Sunday *New York Times,* the mayor of faction-torn Jerusalem may have provided a model. He said:

> The mistake made by many people is to look for integration. We are not looking for it. Do you think the Armenians want to be integrated? They came here to be Armenians in the City of Christ. They remained Armenians under the Byzantines, under the Arabs, under the

Persians, under the Turks, under the British, under the Jordanians, and now under us.

If there is a model, it is the Church of the Holy Sepulcher. Walk into that church and you discover that every stone, every pillar, every individual mosaic tile is claimed by one of the six major Christian denominations.

As with the Church, so with Jerusalem. Everyone has his corner, and each group's claim has to be balanced against those of all others.

This model also applies to the United States. As the American Society of Planning Officials, in a paper entitled "Problems of Zoning and Land-Use Regulation," which was prepared for the Douglas Commission in 1968, indicated:

It is customary to see the identity versus diffusion problem as a struggle between those who favor segregation and those who favor integration. In this form, integration must prevail. However, discrimination is a special case of a much broader problem that is a true dilemma.

It is a common trait for a man to prefer to associate with and live near persons similar to himself. The characteristics that he considers most important to judge similarity will vary. It may be religion, national origin, economic status, social position, race, or skin color.

The individual gains a sense of identity by living among his peers. He preserves and reinforces values that are precious to him. Beyond the benefit to the individual is a possible benefit to society. The homogeneous group may be stronger, more useful, than the heterogeneous crowd.

The problem in subsidized housing is that the tenant is lacking that element of choice. The choices of the public housing tenant are extremely limited. He doesn't choose his apartment. He is assigned a unit. The rent he pays is determined by a formula that has nothing to do with the quality of the unit.

In fact, that kind of problem also prevents public housing or any of the subsidized housing from providing a benefit to someone who wants to live in an older project or an all-black project because he has to pay the exact same amount whether he lives in that project or in a newer project. Authority-wide, you may get integration, namely, that all the higher income tenants are living in the newer projects and all the poor ones are living in the old projects.

Also, if the tenant decides to move, the subsidy is lost. The resident of public housing is totally segregated from the mainstream of the American housing market.

What is needed in public and subsidized housing is a completely new subsidy structure in which apartment rents reflect something other than the tenant's economic situation, and tenants are transformed from supplicants into consumers by granting them the right to take the subsidy and move into the private market.

The details of such a system are much beyond the scope of this paper. However, even if it were implemented, the system would change the character of public housing, but it will not result in a system that is multiracial. It should be remembered that 88 percent of the black residents in the Chicago public housing system chose to remain residents. It will, however, diffuse the issue of segregation when every recipient of a Federal housing subsidy is living in a unit that represents a free choice.

CHAIRMAN PENDLETON. Thank you, sir.

Ms. McGrew, welcome.

Statement of Jane Lang McGrew, Steptoe and Johnson, Washington, D.C.

Ms. MCGREW. Thank you, Mr. Chairman.

With your permission, rather than summarizing my entire paper, I'd like to hit upon just three points, the first being the conflict between the principles of integration and free choice or nondiscrimination; the second, the impact of the inadequacy of funding of low-income housing; and third, the importance of enacting amendments to the Fair Housing Act.

I was struck, Mr. Chairman, in rereading not only my statement but those of my colleagues here today, how frequently the theme of free choice was repeated, and in many different forms. It brought to mind a book that I read several years ago on an unrelated subject called *Woman in the Dunes,* by a Japanese writer, Kobo Abe.

The story in this book is about a man who inadvertently happens upon a village that is buried in sand dunes. Each of the villagers lives in a home which is actually in a pit of sand, and they spend most of their days sending up baskets of sand to prevent them from being literally buried by the dunes.

When the man happens upon this village, he is taken into one of these homes. He is lowered by a rope ladder. The next morning, when he wakes up, the rope ladder is gone, and he realizes that there is no escape. For months he plots how he can escape and is obsessed with the idea he can, some day, leave this sand pit.

And it happens then that the woman whose home he was sharing becomes ill and is taken away to a hospital. She is taken out by the rope ladder, which is lowered again, but when she is taken away, the rope ladder remains. The man finds it the next day.

It is interesting what happens then. The man climbs up this rope ladder that he had awaited for so long, and he breathes in the air. But it didn't taste as he had expected, and he hastens back down the ladder.

There was no particular need to hurry about escaping. On the two-way ticket he held in his hand now, the destination and time of departure were blanks to him to fill in as he wished.

In addition, he realized he wanted to talk to the other villagers about a matter, and if he didn't do it today he would do it tomorrow. He might as well put off his escape until some time after that.

In fact, the man never leaves.

The question this suggests is: Why did the man stay after escape became possible? Did he choose freely to stay there, or had the matter of choice become irrelevant? Did he reject alternatives, or was he disabled from choosing them? I honestly don't know the answers to those questions, but they are not simple, whatever they may be.

I hope the sand dunes analogy is not too metaphysical for the context of our discussions today, but let me make it more explicit.

Think of the rope ladder as a section 8 certificate or a voucher. Give it to a person who has grown up in a black inner-city neighborhood and say, "Here, take it anywhere. Immigrate to the suburbs." But she doesn't. She stays in place typically.

And if asked why, if asked, "Where would you go?" she probably doesn't have an answer. Or "How would you get there? Which buses would take you?" Is it free choice if she stays, or is it the lack of knowledge about the possibilities?

Is it fear? We have heard mention of and I've spoken in my paper about the *Gautreaux* litigation. One witness at the fairness hearing on the settlement, which Mr. Polikoff doubtless remembers was a very moving event, responded to the suggestion that more housing would be built in the suburbs. She said, "No, build in our neighborhoods in the inner cities. I would die in the suburbs."

Is that free choice to stay?

As these comments illustrate, we can raise the debate about whether and how to promote integration to a philosophical level that is beyond our reach and comprehension, and certainly beyond solution. Frankly, that is no more helpful an approach than the simplistic answers. The point is that the assertion that freedom of choice is a higher social value than integration doesn't advance the argument at all, because free choice is not objectively definable.

Let me concede, though, for the moment, that the achievement of integration may be at odds with the concept and exercise of free choice at times and may be at odds with the concept of color blindness. Nevertheless, housing integration is a national goal. It was adopted by the Congress. It has been recognized as such by the courts. We must find ways to reach it which require minimal compromises of other valuable principles and objectives, but no compromise will not be possible.

This poses a social dilemma. One solution that has been tried lately is just to deny that integration is an objective and thereby eliminate the conflict. This is not typically a democratic solution when the law of the land is otherwise. Moreover, it's not very good public policy.

We will get bogged down in going this route in a nonproductive ideological quagmire. The danger is not only that we will become enthralled with what is, frankly, a morally and intellectually intriguing issue, but also that we will be paralyzed by the debate. Instead of designing and implementing integration strategies which don't present this quandary, we engage in ideological struggles that preclude pragmatic compromise.

A very good example of this is what has become of the Starrett City litigation in New York where a very pragmatic solution had been worked out. It has been disrupted by an ideological purist.

I have suggested in my paper that some affirmative steps can be taken to eliminate discrimination and increase the opportunities for integration. In this regard, I must respectfully disagree with Mr. Welfeld's argument that cutting off funds is the wrong solution because it only hurts the poor. The implication is that once the Federal Government ponies up with money to a community, it is bound forever after to keep paying, irrespective of the recipient's conduct—again, bad public policy.

Why should a housing authority that maintains a dual segregated system receive modernization money, these funds being very limited, ahead of a housing authority that has actively promoted fair housing opportunities? Or why should a city that

supports no fair housing enforcement receive a housing development grant or an urban development action grant ahead of a city that does?

Keep in mind, if we don't assist the poor people of one city to obtain housing, that money will be used to house the poor people of another city. Because our dollars are limited, we should get the most for each one of them, not just housing but fair housing, not just nondiscrimination but integration.

I am also troubled by the idea that fair housing is an obstacle to housing opportunity. Senator Taylor has been quoted by Mr. Welfeld as saying in 1949 that we can't be too self-righteous and ready to let other people go without housing in order that we may stand by our principles.

The notion that fair housing is a major obstacle to housing assistance for the poor is disingenuous nonsense. The waiting lists in many cities are years long. The real obstacle to housing is inadequate funding and supply, not the principle of fair housing. We should use that principle to guide our hand in allocating our very limited assistance.

I want to emphasize that this is not just a Jane McGrew proposal. This is what section 808 of Title VIII says: "The programs for housing and urban development are to be administered affirmatively to further the purposes and policies of the Fair Housing Act."

At the same time, I think we and the Congress should be aware, as I have stated in my paper, that the inadequacy of funds is frustrating in an affirmative way, the Federal fair housing enforcement effort. Again, the *Gautreaux* case is a very good example cited in my paper.

In the last remaining moments, Mr. Chairman, I want to urge advocates of fair housing to seek a compromise on the fair housing amendments. I think it's time to put aside the argument on administrative enforcement procedures. People can differ on the reasonableness and appropriateness of that approach. I would focus instead on the need to eliminate the $1,000 ceiling on punitive damages, to eliminate the qualification on the availability of attorneys' fees, to provide for civil penalties, to add handicapped to the list of protected groups, and to enable the Department of Justice to demand access to records in the course of its investigations. In addition, I support the administration's proposal and urge the Congress to adopt a program funding local testing as an essential adjunct to the effective enforcement of the fair housing laws.

I'd like to close with the closing words in my statement, which I borrowed from Rabbi Tarphon: "The day is short and the matter is urgent. It is not upon thee to finish the work, but thou art not free to desist from it."

Discussion

CHAIRMAN PENDLETON. Thank you very much. We have some time for questions. Mr. Bunzel?

COMMISSIONER BUNZEL. No.

CHAIRMAN PENDLETON. Mr. Destro?

COMMISSIONER DESTRO. I have one now, and I'd like to listen to some of the others before I come back to any more. I was interested in Mr. Welfeld's testimony about the quotation from the mayor of Jerusalem. It leads into the question that I think we have been discussing over the last couple of days, among others, about whether or not affirmative steps are different, for example, than removing discrimination, and then, which affirmative steps are discriminatory and which ones aren't.

The question I have, along the lines of that argument, is: Wouldn't you agree, at least with respect to his example, with respect to the Armenians wanting to live together as Armenians—wouldn't you agree that one of the reasons for that is because they were so beset by the outside, in the manner of the sand pit that Ms. McGrew so usefully used in her testimony?

MR. WELFELD. They may have been beset from the outside, but there were also tremendous positive values that the Armenians saw. I suppose the classic case is the *Williamsburg* case, where at least the Hassidic group moved from Hungary as a separate group, and for their religious reasons they are almost like the Amish. They try to segregate themselves from the general culture of America. Now, they have made that choice, and it hasn't been imposed on them.

COMMISSIONER DESTRO. I'm glad you put it in those terms because I guess the question that I have—I know this is one that I've heard the arguments pro and con, but I wonder what the rest of you think about this—it has been true for a long time, and all the witnesses have said that the white community is more resistant to integration from the black community, and vice versa, than they are to integration from other communities.

What I have been hearing from the other witnesses is that there is a need to break that down. The big debate is: How do you break it down?

The Hassidic community would seem to be an aberration in the sense that they want to get together for any number of reasons. There are other lesser ethnic cohesive forces. But do we have something to learn by looking at the experiences of other ethnic communities which, as generations have gone by without them having the perception of fair housing being available, gradually they have expanded outward and gradually have assimilated?

MR. WELFELD. My answer to that is I think there has been a tremendous rise in ethnic consciousness in America over the last 10 years. There's a wonderful book dealing with the experience about the Jews and the Italians responding to school integration and housing integration. Although Mr. Starr says New York is diverse, it may be diverse in Manhattan, but in Brooklyn it isn't. There's a whole slew of small communities.

Now, for example, in the *Williamsburg* case, the blacks and Puerto Ricans live side by side, almost. You know, it's one block Hassidic, one block Puerto Rican. But there is absolutely no contact between them at all. They just walk by each other. That is when they're not fighting.

CHAIRMAN PENDLETON. You have that right here in southwest Washington. The people who live in the projects don't mix with those who live in the townhouses right across the street. It's not so much that it's racial as it is class; is that correct?

MR. WELFELD. There's that, and the fact that property values drop as you get closer and closer to the projects.

CHAIRMAN PENDLETON. It used to be all black. I know a little bit about that.

COMMISSIONER DESTRO. Would any of the other panelists care to comment on that? The thing I am wrestling with here is the natural feeling of being cohesive with people who are like you, whether it be class, race, or otherwise, and then this perception that you can't get out, which I heard Ms. McGrew talking about in terms of your ability to choose to actually get out. I saw a reaction that you made to some of the comments. You sort of physically reacted, and I'm interested to hear your comments.

MS. MCGREW. My reaction probably was to that particular quotation on the Armenians. I feel when you come to this country that, while you may preserve your own traditions, you are in your own home in your own way with your own friends, that you buy into a society that is not a separatist society.

I am perhaps an unusual—not unusual in New York—example of that, an amalgam of Russian and Hungarian Jews and Irish Catholics and German Protestants, I think. And see what that got you.

[Laughter.]

Anyway, that was the reason for my reaction. I do not have very strong feelings in favor of any groups who wish to keep people out, because they feel they have a vested right in preserving something that they imported.

But beyond that personal reaction, Mr. Destro, my point is, really, I don't think you ever know the answer for everyone. Some people stay where they are because they want to, some people because they are frightened, some people because they are ignorant, some people because they have a sense of obligation or something that they call obligation. I can't attribute to any group of people in any particular location a particular motivation, and, likewise, I can't blame any particular force outside of them either.

What I think is important is to get beyond that and say that there are a lot of different explanations, as in any situation with a large number of people, and the fact that they are all black or all Hassidic is not the full answer. I think, rather, we should affirmatively look for opportunities to provide integrated living, integrated learning situations for as many people who can take advantage of it, who wish to take advantage of it, or can learn of the advantages that it offers.

COMMISSIONER DESTRO. The reason I asked the question—I don't mean to be misinterpreted here, but my question was: Do we have something to learn by looking at different ethnic communities and the means by which or the timetable by which some of them have flown apart?

When I first moved to Cleveland after I got out of law school, the registrar of the Cuyahoga County courts where we all had to file our bar certificates said, "Oh, well, you've got an Italian last name. Your parents must live in Mayfield Heights." And the way she judged that was that I was too young to have parents who lived in Little Italy, so I must have been from the next generation which had moved radially out in the suburbs but still in somewhat of an identifiable community.

I wasn't from there, but in any event, what she was describing was a general phenomenon; and the children of that generation have moved out to general integration, by and large, because they felt

there was no more pressure, or generationally they felt there was less and less pressure to stay where they are, either defensively or that they were trapped there. I guess that's the phenomenon that I'm trying to quantify. I'm not sure we have looked that much at it, and I'm wondering if you think that would be a good thing to look at.

MS. MCGREW. Well, I think it's very interesting. I'm not a sociologist, so I can't shed much light on that myself. I find it a fascinating subject to read about. I think there are limitations on how much can be generalized from the experience of some ethnic groups to the experience of blacks in this country, and perhaps of black Hispanics, who have had much less opportunity and have experienced many greater obstacles in the course of that kind of progress. In fact, they may well explain why it works more readily with some groups that are not physically differentiated from others than it does with those which are. And I think it is, perhaps, a signal of the limitations of any generalization which could be drawn from that kind of study, which I would encourage anyway should be done, but I would caution against drawing too many inferences from that.

CHAIRMAN PENDLETON. Mr. Hazlett, I am fascinated by your paper, and it supports my notion and my understanding of rent control and the production of units for either occupancy control or occupancy. Perhaps I should ask you a question, as we got some answer from the last panel.

Let me try it this way: Do you envision a time when the public policy objectives of the Fair Housing Act will coincide with the economic policies of people who have to produce public housing; that is, you can get a fair rate of return, and we can also satisfy the goal of an adequate supply of public housing at an affordable price and everybody goes away happy. Do you have a vision of that kind of time?

MR. HAZLETT. I hope you're not asking for a date.

CHAIRMAN PENDLETON. No. Next week will do.

MR. HAZLETT. I think it is safe to say that there is a correlation between expanding housing opportunities and local policies with respect to growth, the growth of the housing stock. I think economists who have looked at this are very well convinced that it is pro forma for nice communities to look to zoning, for example, as one way the community can be kept "nice," and in this context "nice" has a rather nefarious overtone to it.

The idea of encouraging housing certainly comes in direct conflict with programs at the local level, such as rent controls, and this is why people who really are concerned with low- and moderate-income housing opportunities take a lot of time to campaign against rent controls.

I know that the Department of Housing and Urban Development actually went to court during the Carter years to exempt its units, subsidized their own from any sort of local rent-control ordinance. And this has been a problem in terms of Federal policy for many years now, that if you are trying to promote housing opportunities for people on the bottom half of the economic totem pole, so to speak, that these local policies can have a very, very negative effect.

And even going to the previous question, while I personally have nothing against ethnic communities in open markets, I was interested to hear Professor Muth's comments yesterday—not that economists have to sort of flock together on these things. He has spent a number of years looking at housing markets and has quite a national reputation in this field, and his finding is that whites are actually willing to pay a premium to live with other whites.

Let's take that as a given for a moment. When you look at the rent-control market, you see that white communities can actually get that premium for free, so to speak, if they get the local government to simply tell every tenant that's there, "You get this unit. It's yours, and you only have to pay the going rent right now."

The community has to then go out and just decimate the housing market in terms of stopping all new building with zoning ordinances and rent-control ordinances that, themselves, are antigrowth because they have just a devastating effect on new construction for the rental housing market. The community can then become extremely exclusionary. Yet, the people who live there as renters don't have to pay the price to live in that exclusive community. And this is what I think the comments from Councilman Cunningham and others that are actually sort of on the front lines in this political debate have to face when they look at the actual way in which controls are used by existing, often racially homogeneous, communities to keep out what would be a heterogeneous population.

CHAIRMAN PENDLETON. Mr. Welfeld, do you have a comment?

MR. WELFELD. Yes. I wanted to remind you of Roger Starr's comment. You know, when the black community becomes dentists, the fair housing issue will be basically solved. You take Shepherd Park in Washington, D.C., which is a highly integrated community, although it's a high-income community.

CHAIRMAN PENDLETON. I would also suggest Mr. Starr said in his paper that that black dentist, at some point, also becomes different. Once he or she moves to the other side of the tracks, they don't want anybody on their side of the tracks who is of a different economic or social fabric so it isn't just a black-white situation. There is also a black-black situation in cases. Isn't that true?

MR. WELFELD. Yes. And in the Canarsie case, the reason why there was such intensity was not just cultural, but most of these people had come from east New York; and it started off as integration with middle-income blacks, but by the time it was finished, that neighborhood was devastated by very low-income blacks. And this was the last place—after that it was Jamaica Bay, and they couldn't afford to go out to Long Island.

CHAIRMAN PENDLETON. Isn't it also true that blacks will pay a premium to live in white neighborhoods? You mentioned whites will pay a premium to maintain, but do blacks not also pay a premium to move into certain neighborhoods?

MR. WELFELD. I have a theory. My sister lived in Canarsie for a while. What in effect happened is that all of a sudden when there was a worry that blacks were moving in, the price dropped. The only people who would pay what she thought was worth it were blacks. So in that sense, blacks will be paying a premium.

CHAIRMAN PENDLETON. Just one more question. That's not why I'm looking at it, but we have somebody here that probably paid a premium to do some things and understood that had to be done.

Just one more question. What is wrong with Senator Hatch's bill about intent? And are we really saying here that all this has to do with intent and not with effects, and that the Department of Housing and Urban Development or the Justice Department or anybody can enforce fair housing; and that there aren't enough units, as you have already said, and I agree with. All the devices to legislate fairness and equal opportunity are in a sense almost specious because they give the perception of equality, and even if you have the right balances in the units does that say discrimination is over?

I don't happen to think so. It says that race and gender and physical conditions balance in a multi-family unit. But we heard this morning that people are saying that you are there because of those conditions. Someone said, "We have enough of your skin color already. We can't have anymore."

But can government really legislate or handle fair housing under Title VIII? Can it really do that? Are we telling the public the truth?

Ms. McGrew.

MS. MCGREW. Mr. Chairman, I would say that no law can accomplish a complete change in everyone's attitude and in all circumstances, but Title VIII, like Title VII of the Civil Rights Act of 1964, has had a tremendous impact upon people's behavior. I don't think you would see anything close to the changes in the employment patterns in this country, not remotely close to that, but for the enactment of Title VII.

Title VIII has perhaps not the same potential because you don't have the aggregations of people that you can deal with to the same extent that you do in the work force through the class-action device. The only areas where you tend to have those groups tend to be in massively owned projects that are publicly owned or publicly funded.

So, I think there are some inherent differences, but there have been changes in people's behavior as a result of Title VIII. You can only look at the impact that several decrees have had in various situations, both in the public sector and private sector. The whole structure of public housing has been reexamined and, but for the impact of the lack of funding, probably would be in a much more radical state of transition than it is now. But there already has been significant impact in many cities.

I think an example of the impact of the law may be shown by this somewhat sad anecdote that occurred in Virginia, just in the northern suburbs here, when an individual came to a door to rent a unit in a duplex who was black and was told by the owner, "I don't have to rent to you because I don't want to. You're black and I don't own enough units for Title VIII to cover me." He referred to the Fair Housing Act, not Title VIII.

But in any event, that was true; but, unfortunately, no one informed him there's another law, the Civil Rights Act of 1966, which precluded him from doing what he did and that he would be sued under that provision.

I think people are very aware of what the law prohibits and what the law allows, and I think they

will modify their behavior to conform, which leads back to your initial question, Mr. Chairman, about intent versus effects. I think we have to be sensitive to the fact the law does change overt signs of behavior. People and groups of people in the form of municipalities become much more subtle in their ways of handling things. If we are limited to dealing with only the overt acts and to draw conclusions only from their overt statements, I think we would be shackling our attempts to enforce the fair housing laws.

CHAIRMAN PENDLETON. I want to yield to Commissioner Berry, and Commissioner Ramirez has some questions.

COMMISSIONER BERRY. Why don't we let Commissioner Ramirez go first.

COMMISSIONER GUESS. I have a question, too, Mr. Chairman.

COMMISSIONER BERRY. Then I'll go ahead and ask mine.

CHAIRMAN PENDLETON. Let Commissioner Ramirez go.

COMMISSIONER BERRY. No, she won't mind.

Let me say I found all the papers interesting. Mr. Hazlett, in your discussion of rent control, if I understand it correctly, you believe that rent control may, in fact, exacerbate the problem of race discrimination in some cases.

I just want to point out that in the discussion we had yesterday with Professor Muth that you mentioned, I think we established that landlords have more values than worrying about how much profit they're going to make economically, and whether your example on page 213 of landlords losing something by not renting and indulging in race discrimination depends on what kind of market you're in, that is, whether you've got a lot of people trying to buy houses or a few people trying to buy houses; and that it's not a single causation situation where they can get to indulge that and they're going to lose money, and, therefore, they won't do it because they'll lose money, and that each situation turns on its facts.

I didn't want to ask you about that unless you object to my characterization of what happened. I have a question about something else. But do you object?

MR. HAZLETT. I strongly agree with the premise and strongly disagree with the conclusion. I was here yesterday for that discussion and wanted to jump in. I believe your point was the landlord loses something in sort of a loose market with a high vacancy rate if he or she discriminates. Under those conditions that's one thing. If there's a tight housing market, they can discriminate because they have a whole bunch of buyers or renters available for the unit, and they don't lose anything.

COMMISSIONER BERRY. If they are all willing to pay whatever price—

MR. HAZLETT. If they're all willing to pay the *same* price.

COMMISSIONER BERRY. Yes.

MR. HAZLETT. That's rent control.

COMMISSIONER BERRY. No, no, no.

MR. HAZLETT. Yes.

COMMISSIONER BERRY. Even in a market where there is such scarcity of housing or apartments that there are people queued up trying to get apartments and are willing to pay whatever they want? In some neighborhoods of residential housing with which I am familiar, even in this city, there are people stacked up trying to buy houses, and if you go over to look for one, you will find people racing to the telephone to call the broker to say, "I want to put in something on that." It's much harder to say there is a single causation operating there, don't you think?

MR. HAZLETT. Not at all, no. Because in that case there is a dramatic upward pressure on price. And that is the way the bidding takes place. If there is a tight market, prices go up. In a rent-controlled market, prices are capped, and so the pressure has to go out in a different direction.

COMMISSIONER BERRY. No, no, no.

MR. HAZLETT. The different direction is discrimination based on the personal predilections of the landlord. And that is the economic difference between those markets. Let me just say the classic tight market that you speak of *is* rent control.

COMMISSIONER BERRY. You're not understanding my question and I'm not making it clear. I'm referring to your argument on page 213—which is before you get to the rent control argument—which is about in a free market, without rent control, how if a landlord indulges his preference for race discrimination, he will always lose money.

MR. HAZLETT. No.

COMMISSIONER BERRY. And I'm saying in the discussion yesterday, we at least modified it to say that in that kind of market, it would depend on how many buyers there are and what the prices are.

MR. HAZLETT. Right. In my comments here, today, just earlier, I did say that, in fact, if there is a

situation where the other tenants in the building do have racial preferences, then you may have a situation in which discrimination by the landlord in the direction desired by tenants is profitable.

COMMISSIONER BERRY. Well, the next question I wanted to ask you: We had some testimony yesterday from a number of experts who told us that discrimination exists and is pervasive in many cities in the country. We had a bunch of tables and discussions from the panel yesterday. And it seemed to be in cities that some had rent controls, some didn't have rent controls, all sorts of cities, a very high index of race discrimination, especially when it came to blacks. Is it part of your argument that if we got rid of rent control, we'd get rid of that segregation? Is that your argument? If we get rid of rent control, we'll get rid of housing segregation?

MR. HAZLETT. You didn't really think you were going to stump me on that, did you?

[Laughter.]

No, rent control is not the sole cause of residential segregation based on race in the United States. I would never make that comment. As a matter of fact, rent controls only right now cover about 10 percent of the housing market. But they have a very dramatic effect in those communities in many instances in further segregating an already bad situation. And because it's a public policy that may be designed rather cynically, if my analysis is characterized that way, to exclude certain people from freely competing for an open market, then I think it's a very serious public policy problem that this Commission might consider giving some very serious attention to because these people should at least suffer some bad publicity over a policy that is designed to exclude people from a market based upon social or racial characteristics.

CHAIRMAN PENDLETON. We have to take a break. We will have Assistant Attorney Reynolds on, and then we can come back and finish the questions, if you don't mind.

COMMISSIONER BERRY. If they don't mind.

CHAIRMAN PENDLETON. You don't mind coming back?

Okay. Is Mr. Reynolds there?

COMMISSIONER BERRY. If he's not, I'll ask another question while he's coming.

CHAIRMAN PENDLETON. I hope you get an answer.

I think we should break. He's coming in now.

[A short recess was taken.]

Hearing, November 13, 1985

CHAIRMAN PENDLETON. Mr. Reynolds, as soon as the clerk is here, we can swear the clerk in, and then I can swear you in.

[The clerk was sworn.]

[William Bradford Reynolds was sworn.]

CHAIRMAN PENDLETON. Thank you, sir, and welcome. Mr. Reynolds has a statement and he will respond to questions.

Testimony of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

MR. REYNOLDS. Mr. Chairman and members of the Commission. I submitted to all of you a more lengthy statement. I do have a few comments that I'd like to make right at the outset, and then I'd be more than happy to answer whatever questions you all might have.

I do appreciate this opportunity to comment on the Fair Housing Act and the Justice Department's efforts in enforcing that statute.

The Department's program to eliminate unlawful housing discrimination has taken several forms in the past, and I believe that most of these systems have been very, very effective. Shortly after the Fair Housing Act was passed, giving the Attorney General the authority to bring legal actions, a separate litigating section was created in the Civil Rights Division to focus on violations of Title VIII.

Then, in the late 1970s, the housing section was merged with the section which handled school matters, and at that time the more routine housing investigations and lawsuits were turned over to U.S. attorneys outside the main Department of Justice to pursue, to investigate, and to make those cases on their own. That new section was formed, in part, to attack housing and school discrimination in a single action, and there was a case that was brought that, indeed, did that. It combined the housing and school allegations. That was *United States* v. *Yonkers* in 1980.

But the overall number of cases filed under Title VIII dropped noticeably, and therefore, after I came to office, I had the responsibility for those routine Title VIII cases returned to the Civil Rights Division, since it seemed to me that they weren't being pursued as vigorously as they might be in the hands of the U.S. attorney's office. This did occasion some considerable startup time to begin new investigations, since we had no investigations at all basically at the Department at that time. And this took a while to generate new cases.

In November of 1983, I also made an organizational change that affected the whole fair housing program. The housing and education duties were again separated, and I placed them in different sections, and with this structural modification gave the housing program expanded resources. And it was because of this shift, I think, of personnel and emphasis that we were able to bring the 22 fair housing cases in 1984, which was more Title VIII suits filed by the Department of Justice than in any year since 1976.

Moreover, we have 14 housing cases so far this year and 5 others that have been authorized for suit but aren't yet filed because of settlement negotia-

tions that are now ongoing and in process. Our recent filings include suits against large apartment complexes, resort developers, real estate brokers, and a municipality.

The apartment cases reach several major companies, one that owned and operated over 3,700 apartment units covering 8 cities in California, another with 2,600 units in some 24 complexes located in 6 different States, and a third company controlling approximately 2,000 units at 13 complexes in 3 New England States, also an apartment firm operating some 1,600 units in the Memphis area.

The suit against the municipality is the *Cicero* case where the complaint alleges that town officials intentionally excluded black persons from residing there through official acts of intimidation against those who have attempted to move to Cicero and by failing to participate in the Federal community block grant program. We also included charges of employment discrimination in that case, which is the first time the divisions combined in a single lawsuit against a local government, allegations that go to both housing and employment violations.

In addition to the civil litigations, since January of 1981, we have initiated 26 criminal prosecutions for housing-related offenses. These criminal cases have involved fire bombings of homes, cross burnings, shootings, and beatings of blacks and interracial couples. The most recent criminal prosecution charges the head of the North Carolina Ku Klux Klan organization and also Klan members with violating the rights of persons because of their association with blacks.

Although I believe our enforcement program is functioning well, we expect to continue bringing a large number of cases under the existing law, but the Attorney General's authority in this area can indeed be strengthened in our view. In 1983 the administration offered legislation that would, among other steps, extend the law to cover handicapped persons and empower the Justice Department to obtain civil penalties in cases that it files. Those penalties could be up to $50,000 for a first violation of the act and up to $100,000 for a subsequent violation.

The amendments also would permit the Attorney General to bring individual lawsuits when HUD complaints are referred to the Department. We now only can file where there is evidence of a pattern of practice which violates the statute or if a group of persons have been denied rights.

There is another bill that was introduced in 1983 designed to change Title VIII, and we do have some disagreement in several areas with the approach suggested in that bill, which was S. 1220. Our concerns there, as we have expressed them to the Congress, were with provisions to set up an administrative law judge [ALJ] process to deal with matters that HUD cannot successfully conciliate. Our view was that this was particularly inept in the face of the decline in the number of cases HUD has failed to conciliate and the increase in the number of States and localities with fair housing laws that were substantially equivalent to Title VIII. In those instances HUD is required to refer complaints to the State and local authorities before it attempts to resolve them.

We think an ALJ system would be expensive and somewhat cumbersome and unnecessary because under the bill that we have proposed, our existing staff could bring the lawsuits for any individual violations that are referred to us, and a court can and, indeed, does act quickly to ensure that housing rights are protected once you go to court, which leaves little substantive advantage, as we see it, to going to the considerable expense and burdensome process that would result if we had a whole new ALJ system that was added to the existing enforcement mechanism.

I would add only that initiatives during the past 2 years have led to a much closer cooperation with Justice, HUD, and State and local agencies in this whole enforcement effort, and I think there are initiatives afoot that will ensure that that kind of cooperative effort is something that increases and increases and improves our overall effectiveness. We have negotiated some formal agreements with State agencies that have allowed us to file three cases based on information we got from the agencies, and we think that that is an arrangement that will continue to produce some additional fruit for further litigation.

The Division is committed to vigorous enforcement of Title VIII, and this is certainly going to continue in the years ahead. With that, Mr. Chairman, I will be happy to answer any questions that you and the Commissioners might have.

CHAIRMAN PENDLETON. Thank you. Your complete statement will be made a part of the record.

CHAIRMAN PENDLETON. Mr. Destro, do you have a question?

COMMISSIONER DESTRO. Just one right now.

Mr. Reynolds, you indicated that HUD was required to refer cases to the States for enforcement whenever the States had substantially equivalent legislation. Do you have any data with respect to what the States are doing with those referrals?

MR. REYNOLDS. I don't have the specifics, and I think that the way the process works, HUD does do the referrals, and there are an increased number of States that fall into the category that can receive cases of that sort. And then HUD has the ability to recall the cases in the event that the States are not processing them appropriately. But I don't have the specifics on that, and I suspect that HUD can better answer that than I can.

COMMISSIONER DESTRO. Thank you.

CHAIRMAN PENDLETON. I have just a couple of questions.

Mr. Reynolds, do you favor the effects or the intent standard of proof of discrimination, and why either one?

MR. REYNOLDS. I'm not sure it's a question of favoring or disfavoring. The courts of appeals have addressed the question of what the proper standard is under Title VIII, and I think, with varying degrees of response. There are one or two courts of appeals that have suggested that Title VIII has an effects-only test. I think, by and large, the appellate court opinions in these areas recognize that effects is legitimate evidence to prove a violation of Title VIII, but that, generally speaking, those decisions will be ones that look to effects as legitimately raising an inference of intent. And my sense is that the way the law is right now, Title VIII does, indeed, require some proof of intent, either inferentially by effects evidence or directly.

We have, in our cases, found that in virtually all of the instances, either because there is sufficient effects evidence or because there is direct evidence of intent, that the standard can be easily met by using evidence of effects that does, indeed, infer intent.

CHAIRMAN PENDLETON. Commissioner Berry, do you have a question?

COMMISSIONER BERRY. Yes, I have a number of questions.

CHAIRMAN PENDLETON. We have some time on the left over here.

COMMISSIONER BERRY. Well, I have about three questions, maybe four.

Mr. Reynolds, if I understood you correctly, you just said that your impression is that the court requires proof of intent in a Title VIII case, after talking about the courts of appeals. Could you tell me the citation for the case in which the Supreme Court required intent in a Title VIII case?

MR. REYNOLDS. I don't know that this issue has been directly before the Court. *Arlington Heights* is the closest case that I think addressed it. In *Arlington Heights* the Court sent the case back to the court of appeals after ruling on the constitutional aspects. And I'm not sure there is a Supreme Court case that has addressed it, which is one of the reasons I suspect there seems to be a considerable degree of confusion at the circuit court level.

COMMISSIONER BERRY. I'm still not clear on your answer to my question. Are you suggesting that in *Arlington Heights,* the Supreme Court decided on remand that an intent standard was necessary in Title VIII—just so I'm clear?

MR. REYNOLDS. Well, the Supreme Court doesn't decide anything on remand.

COMMISSIONER BERRY. I'm trying to understand what you said.

MR. REYNOLDS. The Supreme Court will remand the case, and the court of appeals will then do it. What the Supreme Court did in *Arlington Heights* was deal with a separate issue of intent in the case that didn't deal with the Title VIII standard—I think it was a Title VI standard—and the court remanded the case for more evidence on the question of effects at the circuit court level. So we don't have a ruling yet from the Supreme Court that speaks directly to the standard for Title VIII.

COMMISSIONER BERRY. Okay. That's what I thought. I just wanted to be sure we were in agreement.

MR. REYNOLDS. I think the Court has yet to address that question, which is one of the reasons there seems to be considerable confusion at the circuit court level on the issue.

COMMISSIONER BERRY. Could you tell me whether, at any time during your tenure as Assistant Attorney General, your department has provided guidance to HUD on whether or not they should use the intent standard in Title VIII cases? Has anyone at HUD been provided with guidance in terms of using the intent standard or the effects standard in Title VIII cases? Have you ever done that?

MR. REYNOLDS. We coordinate with HUD on a lot of this enforcement activity, and I'm sure that during the course of that coordination, there has been discussion back and forth on that aspect as well as others. I don't know offhand what form it's taken

or the nature of those discussions, but I'm sure the discussions we have had with HUD in this area have certainly touched on or focused directly on that issue.

COMMISSIONER BERRY. But to your knowledge, there is not in existence a letter to HUD explaining to them at any time that they were to think in terms of the intent standard when they were gathering evidence in these cases, during your tenure as Assistant Attorney General?

MR. REYNOLDS. It could well be. There might well be not only 1 letter but 10 letters like that. I don't know.

COMMISSIONER BERRY. From you?

MR. REYNOLDS. That could well be, too. I just don't know. If you have such a letter and let me see it, I certainly can resolve that in a hurry. I write an awful lot of letters, and I have absolutely no recollection of whether there is or isn't. But if you have a letter like that, let me see it.

COMMISSIONER BERRY. Well, let me put the question differently. Do you believe or is it your impression that HUD is supposed to be guided by the intent standard in its enforcement policies under Title VIII?

MR. REYNOLDS. Well, certainly. I think Title VIII does call for an intent standard, and that HUD in pursuing these cases should, indeed, factor that into its analysis. But I think, at the same time, that you can prove intent, as I have indicated, in any number of ways, and effects evidence that raises sufficient inference of intent is more than adequate to make a case under Title VIII.

COMMISSIONER BERRY. But you have already told me, if I understood you correctly, that the Supreme Court has not decided that that is necessary.

MR. REYNOLDS. I think the Supreme Court has not spoken directly to that issue.

COMMISSIONER BERRY. Right.

MR. REYNOLDS. I think the courts of appeals have, though.

COMMISSIONER BERRY. The other thing I wanted to ask you: At the time you were up for confirmation as Associate Attorney General, as I understand it, one of the reasons why Senator Mathias especially—and other people, but notably Senator Mathias—was opposed to your nomination was because he thought you had done a poor job of enforcing the fair housing laws.

That may or may not be the case, but there is an article in the *Wall Street Journal* on October 28 which says, "Justice-HUD Upholds Housing Segregation But Enforcement Lags." And there is a case cited there of a Mrs. Tsoukalas, who had a housing discrimination complaint, among some other people, and she said the Department was dragging its feet on resolving it. There are lots of examples in this article. And it quotes you as saying you don't know why the Department didn't respond. "That's something we probably should have pursued."

Have you done anything about it since then?

MR. REYNOLDS. Yes, we have that under active investigation at this time.

COMMISSIONER BERRY. Okay. The other question I have is in Dallas. There was a series of articles in the newspaper about public housing segregation. Is your office at all involved in trying to resolve the public housing segregation problem that is alleged to exist, at least in these articles, and that HUD seems to believe exist in Dallas? Are you familiar with the existence of that problem?

MR. REYNOLDS. Is that the series of articles in the Dallas paper?

COMMISSIONER BERRY. Yes.

MR. REYNOLDS. I think an awful lot of that article is based on information and evidence that existed some time ago, and I think that HUD is looking into current matters. We have some cases down there, but I'm not sure that too much of the article, if I recall, is current with existing information in the area.

I think that HUD does have investigations in the Texas area, and I think probably that would include Dallas, and we have some cases that are certainly active down there.

COMMISSIONER BERRY. But you're not aware of any direct involvement of your office at this time with that particular set of problems?

MR. REYNOLDS. Well, I'm not sure what "that particular set of problems" is. I think it was a series of five or six articles that went on for seven or—it was in small print, and it was extraordinarily long, and I think it covered an awful lot of things.

COMMISSIONER BERRY. Forty full pages of newsprint, February 14, 1985. It says that, "Segregation and Discrimination in Public Housing Is Rampant in Dallas." I just wondered if you had gotten involved in it yet. That's the only reason I'm asking.

MR. REYNOLDS. There's a lot of involvement at the HUD level and our level with housing discrimination, but I don't know how closely tied it is to all of the information in that article, because I think a

lot of that was harkening back to a number of events and activities that were of a different time period.

COMMISSIONER BERRY. Last question—for me, at least, unless I think of something else: How many public housing segregation suits have been brought during your tenure?

MR. REYNOLDS. Public housing?

COMMISSIONER BERRY. Yes.

MR. REYNOLDS. Boy, I don't know what the breakdown is on public housing.

COMMISSIONER BERRY. This article alleges there aren't any, but I just wondered whether you knew. And do you have any plans to bring any that you know about?

MR. REYNOLDS. Well, I haven't done an examination of the public housing versus nonpublic, so I don't know. We can certainly provide an answer to you.

COMMISSIONER BERRY. I'd appreciate it if we could have it.

CHAIRMAN PENDLETON. The record will be left open for 30 days; could we ask, without objection from you or other members of the Commission, if you would give us that information for the record within the next 30 days, so we can put that in as part of our record, which gives you a chance to answer the question that you are not able to answer today?

COMMISSIONER BERRY. And if you could also check while you're doing that to see if there is any letter you ever wrote to HUD concerning the intent standard, and also if you could find out whether your office is, in fact, involved in these allegations. I could provide the newspaper articles to you if you want them.

MR. REYNOLDS. You mean in Dallas?

COMMISSIONER BERRY. In Dallas.

MR. REYNOLDS. I have them. I don't need another copy of the Dallas articles, believe me. I'd be more than happy to provide that to you.

COMMISSIONER BERRY. Thank you.

CHAIRMAN PENDLETON. Mr. Guess.

COMMISSIONER GUESS. I only have one question. I'll ask it when I get your attention.

I only have one question. Our press reports tend to reveal that recently—let me preface this question by stating that the section of our consultation/hearing that we are addressing now, sir, is pertaining to Federal enforcement—and press reports have indicated recently that some of your duties and responsibilities in the United States Department of Justice have been expanded recently. My question would be, sir: Could we conclude that the civil rights enforcement area is in any way being hampered as a result of the expansion of duties on your part?

MR. REYNOLDS. No, not at all. I think that a lot of that is exaggerated a bit. I am, at the moment, doing some extra things for the Attorney General at his request because we have been shorthanded with the whole confirmation process. But I am pleased to report that I think we now have a full team just about on board, and therefore, an awful lot of those activities will now be assumed by the newly confirmed Assistant Attorney General, and my concentration will be fully on the civil rights area, and I think in the interim, certainly, I have been able to concentrate completely on the enforcement activity in my area.

COMMISSIONER GUESS. Does that mean, sir, that I can sleep a lot sounder tonight knowing that 100 percent of your attention is now going to be focused on civil rights?

MR. REYNOLDS. Absolutely.

COMMISSIONER GUESS. Thank you, sir.

CHAIRMAN PENDLETON. Mr. Reynolds, we have been talking a lot the past day and a half about integration maintenance. We have heard the term "gerrymandering of words"; we have heard it can't happen; we have heard it can happen. And the case that has been discussed, among many cases, is the one in Starrett City. Do you believe that Title VIII as it is presently constructed forbids integration maintenance such as we have in Starrett City?

MR. REYNOLDS. I certainly do. I only hesitate because I think that the term "integration maintenance" takes on different meanings, depending on who is using it. But it does seem to me that if, indeed, an owner of an apartment complex uses race to exclude tenants from an available unit, that that would be a violation of a statute, whether one does it to maintain a racial balance or to upset a racial balance. So, I think that the statute, itself, clearly does not allow for the sale or rental of available housing space based on race, and that would certainly be in violation of that prohibition of the statute.

CHAIRMAN PENDLETON. Just one more question. Do you support or do you believe that separate waiting lists for minorities and nonminorities in public housing is permissible?

MR. REYNOLDS. If you have separate waiting lists and are picking off of those lists names of people to

fill housing by reason of their race, then I think that is impermissible under Title VIII, absolutely.

CHAIRMAN PENDLETON. I have no more questions. Do other members of the Commission have questions?

COMMISSIONER RAMIREZ. Mr. Chairman, I have a question.

CHAIRMAN PENDLETON. Commissioner Ramirez has a question.

COMMISSIONER RAMIREZ. Mr. Reynolds, I am not an attorney and I don't want to get bogged down in the attorney's perspective, and I often do on this Commission.

But I notice that you talk about recent case filings on the part of your department, and you talk about filings against large apartment complexes, resort developers, real estate brokers, and a municipality. Am I correct in assuming that those suits are filed under the criteria that you state on page 9, which says, "Currently, we can file suit only where there is evidence of a 'pattern or practice' of discrimination or if a 'group of persons' has been denied rights." Are those the standards under which you file the cases that you say you filed?

MR. REYNOLDS. Yes, that is right.

COMMISSIONER RAMIREZ. So, those cases are filed on the basis of discrimination against a group of people?

MR. REYNOLDS. Right, or a pattern of practice of discriminatory activity.

COMMISSIONER RAMIREZ. Right. And am I right that those cases are filed against property owners in the private sector, with the exception of the municipality, I would assume?

MR. REYNOLDS. Those particular ones are. There are also suits against public housing, but the ones that are mentioned in the testimony, I think, are private.

COMMISSIONER RAMIREZ. And you are proceeding to file those suits consistent with your own philosophical decision in your reading of the law on the basis of intent. I mean, they have stood the intent test, and that is why you are proceeding to file those cases. Am I getting—

MR. REYNOLDS. Those are all cases where, either by reason of effects evidence that raises an inference of intent or by reason of direct intent evidence, we feel there is a violation of Title VIII.

COMMISSIONER RAMIREZ. Now, what I would like—and I recognize that you cannot speak to specific cases, but in general terms, assuming that you are successful in the filing of these cases, what kind of a remedy for group-based discrimination would you fashion? What would make whole, if you would, the process which started with the intentional discrimination of the persons you are prosecuting against a group—that is, one would assume this involves minority persons, whether they be Hispanic, black, or Asian. What is it that would make whole the situation?

MR. REYNOLDS. Well, we undertake to place all of those who are victims of that discrimination in a housing unit to the extent that they come forward and suggest that they are without housing and are interested in going into that unit or into that apartment complex. We require the owner to engage in affirmative measures that will advertise that it's an equal housing opportunity owner, that it will take steps to advertise available dwellings and to show those dwellings on a nondiscriminatory basis to everybody who comes in. And we have specific reporting requirements that are called for that we monitor very closely through the monitoring mechanism that we have in the division to make sure that the owner does, indeed, engage in those steps that will ensure that people get an equal opportunity to housing.

And the kinds of cases listed here are some of those that in an apartment complex of this sort—some of those people who were denied housing by reason of race have moved on and gotten housing elsewhere and, therefore, don't come forward and seek to be placed in one of the units. But to the extent that there are those who did apply and got turned away or knew that this was an owner with a reputation of discriminatory conduct and, therefore, were deterred from knocking on the door and still want the apartment, we will provide make-whole relief to those individuals.

There is the practical problem that adheres in all of these situations of having a limited number of available apartments, and therefore, some of those people would have to wait for the next vacancy. But they would be put at the top of the list and be given the next vacancy if they were within that victim class.

COMMISSIONER RAMIREZ. How do you monitor the activities of the apartment owners to see that they do go through these processes? Do they report to you? How do you do the monitoring?

MR. REYNOLDS. There is a very extensive set of reporting requirements that are included in our

decrees, where the owner or the landlord is to keep track of those people that are interested in the apartment, those people who are put on a list, who are accepted, who are turned away, reasons for the different decisions, and those kinds of reports with that kind of information are provided to us on a periodic basis, and we can check that.

In addition, you have the availability of testers that can go out to make sure that the landlord is, indeed, not turning people away by reason of their race. And there are also those individuals who, by reason of the extensive advertising, can come in and complain to us if, indeed, they feel that they are not being treated in a nondiscriminatory fashion.

So, there are a series of monitoring techniques that adhere under our decrees, and we have a separate enforcement unit that is aimed specifically at monitoring activities within the section, that goes out and ensures that those people who are under decrees—either by consent decree or by court order—are, indeed, doing that which they are committed to do through this elaborate process that we have set up.

COMMISSIONER RAMIREZ. That elaborate process is focused on the group that had experienced the discrimination in the first place?

MR. REYNOLDS. Well, no. Of course, that group it's focused on, but not that group exclusively. It's focused on the behavior and activity of the owner or landlord under the decree and, therefore, would include not only that group who are the victims of discrimination, but also anybody else who comes in and is interested in obtaining one of the dwelling units from that owner in the future. So that we monitor the future activity as well as undertake to be sure that those people who have been victims of discrimination are placed in a unit that they should have had had they not been victimized.

COMMISSIONER RAMIREZ. Just one last question. The testers who go in to check to see whether this elaborate procedure is being carried out—do they go in randomly?

MR. REYNOLDS. Well, the testers would go in randomly to check it, but that is one small part of what is a very comprehensive set of monitoring techniques. But that would be in addition to the reporting requirements, monitoring them, going in and checking the reports and reviewing them, and sending lawyers to the location to make sure that all of those activities that the owner is required to do are being done and are being done comprehensively and fully.

COMMISSIONER RAMIREZ. Just finally, if you had a complete file that said that one of these owners had done everything that had been required of them and you happened to notice that there were still no individuals of that group residing in those complexes or in the housing that was provided, are there other steps that you would take to make sure that your system of monitoring was operating the way you wanted it to?

MR. REYNOLDS. I'm not sure I understand your question. I thought your question assumed that our system of monitoring was effective, and that we found out that the landlord or the owner of the property was doing all those things that it was required to do to strive to attract people to the dwelling on a race-neutral basis, and that notwithstanding that it was a predominantly one-race complex. I think in those circumstances—I'm not sure I understand your question. What additional monitoring would we do?

COMMISSIONER RAMIREZ. If you had a group of people who wanted to live there, who had consistently attempted to live there, and you went through a case in which you proved that the behavior preventing those people living there was discriminatory behavior of the owner, and you developed a set of requirements for a new behavior and there was intent, in addition to all of this, and you developed a system of behavior that ostensibly one would assume would give you a different outcome, that is, that minority members would end up living there, and if that didn't work, what would you do? Or would you not do anything?

MR. REYNOLDS. Well, it's hard for me to figure out how that would not work because if I had a group that was turned away because of discrimination, I would make sure that they were at the top of the list to go into the housing complex before I allowed anybody else in there. I would assume that that would be a group or a race other than the predominant race in the complex. So, I think that the result of that kind of enforcement effort in the context that you described would lead to a complex that would, indeed, have a number of people from another race who had been excluded who would then be in the complex.

COMMISSIONER RAMIREZ. Go ahead, Mr. Chairman.

CHAIRMAN PENDLETON. Suddenly we have more questions, Mr. Reynolds. Mr. Bunzel—and Mr. Destro says he has a question. And we have, gentlemen, exactly 8 minutes.

COMMISSIONER BUNZEL. Mr. Reynolds, among the more charitable things that you have been called over the last several years is an ideological purist. I think I know what that term means. I think I understand what it means when somebody is said to have principles. I also know people who rise above principles for varieties of reasons. And I don't want to get you confused with whatever word games it seems that I'm playing.

But I am interested in asking you to address this question of ideological purism in the context of a particular question that has to do with the *Starrett* case.

Roger Starr, this morning, made a very strong statement of his principles and his principled objection to a quota-driven housing project in which a percentage ceiling is applied so that other individuals, in this case minorities, may not apply. He found it, in his own language, loathsome and pernicious.

He also went on to say that he was talking really about a city like New York where he found that there were so many different kinds of alternatives and so many other factors to consider that you really have to understand that the particular plan and the quota-driven mentality that was put into practice in the *Starrett* case, in his view, really was not appropriate. However, he could understand and could acquiesce, although he would not like to be the person to be doing so—he could understand and acquiesce in a *Starrett*-like plan in another kind of city or community where in fact, unlike New York, there were no other opportunities for individuals to participate, because of the many reasons having to do with discrimination or a particular kind of mental set in that community. In his particular case, he could find, though reluctantly, he kept saying, an exception to the particular application of his principles.

What I'm really asking you to do is to tell us why you are (or are not) an ideological purist, and whether or not the particular exception that Mr. Starr uses to explain his position is one with which you could be sympathetic or about which you would say, "No, I cannot even go that far."

MR. REYNOLDS. Well, I will have to say I can't conceive of a situation where I would tolerate discrimination that would exclude from a housing unit blacks who were interested in buying or renting one of those units, in the interest of holding them available for whites, simply because they're whites or simply because the others who are being turned away are blacks. To me that is discrimination, and I think that if we buy into the notion that you can, for whatever reason, use discrimination to get beyond it or compromise the principle of nondiscrimination, you lose the principle and wind up with the compromise. And I think that is something we all ought to be just absolutely adamant about resisting.

COMMISSIONER BUNZEL. Does that make you an ideologue or a purist?

MR. REYNOLDS. It makes me one who is faithful to the principle of nondiscrimination. I don't know what labels one wants to attach to that.

COMMISSIONER BUNZEL. You would disagree in this case with Mr. Starr in saying that if there's an exception it would be a particular community where there would be no other way to provide a kind of integration.

MR. REYNOLDS. I would look for attacking that problem which, as I understand it, means that symptomatic to it is there's a lot of discrimination within that community. I would look to attacking that problem in other ways than by buying into some notion that a discriminatory remedy will help to solve the problem.

COMMISSIONER BUNZEL. So, your commitment is more to access as a value, access in a nondiscriminatory fashion, to every individual or any group that applies, rather than to some form of integration or integration maintenance. If I understand your position and the thread that connects it from beginning to end, it is a commitment to access, and fair access and complete access, as a primary value. Is that a fair statement?

MR. REYNOLDS. I think that's a fair statement of the commitment. I also think, though, that married to that is an abiding interest in assuring, to the fullest extent we can accomplish it, integration within the communities and desegregating of housing markets. But I'm not sure that we get there if we are turning away blacks who are able to and interested in obtaining the unit, simply because we have to reserve them for whites to maintain some racial balance.

COMMISSIONER BUNZEL. Is there a difference, in your mind, between desegregation as a value and a goal on the one hand and integration as a value and a goal on the other? Or do you use those terms interchangeably?

MR. REYNOLDS. Well, I think they can be used interchangeably, but I think they can also have different meanings. And one of the problems in the

debates that surround this whole area is that they sometimes are used interchangeably when the people who are using them don't really mean them in the same way that they might seem to be. But I think the commitment should be one that is to nondiscrimination in all of its aspects, and we should not accept the notion that we can compromise that principle, and in doing so arrive at the place we all want to arrive at, which is one where we have a society that is faithful to the nondiscrimination principles.

COMMISSIONER BUNZEL. Thank you.

CHAIRMAN PENDLETON. Mr. Destro, you have a couple of minutes left.

COMMISSIONER DESTRO. Let me see if I can go one step further in what you have just been talking about. We heard a debate yesterday about what the intent of Title VIII was. Let me see if I can spin a dichotomy, if you will, and see what you think about it.

We have heard some of the witnesses talk about the intent of Title VIII as being to eliminate the problem of separate housing communities, if you will, by racial and ethnic group. And I would categorize that as identifying the society as a whole as having a problem of segregated housing.

On the other hand, what generally goes under the rubric of intent, as I understand it, is the focus is on eliminating the activities of those who are the problem, those who are actually doing the discriminating, and making whole the victims of those individuals who are the perpetrators of the discriminatory activity.

So, on the one hand you've got perpetrators and identifiable victims. On the other hand you have the generalized problem of racial separation in society. Do you draw that distinction and, if so, what is the role of the Justice Department on the more generalized side of the equation? Do you understand what I'm asking?

MR. REYNOLDS. Yes, I think there is a distinction. And another way, I guess, to frame the distinction is one where on the one side there is the concept of institutional discrimination and on the other there is individual discrimination. And I think that with regard to the Department of Justice's role in that dichotomy, Congress has pretty explicitly drawn the line for us by crafting all of the laws in the 1964 act in terms of individual discrimination. It is aimed at discrimination against individuals. It is aimed at discrimination by individuals. And the role of the Department of Justice, under the whole fabric of Federal laws in this area, is to ensure that those individuals who are the perpetrators of discrimination are brought to justice, and that all those who have been victims as a result of that, all those individuals, are made whole, and that the discrimination ceases.

I think that is a judgment call that Congress made some time ago, and when it's revisited that question over and over again in more recent civil rights legislation, it has gone back, in every case, to individual discrimination and resisted the fashioning of laws that would reach the other concept, which is institutional discrimination.

I think the courts have done the same thing. You have, for example, in the school area and in the employment area and in the housing area the recognition—school is the easiest way to explain it—that de facto segregation in a school district is not something that is unlawful under the laws that we have, whereas de jure segregation is. And I think it's the same dichotomy that you were explaining, and the courts have held to that rather rigidly and unyieldingly throughout the whole period of time that we have had these statutes on the books and the courts enforcing them.

COMMISSIONER BERRY. Let me say something just about that because I just want to make sure that I heard what I heard. You are saying, Mr. Reynolds, that the Supreme Court has held to the doctrine that the remedies in the civil rights cases must always be applied to individuals? Did I hear you right? Is that what you said?

MR. REYNOLDS. I think that the court has held to the principle that it's individuals who are discriminated against and it's individuals who are doing the discriminating and the relief has to go to the individual victim.

COMMISSIONER BERRY. So that relief in school cases, if I hear you correctly, has gone to individual persons in schools, not the school systems?

MR. REYNOLDS. Absolutely. It does certainly impact on the school system, but it absolutely is relief that the Supreme Court has fashioned to ensure that all of those victims in the school system are made whole or redressed for the injury of being in a segregated school environment.

COMMISSIONER BERRY. I only pressed that, Mr. Chairman, because that's important. I just wanted to make sure I did hear you right, and I still can't believe I heard you, that school systems are not

ordered to desegregate by court order; it's some individuals in the schools who are ordered to do it?

MR. REYNOLDS. Well, school boards are ordered to, just as employers are ordered to, just as owners of large apartment complexes are ordered to, because they are the ones who have perpetrated the wrong of the segregation. But the remedy that is fashioned is one that is designed to make whole those victims of discrimination. In a school case, all of those students in a segregated public school system are victims of discrimination, and the relief that is fashioned by the court is designed to ensure that all of those victims are given the kind of redress that they are entitled to to cure the discriminatory activity.

COMMISSIONER BERRY. And in employment cases, courts have not announced prospective relief for unidentified victims? Is that what you're telling us?

MR. REYNOLDS. I think that we do have a question with regard to court decisions, and the issue is now before the Supreme Court directly in three different cases, which relates to the whole area of preferential relief for those who are nonvictims. And that is, indeed, an area that the courts have addressed and are in different places on it. And I think that the Supreme Court this term has three cases that it has taken that directly and squarely present the question of what is the appropriate kind of relief in that context.

COMMISSIONER BERRY. I'm pressing this, Mr. Reynolds, because you have been accused before of stating that something was law when it wasn't and the Supreme Court has decided something which it hasn't. And I just want to be sure that I'm not hearing wrong, because the first thing I heard you say before I began questioning you was that the courts had interpreted the civil rights laws to only provide remedies for individual victims. And now you have come back to tell me that there are cases now before the courts in the employment area where that issue is being resolved, but it is not the case that the Court has denied prospective relief to people who have not been identified as victims.

So, I just wanted to be careful so that you wouldn't end up saying something you and I know knew wasn't the law at the time. It may be decided, but it hasn't been yet.

MR. REYNOLDS. Certainly you make your point, and it's a good one in the employment area. The context of the question was outside employment. But in further discussing it and elaborating on it, it is, indeed, the case that certainly the circuit courts have in the employment area addressed relief in a context which goes beyond make-whole relief for victims. And the Supreme Court has that issue before it in three different cases. And if I misspoke or misled you in that regard, I apologize. It was not my intention.

COMMISSIONER BERRY. Thank you.

CHAIRMAN PENDLETON. Mr. Reynolds, thank you very much.

We will take a break for 15 minutes and give our reporter at least a chance to catch her breath.

[A short recess was taken.]

Further Discussion, Federal Enforcement

CHAIRMAN PENDLETON. I'd like to reconvene the previous panel. Are there questions of the previous panel?

Mr. Guess.

COMMISSIONER GUESS. Thank you, Mr. Chairman.

I wanted to ask Ms. McGrew, since you were one of the few panelists who have alluded in your paper to the economic, social, and political consequences of the fair housing law, and it is about one of the political consequences that I have some curiosity. Is it safe to say that many of the elected officials who are of color are elected from districts which, because of the residential housing patterns, are predominantly black or Hispanic or whatever?

MS. MCGREW. Yes, Mr. Guess, that's true.

COMMISSIONER GUESS. So, could we conclude, then, that one of the political consequences of the dispersion of segregated housing patterns would be a simultaneous reduction, given the variables that exist in the political marketplace today, of the number of black elected officials who represent districts?

MS. MCGREW. I think that's a possible result, Mr. Guess. If I could be a bit historical for a moment, I think it is interesting that the civil rights movement began with a strong impetus towards integration, and at some point that impetus started to shift.

I think part of that was the result of a realization of just the phenomenon that you have described, that it is by concentrating groups that you develop a political base and, therefore, have a stronger or more apparent representation of the group. I think that that has been responsible, in some instances, for a trend away from support for integrated housing. I experienced that when I was at HUD in dealing with several minority elected officials from different

cities, who spoke quite pointedly on the subject and saw the movement toward integration as a conscious effort to disperse political power.

I think that, in the long run, it's a mistake to think that by concentrating a minority group in a particular area by choice or otherwise that you will create a stronger political power. I don't believe that that would be the result in a country as long as they are a significant minority. I think we have seen the contrary result, indeed, in the housing area.

By way of example, I suggest the elderly have retained funding longer and at a higher level than any other programs for housing, despite the fact that those programs are the most expensive to run. Public housing funds—public housing is generally regarded as the least costly method of financing assisted housing—lost support earliest on because of the lack of support, in my opinion, because it became identified with minority housing.

I do not believe, for that reason, that minority interests are best represented in that fashion. That is my personal observation, and I hasten to add it's not widely shared.

COMMISSIONER GUESS. As a matter of intellectual curiosity, do any of the other panelists have any thoughts on this question.

[No response.]

COMMISSIONER GUESS. Thank you, Mr. Chairman.

CHAIRMAN PENDLETON. When we stopped, Commissioner Berry was asking questions of Ms. McGrew, I believe.

COMMISSIONER BERRY. I have a couple of questions.

In your paper you point out this Executive order that President Carter issued. Do you know what I mean?

MS. MCGREW. Yes.

COMMISSIONER BERRY. What has happened to that Executive order since the Carter administration?

MS. MCGREW. I think the record of this administration speaks for that. I have focused particularly on one aspect of that, the failure to issue Title VIII regulations.

COMMISSIONER BERRY. Have they been issued?

MS. MCGREW. They have not been issued. They have not been proposed. My understanding is that it's the position of the Department that they will wait for amendments to Title VIII before that is done. I don't know if that's their current position.

I should say that my criticism on that score is not limited to the current administration. I think I've made that clear in my paper.

I would also say that in terms of cooperation between HUD and the Department of Justice, it has been radically improved in the last 18 months, so that there really is a mutual effort going in some investigations, and that is something that is long overdue. I would say that that certainly carries out the intent of the Executive order.

COMMISSIONER BERRY. We'll ask Mr. Knapp when he comes before us, or at least I will if I get a chance. If HUD's reasons for not issuing the regulation are still that they are waiting for the law to be changed, do you think that is a valid reason for not issuing regulation?

MS. MCGREW. No, I don't, Commissioner Berry. I believe that the amendments that are being discussed by and large don't go to the core kinds of definitions and guidelines that are called for under the act now. I would also say that at the rate the legislation has been moving, if we wait until those amendments are adopted to issue even proposed regulations, it will be another 18 years before we see them.

COMMISSIONER BERRY. The last thing I'll ask you is: Given the testimony of Mr. Hazlett and Mr. Welfeld, and the papers I've read, and given what we heard yesterday about the persistence of discrimination and segregation and how it seems to be able to overcome almost anything, and it remains in existence, do you believe, as I infer from your paper, that enforcing Title VIII or amending it and enforcing some other civil rights law will somehow make a dent in housing segregation? Do you still believe that after all you've heard and seen?

MS. MCGREW. Yes.

COMMISSIONER BERRY. Where do you get this unbounded faith and optimism in the light of what we heard about people's choices, what we heard about the economics of it? Is it just that you're an incurable optimist or what?

MS. MCGREW. Well, Ms. Berry, I didn't say it was going to start a revolution. I did say that it will make a difference. I believe, based on the experience in the employment area, that law enforcement changes behaviors, that people respond perhaps more to penalties than to incentives. That's one reason I would like to see civil penalties added to the current law and the limitation on punitive damages lifted. I think that it should be very expensive to

discriminate in the housing arena, as it has become to discriminate in the employment arena.

COMMISSIONER BERRY. Would you, Ms. McGrew, or any of the rest of you—

CHAIRMAN PENDLETON. You're out of time.

COMMISSIONER BERRY. Then I am finished. Would any of you support the idea that was proposed here that there be subsidies paid to white people for being willing to live in black neighborhoods, and subsidies paid to blacks who are willing to be the first black in a white neighborhood, in order to desegregate housing? Would you support that?

MR. WELFELD. You do have that in some of the State housing programs, for example, in New York State.

COMMISSIONER BERRY. Do you support it?

MR. WELFELD. For example, a family that lives in the Mitchell-Lama project, a white family will be getting a subsidy for living in that kind of area. And Massachusetts has a program.

COMMISSIONER BERRY. Do you think it's a good idea, though, Mr. Welfeld?

MR. WELFELD. I don't think it's been shown to be particularly cost effective. I don't think it has really changed the pattern of housing very much.

COMMISSIONER BERRY. What about you, Mr. Hazlett?

MR. HAZLETT. I am highly skeptical that this is going to be the way in which America becomes residentially integrated.

CHAIRMAN PENDLETON. I'm glad the panelist is so forthright in his answer.

MS. MCGREW. I would say as a general matter, no, and that is because there are so many different owners of housing. By and large, I don't think it's feasible. I do think that in the public housing desegregation context that it is legal where there is a dual system to offer incentives to black or white families to move from one project where his or her race predominates to the other, and I do approve of that.

COMMISSIONER BERRY. Thank you, Mr. Chairman.

CHAIRMAN PENDLETON. Mr. Bunzel has some questions.

COMMISSIONER BUNZEL. I have one question which may be very short or it might not be.

Ms. McGrew, I was very much interested in what I thought was a strong comment with respect to your consideration briefly of the *Starrett* case. If I heard you correctly, I heard you say that you thought that the plan that had been devised as a practical approach to a difficult problem in New York in the *Starrett* case was a workable plan, but had gotten messed up by the intervention of an ideological purist.

MS. MCGREW. You remember it correctly, Mr. Bunzel.

COMMISSIONER BUNZEL. You went on then to talk about your definition of choice, and I happen to appreciate that because it comes closer in many respects to one of my own, which develops essentially in an evolutionary way from trying to look at the concept of freedom, which initially began and was defined as an absence of restraints, and then over a period of time, particularly during the British period when there was a lot of ransom legislation and welfare legislation, freedom transformed into meaning the ability to effectuate a choice. And this involved the role of positive government and so on.

But I thought I also heard you say that one of the ways to look at the *Starrett* case is that it got messed up with the intervention of a lot of values that somehow was impeding, as an ideological purist is likely to do, the kind of practical approach to some difficult problems. I'm wondering whether or not what you're really saying here is that one way to deal with some of these difficult problems is to factor out a lot of these values that tend to throw up dust in our eyes when we don't really need it.

The reason I ask this is because I would put it to you that in everything you have said this afternoon, and in all of your very straightforward answers to questions, your own values are pervasive throughout all of your own particular analyses and approaches. That is, I don't think there is any way in which one would argue that your whole position doesn't start from a value base and doesn't have suffused throughout it very explicit values.

If I had the time, I think I could put together a portrait of your values, and in fact probably roughly describe your political views and your social outlook and the role that you think the government should take, and why I suspect you would be considered an unreconstructed or maybe a reconstructed New Dealer and so on. And I'm not in the slightest upset with any of that, because it happens that in many respects I share those values with you.

But my question is: Is it really necessary, and is it part of your position, that in order to get into a problem such as *Starrett City,* we really must try

somehow to factor out values, and that those who throw them into our face are simply confusing us?

MS. MCGREW. The short answer to that is no, Mr. Bunzel, but let me give you a little bit longer answer.

First, I'd be fascinated to have that conversation with you sometime and be very interested in the portrait you might develop, and I would then return the favor.

I would not ever like to be known as a person who did not stand for certain values and did not advocate them—quite the contrary, as you have suggested. But there is an aphorism in the law that hard cases make bad law. And that was never truer of any situation than *Starrett City.*

I believe the parties worked out a viable solution to that case which would have avoided the necessity of resolving an issue in a very unique context. And now, as a result of an impulse to stand for a principle which I would readily agree Mr. Reynolds truly believes in, I believe he has now set up this case for a decision which cannot help but muddle the law further. Whichever way it goes is going to produce, I think, a fallout that is going to have some troublesome and negative consequences. In this case it would have been better to butt out.

The second point, though, that I tried to make is one of priorities. There are a lot of situations that I think need to be addressed in this country involving fair housing issues. There are limited resources, limited staff, limited time to address them. I don't think that it is appropriate to indulge in advocating an ideology, to concentrate our resources in advocating an ideology, when there are very practical needs that should be met in a lot of different cities of this country.

So, I question both the reasonableness of overturning a solution that was agreeable to the parties in this case and the reasonableness of this allocation of resources to do that.

COMMISSIONER BUNZEL. You wouldn't suggest that the Supreme Court should never overturn an agreement that two parties might be willing to accept—not as a matter of principle, certainly?

MS. MCGREW. No, but in fact courts are generally reluctant to do that, regarding them as agreements between the parties. And courts have recognized that consent agreements can be regarded in a different light than a remedial order imposed by a court, and may be subject to different standards. As a result, it has a different precedential value than a court decision will have.

Starrett City as a court decision is going to be something we are going to have to live with for a long time, however it comes out.

COMMISSIONER BUNZEL. I guess what I'm really concerned about is a hierarchy of values from which you speak. But I think—I hope—we could agree that one's hierarchy of values is arguable and debatable, and is not an automatic guideline to what public policy should be. It is a hierarchy of values which you are prepared to advocate and which you are prepared to defend. But that is to be distinguished from suggesting that a hierarchy of values is so right that those who would in some sense intervene with a contrary set of principles or values are simply creating a lot of fuss.

MS. MCGREW. I would agree 100 percent with your statement, Mr. Bunzel. I would not suggest, though, that in this case we are imposing a different set of values. I think we had a resolution that was a matter of accommodation of reasonable people, all of whom had something at stake and something to lose. I believe Mr. Reynolds has raised the stakes enormously for everyone, and I think it was the wrong case to choose to do that in.

COMMISSIONER BUNZEL. Thank you.

CHAIRMAN PENDLETON. I want to thank you and thank the panel.

We will now conclude this portion of our consultation, and now move back to our hearing section. We will now have Mr. Knapp as soon as we can get the table set up.

[A short recess was taken.]

CHAIRMAN PENDLETON. As we reconvene the hearing part of this combination consultation/hearing, Mr. Reynolds and Mr. Knapp are testifying with regard to their responsibility for enforcement of Federal fair housing law and other relevant issues that have been raised during the course of the consultation/hearing.

After the close of the testimony today, there will be an open session in which members of the general public are invited to testify. The time available is allocated on a first-come, first-served basis. If any of you wish to testify and have not signed up, please consult the Commission staff.

There are two Commission requirements governing relevant testimony. Testimony must be limited to 5 minutes and may not defame or degrade or incriminate any person. In addition, it should be noted that the record will remain open for 30 days following the close of these proceedings, and any

interested persons with statements they wish to submit may send them to the Commission's office.

I will now administer the oath to Mr. Knapp.

[John J. Knapp was sworn.]

CHAIRMAN PENDLETON. Thank you, sir. You may proceed.

Testimony of John J. Knapp, General Counsel, U.S. Department of Housing and Urban Development

MR. KNAPP. Thank you.

Mr. Chairman, members of the Commission, on behalf of Secretary Pierce, I want to thank you for inviting us to participate in this consultation regarding discrimination in housing. We welcome your undertaking this inquiry. The last 30 years have witnessed monumental efforts toward elimination of the vestiges of a sorrowful history that had scarred virtually all of the realms of fundamental human activity in our society, particularly education, employment, and housing. Dramatic changes have occurred, and in a relatively short period—so much so that many of us can look back at earlier periods in our own lives and hardly comprehend how that world that we then inhabited can possibly have been the way it was. Yet, in perhaps none of these fundamental arenas of our society have the visible signs that we have come to associate with that sad history been less altered than in housing.

It is right, then, that you undertake this inquiry into the causes and effects of racial residential patterns in our communities: How did they get the way they were, and why do they continue? What are the roles of discrimination and of other forces? What visible results should we expect from the extension of equal opportunity and the removal of barriers to freedom of choice? Should we accept the results if they fall short of complete integration?

In the Department of Housing and Urban Development, our concern with housing discrimination arises from two separate sources. One is our own housing and urban development program activity, and our mandates, expressed in Title VI and in section 808 of the Civil Rights Act of 1968, to prevent discrimination in our programs and, beyond that, to administer those programs in a manner affirmatively to further the policies of the Fair Housing Act.

The second source, which greatly expands the scope of our concern, is the Fair Housing Act itself. Its prohibitions extend far beyond our own programmatic activities and cover, instead, the entire private rental and homeownership markets.

Your invitation asked us to address specifically fair housing enforcement and questions of legislative amendments to the Fair Housing Act. Accordingly, the bulk of my remarks will be devoted to that subject. However, I also will refer to some separate points that arise more directly from our programmatic involvement and that I think should be encompassed by your inquiry.

If the problem that we face in fair housing enforcement is to be summed up in a word, that word is "underenforcement." This Commission is familiar with the often-cited survey of American housing markets that was conducted by the National Committee Against Discrimination in Housing in 1977, and published in 1979, under a HUD research grant. That survey reported that in a typical search for a rental or purchase, involving visits to four agents, a black seeking to purchase a home had a 48 percent chance of encountering discrimination on at least one visit, and a black seeking to rent had a 72 percent chance of encountering discrimination on at least one visit.

HUD staff extrapolated from those findings to conclude that about 2 million instances of housing discrimination occurred every year. Statistical experts may quibble, but even if the estimate is wrong by half, it is nonetheless staggering and, to put it mildly, deeply disconcerting.

Against that evidence, let us look at the state of housing discrimination enforcement activity. The number of housing discrimination complaints that are filed annually with HUD and with State and local agencies that HUD recognizes as administering discrimination laws substantially equivalent to the Federal Fair Housing Act has exceeded 5,000 in only 1 year, 1982, and more often has been about 4,500. In comparison, the number of employment discrimination complaints that are filed annually with the Equal Employment Opportunity Commission exceeds, I believe, 85,000. I think it obvious that those comparisons do not accurately reflect the relative incidence of housing and job discrimination.

If the problem is underenforcement, what is the solution? Is the defect in the law itself and, if so, how can it best be changed to overcome the problem?

The enforcement procedures that are currently provided by the Federal Fair Housing Act divide first into two categories—judicial and administrative. On the judicial side, we have government

enforcement through the pattern or practice jurisdiction of the Department of Justice, where the Department can obtain injunctive relief only; and we have private enforcement through a private right of action, in which an aggrieved person can obtain damages as well as injunctive relief.

On the administrative side, we have Federal and State and local procedures. At the Federal level, HUD's enforcement role is limited to investigation of complaints and voluntary resolution by the parties through conciliation. The Federal statute expresses a strong preference for administrative enforcement at the State or local level. It provides that if a complaint is filed with HUD which alleges activity that would violate a State or local law that provides rights and remedies substantially equivalent to those provided by the Federal law, then HUD must refer the complaint to the agency administering the State or local law.

That is the current scheme. If the causes of underenforcement are in the law, then you must add something to this scheme or try to strengthen in some way one or more of its existing elements.

Since the early 1970s at least, the preferred answer of some civil rights advocates to nearly all questions of enforcement under any civil rights statute has been administrative enforcement, and at the Federal level—providing a Federal administrative law judge with all the powers of a court judge to hear and decide cases and to order remedies.

The relative merits of an administrative versus judicial approach were argued fully in 1972 in the context of amending the employment discrimination law, Title VII of the Civil Rights Act of 1964. Both the Justice Department and the Chairman of the Equal Employment Opportunity Commission argued for a judicial process—on the ground, let me note, that complete and enforceable relief would be obtained more quickly that way because it was assumed that an administrative law judge's order would not be enforceable without some kind of court affirmance. And that is the direction in which the issue was decided in 1972.

But those outside the government who had argued then for an administrative solution were not dissuaded, and they presented the same solution a few years later for the Fair Housing Act. You will recall that amendments to the Fair Housing Act were debated strenuously in Congress in 1980, that the big issue was whether there would be an additional Federal administrative enforcement process, and that ultimately nothing passed.

In 1983 things picked up again, pretty much where they had left off. Senators Mathias and Kennedy, with numerous cosponsors, introduced a bill in about the form in which it had failed to pass in 1980. The President also submitted a bill, which we had developed under Secretary Pierce at HUD. It did not suggest an administrative law process, for much the same reasons that the Nixon administration had opposed such an approach for Title VII in 1972: We thought it would be slower rather than faster.

But we did adopt the conventional wisdom to some extent, in that we did put our focus on government enforcement. We thought that conciliation, administrative conciliation, provided the only really promising avenue for speedy, efficient relief; and we proposed a new ability for the Justice Department to take individual complaints to court after voluntary conciliation had been tried and failed, primarily because of the impact that we thought this backup capacity would have on parties' willingness to resolve matters in the conciliation process.

It is now 6 years since hearings on the Fair Housing Act were last held in Congress. It is perhaps time for us to examine whether the assumptions that lay behind the proposals advanced in the midseventies and since are still valid.

Some important things have changed considerably. The most obvious change, which directly affects the role of Federal administrative enforcement, is the increasing role of State and local agencies. In 1979 we had not even begun the fair housing assistance program, under which we provide direct funding assistance to recognized State and local agencies to enhance their capacities. More importantly, in fiscal 1979 only 211 complaints filed with HUD were referred to substantially equivalent agencies, representing only 7 percent of the total.

The number of States whose laws have been recognized as providing rights and remedies substantially equivalent to those provided under the Fair Housing Act has risen from 22 at the end of 1977 to 33 at the present time, plus the District of Columbia. We now recognize 63 substantially equivalent localities, including 6 that are outside the 33 recognized States.

More dramatically, in fiscal 1984 fully 67 percent of the complaints that came into our process—which includes complaints filed initially with HUD and referred by us to State and local agencies, as well as complaints filed originally with the State and local

agencies and then dual filed with HUD—67 percent of those complaints were processed by the State and local agencies. And 87 percent of those originated with the State and local agencies, not with HUD.

That is not aberrational, but is a continuation of a pattern. The percentage of cases processed at the State or local level was 39 percent in fiscal 1981, became the majority for the first time in fiscal 1982 at 52 percent, and continued to increase to 60 percent in 1983, and as I said, 67 percent in 1984. There is no reason to think that the trend will not continue.

It seems to us, then, that to concentrate the focus of our efforts on adding something to the Federal administrative process is really to be playing at the fringes, outside the areas where the greater possibilities lay. Focusing on any kind of Federal governmental enforcement, in fact, has its obvious practical limitations. There are only so many Justice Department lawyers or HUD investigators and conciliators, and there are not likely to be a great many more.

More importantly, perhaps, there are only so many places where they are located. Sometime popular impressions to the contrary, the Federal Government is not really omnipresent, at least not with personnel. HUD's fair housing investigators and conciliators, for example, operate out of 10 regional offices, 10 places in the United States. That does not represent a truly accessible or practical resource on which to rely for vindication of the rights of, perhaps, thousands of individual victims of discrimination throughout the Nation.

Changes also have occurred in the area of private enforcement through the courts. The principal development here, perhaps, was the *Havens* decision by the Supreme Court in 1982, in which the Court granted standing to testers who had been lied to to sue in their own right, and gave standing also to private fair housing organizations to sue to enjoin discriminatory practices in the housing market and to recover damages for injury to their own purposes and programs. On both those points, the Supreme Court adopted a position that was urged upon it by this administration in an amicus brief signed by the Solicitor General, by Assistant Attorney General Reynolds, and by myself.

In the private enforcement area, there also has been increasing success in obtaining substantial damages awards, and in obtaining speedy relief through temporary restraining orders. The Open Housing Center in New York recently published a report entitled "The High Cost of Housing Discrimination," which details the increases in fair housing damages awards and settlements obtained in the New York metropolitan area, rising to $1.3 million in 1984.

These are the factors that have led us at HUD to conclude that the primary target that we should keep our eye on is the enhancement of private enforcement. That conclusion is what led us to develop the fair housing initiatives proposal, particularly its private enforcement component, that was included in the President's budget for 1986—a budget that, I need hardly remind you, was not generally receptive to new spending proposals.

That proposal, calling for the direct funding of private fair housing groups for enforcement activities utilizing the several procedures provided by current law, but particularly the private right of action, was and remains a sign of two convictions: one, as I have indicated, that it is private enforcement—the traditional role of the private attorneys general that the Supreme Court has recognized have a uniquely important role under the Fair Housing Act—that offers the only realistic hope for making a significant dent in the underenforcement problem that we now have.

And, second, that the private fair housing organizations are essential to that enforcement effort. They are unique. I do not believe that there are exactly analogous organizations available to provide the same services to, say, victims of employment discrimination. And we believe that they are essential, principally because of the dependence of disparate treatment housing discrimination cases on tester evidence, and the need for some institutional arrangement to go to in order to get it.

There appears, for reasons that I do not fully comprehend, to be no alternative source for that particular kind of indispensable support of discrimination complaints by individual victims, and as long as that remains the fact, fair housing enforcement will not get very far without them.

With respect to Fair Housing Act enforcement, therefore, we continue to believe that some kind of backup authority to give greater credibility to HUD's conciliation efforts would be useful. We also believe that utilization of the court system by the Department of Justice would be a more efficient and effective means of supplying that backup than a new Federal administrative process that, after all, would

be pretty much inoperative in over two-thirds of the States.

But all of that is, in our view, somewhat secondary. The more important focus, we believe, should be private enforcement. We have proposed to support the enhancement of private enforcement by direct Federal funding. That would be an unusual, even unprecedented, step. The Federal Government has not previously offered direct funding for private civil rights enforcement activities in any permanent, ongoing way. But it appears to us to be a far more promising route than any other which would continue to make fair housing enforcement dependent upon Federal personnel resources.

I said at the outset that I would also touch upon the second area of our concern with housing discrimination, namely, as it affects the housing and urban development programs that we administer. Pursuant to a separate invitation, we will soon submit to you a presentation on this subject that will discuss, among other things, ways in which housing and urban policies of the Executive and Congress, as well as discrimination, have influenced who lives in federally assisted housing and where it is located.

At this time I wish to say little more about the subject than what may be necessary to indicate how different a subject it is from what I have discussed previously, and to note a few particular concerns that I commend to your consideration. When we speak of HUD housing programs we are, in the main, talking about low-income assistance programs. Therein lies the additional element that makes this a highly distinct subject. It is the combination of low income added to race that brings us into confrontation with the phenomenon of the ghetto and all that that entails.

When we seek to vindicate the rights protected by section 804 of the Fair Housing Act, our target is discrimination. But the fact of the ghetto and the separate concern, particularly pronounced at the time of enactment of the Fair Housing Act, that the continued unrelieved existence of the ghettos, no matter how they came into being, constituted a clear and present danger to the fabric of the society has impelled us to reach beyond nondiscrimination when we address the administration of government housing and urban development programs.

In the Federal programs we have adopted and pursued policies that go beyond nondiscrimination. Examples that come to mind are site-selection policies, which determine where we will or will not build assisted housing, and public housing tenant selection and assignment, where we have rejected freedom of choice for public housing applicants in favor of compulsory assignments, lest individual choices frustrate our larger aims.

When these policies were adopted, there was clear, conscious recognition that they were just that—policy, designed to affirmatively further the policies of the Fair Housing Act as well as Title VI, but reaching beyond intentional discrimination and, in its particulars, not necessarily mandated by the commands of the statutes, much less the Constitution.

My point now is to urge that these distinctions, of which we were at one time quite conscious, be kept in mind and that we resist any tendency to let the two areas of legal dictates and social policy be submerged into one, namely, the commands of the law. I do not urge this in order that we may retreat from our attention to the concerns. Rather, I urge it because I think that we cannot yet afford to lose the ability to be somewhat flexible, to experiment—to have the flexibility not only to try new approaches but, just as importantly, to abandon them quickly when they don't work or even make matters worse. When we move to equate our policy experiments with the commands of the law, we lose that flexibility and we suffer.

In addition to flexibility, we must proceed with caution because we are dealing with a somewhat uncharted area, namely, the limits of voluntary efforts to achieve a more integrated society. I have no doubt that we have the right to take steps toward that end, even if the Constitution and our nondiscrimination statutes do not compel them. Indeed, I think section 808 of the Fair Housing Act is a charge to us to try to do just that.

There is a passage in a Supreme Court opinion that is pertinent here. It occurs in the *Swann* case, decided in 1971. The case involved school desegregation, and the immediate context is the Court's discussion of the limits of the judicial power, namely, that it cannot be exercised in the absence of a constitutional violation. But the Court went on to indicate that not every repository of legitimate authority is that limited. It said:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students

reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a constitutional violation, however, that would not be within the authority of a Federal court.

Now, I have always thought that "housing" could be substituted for "educational" in that passage, and that it would be a legitimate statement in that modified form. But I have also thought that there is a serious gap in the statement, one that we have not yet filled in, and that concerns the limits on such voluntary policy efforts—the point at which they intrude upon individual rights in a way that cannot be tolerated.

Moreover, I also think those limits are more serious, and that you find yourself up against them rather sooner, in a housing context than a school context. To cite the most obvious reason, spaces in assisted housing are rationed in a way that places in public schools are not. The question that is involved in pupil assignment cases, therefore, is not whether the pupil will attend school, but only where.

Attempts to effect racial balance in assisted housing tend to involve questions of whether some applicants will be admitted at all, or at least when they will be admitted relative to others. However, I believe that you already have heard something of this during your panel on occupancy controls, and I will not attempt to add to that at this point. Nevertheless, the fact is that in the housing context, even more than in others, these remain largely unexplored questions. It is perhaps because of the intransigence of our residential patterns, their resistance to change, that we are now seeing new efforts, new devices, that do confront us with these questions.

I have heard many people who have devoted a great deal of their own effort and thought to dealing with these questions say that they don't really know what the answers are. It may be some time yet before we can begin to feel comfortable with our conclusions, even our assumptions. I believe, however, that if this Commission tries seriously and honestly to sort out these issues from a fresh start, refusing to let your inquiry be cut short by answers provided from other fields before you have explored fully what housing means, what our citizens hope and expect to receive from their housing, what is the full scope of what we mean by equal opportunity in housing—if you do that, you will have made a contribution for which many will be grateful.

Again, I thank you for inviting us to participate in this consultation.

CHAIRMAN PENDLETON. Mr. Knapp, I want to thank you, like Mr. Reynolds, for taking time out of your schedule to come and spend time with us. Your complete statement will be made a part of the record. There are some questions, I'm sure, that my colleagues have, and Commissioner Ramirez would like to take the first half-hour.

[Laughter.]

COMMISSIONER RAMIREZ. I think I would enjoy talking to you for a half-hour. I will try not to do it at this point in time.

I appreciate your testimony and particularly your encouragement that the Commission not rush to judgment on these issues which are indeed difficult, as particularly reflected in the fact that we have made such very little progress in the last 20 years.

I was interested in those policies which you talked about which you have instituted, in which you talked about site selection, and indeed assignment of tenants on the basis of race. When did those policies come into being? How long have they been in place? What is your experience to date with those policies? And what have the results been?

MR. KNAPP. Let me refer first to site-selection policies and a bit of a transition in site-selection policies.

I think in about 1967 the Department adopted site-selection criteria for public housing. It also adopted some site-selection criteria for insured housing perhaps a few years later. The point of the site-selection criteria, as adopted in 1967, was essentially that public housing should not be located solely in areas of minority concentration, but that a local authority should provide a balance in the locations of housing.

The *Shannon* case in 1970 altered that somewhat. It read a combination of things—Title VI and the Fair Housing Act, and I was about to say other policies calling for spatial deconcentration, but in fact they came later—to say that the benefits of the housing programs were not really being provided in the manner in which they were intended by these civil rights acts if the assisted housing was placed in minority areas at all, absent an absolutely pressing need. So it changed the burden; it kind of raised the standard somewhat.

Indeed, in that decision, I think that the district court had approved the siting of the particular project—there was a question in that case—by saying, "the evidence is clear that HUD-assisted

housing has been provided in a balanced manner, between minority-concentrated areas and nonminority areas," which was exactly what I think the 1967 policy that I mentioned sought. And the court of appeals said, "That's irrelevant," and remanded in a way that it would have permitted the siting of that project in a minority-impacted area only upon the finding that there were just no other places to build it or no other way of providing the housing.

That, as I say, swung things perhaps somewhat too far, and then resulted in a kind of a counterprotest over the years.

One of your witnesses here was Professor Calmore. Professor Calmore wrote I think a quite influential article in about 1978 or 1979 entitled, "Fair Housing v. Fair Housing," which was directed particularly to the site-selection criteria, and the spatial deconcentration imperative of those criteria, and claimed that it was acting to deny assisted housing to minorities where they lived, and claimed that they had a right to receive the housing where they were, those who wanted to stay there, as well as elsewhere for those who wanted to move.

That is one of those examples that I think indicates the kind of attention that has arisen through these policies.

COMMISSIONER RAMIREZ. When you were talking earlier, I had the impression that you had done something fairly recently—

MR. KNAPP. No, I was talking about historic policies. Those two examples were historic policies at HUD, not recent.

COMMISSIONER RAMIREZ. I was confused, since you had said you wanted time. I thought it was something fairly recent.

MR. KNAPP. The tenant selection policies that I referred to—those were adopted in 1967.

CHAIRMAN PENDLETON. Mr. Knapp, having had some experience with the Department as far back as I guess 1967, 1968, I have always been fascinated by the combination of programs, either in the categoricals transferred into block grants, and how cities began to use categoricals as a way to manipulate the location of housing. And when those included water and sewer and open space, you got a pretty good development when you could put all those pieces together, especially if the funding came at the same time, and the relocation money that was available, and what have you.

Now, you and I know that through no influence of our own but through public policy at that time, urban renewal came in where cities, where the Federal Government bought up large tracts of land, predominantly in downtown areas of the metropolitan area, and local governments through ordinance or through disposition and development agreements could sell that land at a much lower cost to the developer than the Federal Government paid because of tax resources. And now we have a lot of hotels and motels and major office buildings downtown that have been the result of that kind of public policy.

I guess what I'm driving at is: Is that the kind of public policy that may be needed to put in housing for low-income people to do whole bunches of things with now? I mean, land is at a premium, and of course, cities have their own programs, cities and States, and we've tried a lot of things. That's been a success. And what the public is asking, from what I've heard here, is: How do we make this housing development a success with the same kind of an effort and the same kind of incentive that went into commercial and office development? Is that possible or not possible?

MR. KNAPP. I think you're asking me really a question about the success and the probability of success of different kinds of subsidized housing production programs that have been attempted successively over the years. One program is succeeded by another. And I'm not sure that I personally really have an answer as to that.

I think the experience with the programs that we have had has not been that successful, for one reason or another. They have either been operational failures because of changing economic circumstances, as the 236 programs were, or they were simply vastly expensive, as section 8 was.

We have a new program now, which is less a fully low-income program than a mixture of market rate and subsidized units, housing development grant program.

CHAIRMAN PENDLETON. You mean the 80–20 program?

MR. KNAPP. Essentially. Although it's a grant program, it's a modest program. It's pretty new. I won't confess that we asked for it, but we have been administering it and trying to make it work, and it's probably too early yet to tell how successful it is or not.

There is also the fact that during the last 3 years, at the same time that HUD-subsidized multifamily starts had been dramatically down, multifamily

starts in general had been dramatically up. I don't attribute one to the other, but it is a fact. And certainly it's the decline in interest rates, but the increase that occurred from that in terms of numbers, I think, exceeded whatever any production program would have supplied anyway. Beyond that, I don't know that I have an answer.

CHAIRMAN PENDLETON. Is it safe to say that in the future, with production numbers being down, housing discrimination monitoring and litigation are going to be a result of what happens to existing units that are uninsured? It doesn't look like we're going to have any new units. There might not be enough money for a new Starrett City or some other units.

So the public can expect, I guess, from a public policy point of view, that we will really be talking about the public housing units that are already on line, and whatever might be done by States and localities that use all kinds of zoning variances and density bonuses and the like to put up low-cost or low-income units.

MR. KNAPP. The question of housing discrimination, in terms of discrimination against individual applicants and the access of individuals to housing, is operative both as to housing that has any kind of a HUD connection one way or the other or is subsidized or is not. The scope of the Fair Housing Act is all of it, rather than the Mrs. Murphy type of exemptions. And certainly the thrust of the administration's housing policy is more a reliance on the existing stock, both in terms of assistance for rehabilitation more than new construction, as well as through the "finders keepers" type programs, the certificate program or the voucher program, which for these purposes are essentially the same.

So, yes, I think that to an extent, because it is more spread out, perhaps the monitoring problem becomes more difficult, again putting the reliance necessarily more on complainants, and attracting complainants by removing or at least lessening what are now cost barriers to their bringing cases in terms of unavailability of finding a way of affording the evidence that makes the case, and also—as I mentioned has been occurring—the kinds of damages they can get for it and make it worthwhile to stay with the case, to pursue a case.

CHAIRMAN PENDLETON. You're saying that integration maintenance is highly improbable in cases now because of the lack of the public involvement in construction versus the—

MR. KNAPP. I don't know that there is a connection there.

CHAIRMAN PENDLETON. Certainly, if you don't have enough units, you can direct—we're talking now about if you put up new units, you're not going to have much more integration maintenance except those in the old units because there's no money to construct. So, the talk about engineering people into units is just not going to be there. Is that accurate or not accurate?

MR. KNAPP. There are still some units being built, and frankly, you'd be surprised at some places where quotas sometimes get suggested, even in elderly housing. You would think that would not be a place where one would consider it, but we have had experience with it.

It puts a limit on the likelihood of situations quite like *Starrett City* arising repeatedly. It does not affect the other kinds of things, which I know your witnesses would say—and I would certainly say the same thing—are not quotas, very much different from quotas. The homeownership, say, the suburban community things that I think particularly Mr. Polikoff talked about.

CHAIRMAN PENDLETON. Does anyone have questions? Why don't you begin, Commissioner Berry.

COMMISSIONER BERRY. Everybody is always so generous in letting the other person go ahead.

Mr. Knapp, I have a number of questions. The first one is: Is it true that HUD operates its enforcement program under the understanding that Title VIII is to be read with an intent standard as opposed to an effects standard?

MR. KNAPP. No, it's not, not really, because from the standpoint of our program—now, again understanding particularly that our enforcement program is a conciliation program.

COMMISSIONER BERRY. Yes, I understand that.

MR. KNAPP. It seems to me in that context, whether or not, let's say, a person ought to be able to obtain damages in a suit for unintentional conduct, it seems to me that that is not really a question that should persuade us as to whether or not we will accept the case for resolution and conciliation or not. Because if activity has a discriminatory effect, even if unintentional, it seems to me that the conciliation process, the voluntary process in which education is a fair part, is suitable for dealing with that kind of thing anyway.

So, from that point of view, and that being the limits of our enforcement role directly, no, I don't

think that we operate, and certainly not consciously or explicitly, on a basis that we will only seek to resolve complaints if they involve intentional discrimination.

COMMISSIONER BERRY. When do you begin to apply an intentional discrimination standard? Is it when you begin thinking about the Justice Department litigating the case, or at what point?

MR. KNAPP. I can't recall an instance, Commissioner, when we really have bothered to try to make that analysis in a case, even when referring it to the Department of Justice, because generally speaking what we are dealing with are what are referred to as the garden variety discrimination cases, which are disparate treatment cases. And in disparate treatment cases you don't get that issue of intent versus effects. Disparate treatment cases are intentional discrimination cases; that disparate treatment itself is the evidence of the intent. So you really don't get into the issue.

COMMISSIONER BERRY. Have you, during your time at HUD, ever received any guidance, either orally or in writing, from the Justice Department that when it comes to litigating cases, the intent standard will be applied and that you ought to be aware of that?

MR. KNAPP. Not as to Title VIII.

COMMISSIONER BERRY. Not as to Title VIII?

MR. KNAPP. Not as to Title VIII.

COMMISSIONER BERRY. What about as to Title VI?

MR. KNAPP. In one instance when we referred a case involving a housing authority to the Justice Department, they responded that in their view on the record, it did not seem to make out a case of intentional discrimination, and therefore, they would not pursue it.

In fact, I thought they were perhaps wrong in that instance because what the case involved was departure from a written tenant selection and assignment of standards, which seemed to me to be evidence of a discriminatory intent anyway. We ended up resolving the case with the housing authority anyway, so the matter really didn't get argued much further. That was the only occasion.

COMMISSIONER BERRY. I'm just wondering how you work effectively with the Justice Department, and Ms. McGrew said in her paper that you have begun to work very closely together on these cases. If the Justice Department, as Mr. Reynolds told us in his testimony, applies an intent standard—you may use effects to prove intent, but really an intent standard; that's the way he reads *Arlington Heights* and so on—and you in HUD don't even bother thinking about an intent standard, then how do you put together cases that Justice can then take to court? I don't understand how you guys do that.

MR. KNAPP. Well, if you were to assume that we put together the case—

COMMISSIONER BERRY. Oh, you don't.

MR. KNAPP. —and then Justice takes it to court, you'd be mistaken anyway. Because no matter how fully we have developed a case, they always investigate it over again anyway and I think always have done so. We may give them a fairly good head start on it to make it somewhat easier, but they always conduct their own investigation anyway.

COMMISSIONER BERRY. So, we have two different tracks going. You use your resources to make a case one way or to conciliate or to investigate a complaint.

MR. KNAPP. Sometimes we work together by using our own separate resources either jointly or concurrently.

COMMISSIONER BERRY. But you've got different standards, which means you're looking for different things. If I understood you rightly, they've got one standard and you've got another.

MR. KNAPP. Yes, and we're also looking with a different process in mind. We are looking at a conciliation process, and they are looking at a litigation process.

COMMISSIONER BERRY. The other thing is: I notice we got a letter that was just delivered to us, after some 8 months. I think it was 8 months ago that we first wrote to HUD asking you about the *Dallas News* articles on public housing segregation or at least allegations concerning that, and we just got a response.

Having run some programs in the Federal Government myself, I know how it is with getting a response when one has to go to a hearing or something. So, I appreciate the response anyway. But would you characterize this as an interim response, since it doesn't give any detail about the specific allegations? It just tells us essentially what you're working on.

MR. KNAPP. Oh, yes. What it said was that we have been preparing a somewhat lengthy analysis of that, and that we will be submitting it to you as well as to the House Banking Committee very shortly.

COMMISSIONER BERRY. So this is just an interim response.

MR. KNAPP. Yes.

COMMISSIONER BERRY. The letter to Congressman Gonzalez is dated April 16, 1985, and we're getting that letter today, dated November 8, 1985. From April to November—how many months is that? It takes a long time for letters to get over from HUD.

CHAIRMAN PENDLETON. I talked with Secretary Pierce about this. He assumed that the letter he sent us back in March, about a week after we sent the first one, would suffice until after they had done the study. What we were looking for was a complete answer, and that complete answer was not available at the time. I think this is the interim, saying that they did respond to the Congress, and "We'll let you know something within 10 days."

MR. KNAPP. Well, in all truth the letter to Chairman Gonzalez is an interim response also.

CHAIRMAN PENDLETON. So, we've got the two interims here.

COMMISSIONER BERRY. Waiting for the final.

CHAIRMAN PENDLETON. We can't expect to have 2 pages with 44 pages of press in the Dallas paper.

COMMISSIONER BERRY. Right.

CHAIRMAN PENDLETON. Did you write the story? [Laughter.]

COMMISSIONER BERRY. So, we're trying to get as many answers as we can here, hope you notice that.

There were a series of articles in the *Wall Street Journal* about HUD and Justice enforcement. There's one October 28, "Justice-HUD Oppose Housing Segregation But Enforcement Lags." And in this particular article, I was thinking about your testimony that you have a small number of complaints compared to some other agencies. You were talking about, I think, 8,500 or something, and you were comparing that with the numbers of complaints that other agencies on other issues get. I wondered if the reason why you have a small number could in any way be related to some of the views that were expressed in here about what HUD does with complaints when it gets them.

First of all, in the article there are complaints from your department about being overworked, understaffed, and having 6-month backlogs. And then there are some people who are complainants who say that they have stopped sending any complaints to the government, to HUD or Justice, because of the way they are handled. Do you have think that has any influence on how many complaints you get or not—these attitudes or perceptions?

MR. KNAPP. I doubt that either I or any person in an administrative position in my department or any other can say that the public is never frustrated by the processes of the government. I do not think that that is a significant factor in the small and continuing small number of Fair Housing Act complaints that are filed with the Department.

COMMISSIONER BERRY. Do you think the activities of HUD are relevant to trying to end housing segregation? I mean, given all the testimony we've had yesterday and today about the pervasiveness of it, given statements made by your Secretary over and over again about the pervasiveness of discrimination, and those indices that we saw yesterday that were given to us in evidence about how much segregation there is in most cities, and yet you've got this law that's been around since 1968, and a department which the Commission has criticized in every administration for not doing what it ought to do in terms of enforcement—do you think your programs are really relevant to trying to end housing segregation? If they are relevant, why do we still have all this segregation?

MR. KNAPP. I suppose you'd have to compare it possibly with how much more you'd have if the Department weren't in action. Yes, I think it's relevant.

COMMISSIONER BERRY. You think it's relevant. Okay.

On the Title VIII regulations, we have had testimony, and we know from our own studies that the regulations haven't been issued. Is your response still that you're waiting for the statute to be changed?

MR. KNAPP. I don't think that was ever our response, not that I'm not aware of, because the statutory amendments that were being considered were procedural amendments really, and what is being talked about or what had been talked about or what had been drafted several times were substantive regulations. I do not think there really was, at least never in my mind, a real connection between the two.

COMMISSIONER BERRY. Do you have any plans to issue regulations?

MR. KNAPP. I would say that the most that I've had plans for—and I've had some drafting done in my own office—I would not characterize as regulations, because I don't think that the statute gives us

legislative rulemaking authority under Title VIII, in the sense like the FTC [Federal Trade Commission] has the authority to define what is or is not illegal conduct. We don't have that kind of authority. That takes an express grant of authority. We don't have that authority under Title VIII.

What we could issue would be no more than, I think, guidelines about how we would look at matters when they are brought to us in complaints. So, it would be a somewhat lesser form of guidance than regulations as such. I have always had some doubt, frankly, that HUD regulations were all that necessary or useful because, continuing as you go along, there is not a dearth of authority in terms of court decisions on fair housing cases, or what do or do not represent instances of discrimination.

CHAIRMAN PENDLETON. Just one second. One of the things I find happening is that once you issue the check to the local government or State government for a housing program and it goes into their treasury and loses its identity, as they say, in the appropriations process, State and local, you have a hard time cutting off anything once the money has already been spent for something, don't you? If you take CDBG [community development block grant] funds as a link to some housing, once the money is gone, it's gone. I don't know what the penalties are once the money has been spent. If there's discrimination in the unit, that's one thing, but there's not much HUD can do beyond that point, is there?

MR. KNAPP. You're talking, I think, about what has always been the problem, or a problem, with Title VI enforcement, let's say, in that the remedy provided is a funds cutoff, and that is an impractical remedy, particularly when you're talking about a continuing subsidy program, like public housing.

CHAIRMAN PENDLETON. Right.

MR. KNAPP. But nevertheless, recipients usually are not that resistant to entering in a satisfactory compliance agreement with the funding agency.

There is the alternative means of relief of a Department of Justice suit to enforce the assurances, and that really is the ultimate way of enforcing Title VI.

COMMISSIONER BERRY. The other thing I wanted to ask you is: Given your support for private enforcement, and letting the private sector enforce, would you also be in favor of providing more generous or more reasonable attorneys' fees to private attorneys bringing suit, and also an increase in the amount of punitive damages, which has been recommended before? Are you in favor of those provisions?

MR. KNAPP. I have frankly not been aware that the awards that are given to attorneys in civil rights cases have been held under any kind of, let's say, artificial ceiling. And as far as punitive damages are concerned, I believe in the administration bill that was submitted in 1983, we proposed to remove the $1,000 cap on punitive damages.

I think you also know that in practical terms, since when cases are filed under the Fair Housing Act, they frequently are filed under the 1866 Civil Rights Act, they get unlimited punitive damages under those authorities. So, as you have read over the last few years, there have been some very substantial punitive damages, awards, granted in housing discrimination cases, notwithstanding that limitation in Title VIII. But, yes, I certainly favor removing that limitation anyway.

COMMISSIONER BERRY. But you're not aware of the need to increase attorneys' fees?

MR. KNAPP. No, there is no artificial limitation that's applicable to housing discrimination cases in the way that courts compute attorney's fees.

COMMISSIONER BERRY. But I meant if you were trying to give an incentive to bring such suits, and there's a strong argument in your paper for doing that, for letting the private sector—there are four or five pages or more about what a great job privates can do and are doing. One way to do it is to provide, without even computation, more money to attract people.

CHAIRMAN PENDLETON. That's not fair.

COMMISSIONER BERRY. I was reading his paper. I just wondered if he wanted to jump in and suggest that as a carrot. I guess he doesn't.

MR. KNAPP. You mean a method of computing attorneys' fees somewhat, let's say, unrelated to the normal attorneys' fees?

COMMISSIONER BERRY. Yes.

MR. KNAPP. I would hesitate, I think, before I would endorse that. I would not like to see artificial limitations that create a disincentive to doing housing discrimination cases as opposed to other kinds of work, but to inflate them artificially, I don't think I would do that, either.

COMMISSIONER BERRY. Let me ask you a question about supply. We heard some discussion that the real problem with housing and even housing desegregation is a supply problem, and what we want to do is stimulate more availability of housing, and that this

would help to promote desegregation, among other things, in addition to giving people better housing and more places to live.

But then you said that administration policy is to rely on existing housing stocks rather than new ones. And then if you look at not only the housing programs in HUD, but the tax proposals for the benefits that are given people to build houses in the private sector and so on, apartment buildings and the like—that, I think, supports your notion that you want to rely on existing stocks.

If you really want to desegregate housing, do you believe that this supply issue is really a major problem and it needs to be addressed? And how would you address it, given what you said the policy is?

MR. KNAPP. I don't think that the supply question is really that related to the discrimination question. I really find it difficult to bring myself to conclude that mobility and opportunities are artificially constrained because there is no place to go.

I think that our administration, the administration's housing policies, through the Housing Commission and through our own proposals, have relied very much on the existing stock, the rehabilitation of existing stock, plus the "finders keepers" types of programs, together with—particularly in HUD at least—a belief that there should be some kind of a new construction program, but a very narrow program and very targeted to places where, based on the vacancy rates and so forth, there really was a tight market. And there are not all that many places that meet that criterion.

I don't think that the supply is that short that it really seriously impedes a mobility opportunity.

COMMISSIONER BERRY. I have just two more questions and I'll be finished.

CHAIRMAN PENDLETON. Remember, we announced the public session for 5.

COMMISSIONER BERRY. Is it 5 already?

CHAIRMAN PENDLETON. Yes, it's after 5.

COMMISSIONER BERRY. I'll ask you, and maybe you can answer it later on and submit the answers.

The first question is: How strongly are you committed to a fair housing bill, getting a new fair housing law passed?

The second one is: Do you believe that subsidies, paying white people to live in black neighborhoods, paying blacks to live in white neighborhoods, would be an approach to take?

CHAIRMAN PENDLETON. Could you submit those in writing to us?

MR. KNAPP. Yes.

COMMISSIONER DESTRO. I have one to ask along that same line, and I'll ask to get it in writing, too.

I asked Mr. Reynolds if you have any statistics with respect to the way the State agencies to which you refer the cases are resolved. I mean, What is the outcome in cases referred as opposed to the outcome in cases that you conciliate, for example, or refer to the Justice Department?

MR. KNAPP. We do have data on the performance of the State housing agencies and particularly how it has improved somewhat in the years since we've had the fair housing assistance program. We released a report on it quite recently, which I will be glad to submit.

COMMISSIONER DESTRO. Thank you very much.

CHAIRMAN PENDLETON. Mr. Knapp, thank you very much. We appreciate your time. Now we move to the public session.

This is the public session. People who are testifying have 5 minutes to give testimony, and I again caution you in the matter of defame and degrade and incrimination.

There will be no questions from staff. The Commission's Counsel will let the witness know when there's 1 minute left in the witness' time.

I want to remind all of you that the record is left open for 30 days following this consultation/hearing, and you may submit in writing those things that you would like to have be a part of the record.

Are all three of you testifying?

MS. ROY. Just me.

CHAIRMAN PENDLETON. Would you state your name and address for the record, please.

Statement of Kathleen M. Roy, Housing and Civil Rights Task Forces, Consortium for Citizens with Developmental Disabilities

MS. ROY. My name is Kathleen M. Roy. I'm with United Cerebral Palsy. We're at 425 I Street, N.W., suite 141. The zip code is 20001.

I ask to submit my entire statement for the record, and I will just highlight it.

CHAIRMAN PENDLETON. If there is no objection, we will submit that for the record, and you can tell us what you'd like to.

MS. ROY. Thank you very much, sir.

I'm here today on behalf of the Housing and Civil Rights Task Forces of the Consortium for Citizens with Developmental Disabilities. CCDD is a coalition of over 40 groups who represent individuals with disabling conditions throughout the country. We are privileged to be here today because we know that your mandate includes a look at discrimination against disabled persons.

Over the last 10 years—a little more—there has been a growing change to enable persons with disabilities to live in the community like everybody else. Indeed, many institutions are closing, and persons are being housed and educated in the community like all other nondisabled people. As I and other members of the consortium work together to assure that people with disabilities are in the community, there is one overriding concern, and that is housing. And that's why we're here today.

I want to first highlight a few of the significant problems and then go into greater detail.

First, there is a real lack of appropriate and accessible housing. And this is critical to what we call independent living within the community.

Secondly, there are very few rental units, either public or private, which are in fact accessible or adaptable, and by that I mean a person in a wheelchair or other kind of significant disabilities could live in.

Thirdly, those accessible housing units are often in HUD 202 structures, and most of them are for the elderly. I think you will agree with me, sir, that persons like myself should not be relegated to live with older people. I live and work like everybody else, and I don't want to have to live with old people. If I choose to, that's a different story.

We have a difficult time receiving our fair share of section 8 vouchers. This has been again difficult to overcome.

The Fair Housing Act currently does not cover disabled persons, and this perpetuates discrimination in the housing area.

Finally, regulations implementing section 504 of the Rehabilitation Act of 1973, which is, in fact, our own civil rights act, have not been issued by HUD, and this is a very big problem for us.

On page 4 are some of the real-life problems of lack of accessible housing. Let me only point out one.

Here in the District of Columbia, the Hospital for Sick Children, they complain that many of the young persons cannot be discharged, not because they're sick but because there is no accessible housing for these disabled persons to go to. So they have to stay in the hospital for months on end.

We have also attached an article from the *City Times* which delineates further the plight of severely disabled persons who cannot obtain housing.

HUD has not only failed to provide leadership in addressing the housing problems of people with disabilities, but they have proposed section 504 regulations which will needlessly perpetuate such discrimination. The disabled community is deeply concerned about these proposed regulations. And I just want to highlight a few of our major concerns. They are not the only concerns that we have. They are the major ones.

First of all, they provide separate admission standards for housing applicants who are disabled, which will be unnecessarily confusing and will only exacerbate the problems of discrimination.

MR. SCHULTZ. I will inform the witness you have 1 minute.

MS. ROY. Secondly, HUD's assessment of how many accessible housing units are needed is based on a survey which excludes people in institutions.

Thirdly, HUD's restriction of the number of new units in substantially rehabilitated housing is limited to a 5 percent ceiling.

Fourth, by imposing a standard which is different from other Federal recipients, they will in fact include unnecessary and costly litigation.

Finally, there is a need to collect real data in this area so we can have housing like everyone else.

In view of your mandate to include disability, we are concerned, sir, that you have not included other witnesses representing individuals with disabilities, because this is in fact a critical issue for all of us.

MR. SCHULTZ. I'm sorry, your time is up.

CHAIRMAN PENDLETON. Thank you very much for appearing, and we'll take your admonition in the end seriously, and we will do what we can.

MS. ROY. We're ready to help you. That's all I was going to say.

CHAIRMAN PENDLETON. Remember that the record is kept open for 30 days, and if there are other comments you may have, please feel free to send them to the Commission, and we can include that as part of the record.

MS. ROY. Thank you, sir, very much.

CHAIRMAN PENDLETON. Would you give us your name and address for the record, please.

Statement of Reverend Ima Jean Stewart, Washington, D.C.

REV. STEWART. My name is Reverend Ima Jean Stewart. I reside at 214 P Street, N.W., Washington, D. C. 20001.

Mr. Chairman, and members of the Commission, I just have one issue in housing discrimination that I want to bring to your attention.

Some years back this Commission did a consultation on battered women. I am hoping in the future you might do another consultation. That is one thing.

Number two is I don't have any statistics to prove what I'm saying, but going across the country throughout the inner cities, affluent blacks are keeping lower class blacks out of certain neighborhoods. I can't prove it, but that is up to you-all.

Shelters—we are short of housing across this country. The cheapest housing, as you know, is in the inner cities, but we can't get there, because blacks will zone us out.

I wonder today how strongly the black middle class is committed to helping those who are trying to get in the status that they are.

The last point, Mr. Chairman, is I have tried to be a member of the advisory board to the Commission on Civil Rights from the District of Columbia for years, and because I am not in with the black bourgeois in this city, I have been classed out. I would ask you if you would look into this situation.

I thank you very much.

CHAIRMAN PENDLETON. Reverend Stewart, you have never been at a loss for words or candor, and we appreciate it.

REV. STEWART. Thank you.

CHAIRMAN PENDLETON. Are there other witnesses?

Would you please give us your name and address for the record.

Statement of Clifford Osborn, Mayor, Oak Park, Illinois

MR. OSBORN. Yes, I would. My name is Clifford Osborn, and I'm the mayor of Oak Park, Illinois. My address would be One Village Hall Plaza, Oak Park, Illinois 60302.

I just have one issue, reserving our right to submit written testimony, which we will do. I would like to make or enhance one point, realizing that this has been a long day, and yesterday was a long day also for you.

I'll take just a second about Oak Park, Illinois. We are a community of just under 60,000 population bordering on two sides the city of Chicago. We are a community that 9 years ago was instrumental in creating what we are calling the Oak Park Exchange Congress, dealing with the subject of integration in communities and how communities could work toward fostering and improving integration within their own communities. It is an organization that meets once a year, either in our community of Oak Park or in some other community around the United States.

The point I would make to you is that we in Oak Park are quite cognizant of the legal status of the Starrett City type of activities, and that not all communities that are involved in hoping to improve the opportunity for lack of discrimination in housing, engage in practices which have been and apparently continue to be those of the Starrett City type, and that we are engaged in a very effective program, we believe, to improve our minority population in Oak Park, and that not all communities are doing things that relate specifically to Starrett City type activities.

That is the point I would make, and we will present testimony in written form which would support our contention.

CHAIRMAN PENDLETON. Thank you, sir.

We will insert your testimony when you send it. The record is still open, as I said before.

I'd like to bring these proceedings to a close. I want to thank the witnesses who attended for a very fine presentation and my colleagues and witnesses for healthy discussion. I'm certain that the transcript will be interesting to read.

I would also suggest that we would like to publish these papers in some bound form like we have in the past in other consultations and hearings, for distribution, as well as the transcript.

I'd like to also mention that I believe that my colleagues will certainly put together policy recommendations to send forth to the administration, to the Congress, about how we see housing discrimination in this country, and how we see it being resolved. To have these hearings and not have a recommendation or group of recommendations going forward I think is not appropriate and does not do justice to these proceedings.

I'd like to thank our Acting Staff Director, Ms. Susan Morris, and her staff, and especially Jay Mann and Mike McGoings for putting this together. Mr.

McGoings, from a personal point of view, you have put together another excellent program, and I commend you.

With that, these proceedings are completed. Thank you.

Appendix

National **A**ssociation for the **A**dvancement of **C**olored **P**eople

April 24, 1986

United States Commission
On Civil Rights
1121 Vermont Avenue, N.W.
Washington, D. C. 20425

Attention: Michael C. McGoings, Assistant General Counsel

Dear Sir:

Though not in attendance at your Housing Conference of November 12, 1985, I have just of late come across the remarks by Mr. Alexander Polikoff, who testified at the meeting. Mr. Polikoff made references to me in his citations. May I take the liberty, then, of commenting on his testimony?

At the outset I would like to point out that I have been in opposition to the concept of "integration maintenance" in housing for more than 12 years. My family has lived for 22 years in the Village of Park Forest, Il.; a Chicago suburb that might be correctly designated as one of the incubation areas of the principles and practices of managed integration in housing.

I don't know if you have read the March 29, 1984 Chicago Tribune article of mine that Mr. Polikoff cited in his testimony, so I have enclosed a copy. I would like to elaborate on some of the ideas in that article, and comment on several other points that appeared in Mr. Polikoff's testimony. First, a general observation:

Proponents of managed housing integration rarely give indication they are aware that Black people have any natural inclination to live with their families, next to Black friends, or just with Black people as a whole. Certainly if the proponents are aware of such preferences, one cannot readily detect it from the way in which they promote the dispersal of Black people so as to affect a purposely designed integration. Supporters of managed integration consistently convey the impression that, if only the housing market actively disseminated information on housing availability in an equitable manner, and didn't "steer" customers (Blacks to certain communities, and

Chicago Far-South Suburban Branch Post Office Box 343 Park Forest Illinois 60466 312 748—5557

whites to others), the changing racial patterns in communities, neighborhoods, and buildings, that do occur, would not; racial diversity would pertain, and what is called "resegregation" would not.

The proclivity to live around one's family and ethnic group is accepted as a standard attribute in other peoples, but integration maintenance proponents seem to want to transmit the impression that the major reason for Black people gravitating to communities and neighborhoods with other Blacks, is that they are uninformed of housing choices, or, there is fear of community disapproval (that may proceed to violence). There is, of course, some validity to those hypotheses. It is a gross misinterpretation, however, to further conclude that such is the major factor impelling Blacks to move into areas where other Black families already reside. Integration maintenance supporters delude themselves, if they indeed think that there is a pent-up desire in most Blacks to scatter themselves throughout communities in the interest of instituting or maintaining integration.

On the other hand, by misreading the preference of Black people for living around other Blacks, proponents of managed racial proportionality exhibit minimal respect for attributes in Blacks that are admired (and certainly not subjected to limitation) in other peoples. This diminution of human tendency most assuredly will be a prime factor in the failure of managed integration for racial diversity. One illustration why: I cannot imagine counseling my family not to move into the area in which I live, because it might appear to be creating a clustering of undesirables, or, for fear that white people may move away. I suspect that enough Black families feel that way; so that managed integration can only succeed through legislative fiat; restrictive covenants.

In point of fact managed integration cannot succeed unless the prime cause of existing housing patterns is confronted at its foundation; that is the inclination of whites to move away from Black people. Such movement is

their prerogative. So how is it possible to maintain integration? Even the first Black family moving into a community, neighborhood, or building is an event impelling some white family to choose to move. The accepted answer is to try to reassure whites that the number of Black families in an area will be managed. Thus is the intractable problem created: Balcks aspire to the freedom of living whereever they choose and can afford; even in areas with a number of other Black families already in residence. Whites are not at all comfortable with that state of affairs, and thus flee the area.

Mr. Polikoff anchors his advocacy of managed integration with the use of a number of important propositions of an ethical nature. Among them are the following phrases: "Morally responsible"; "Responsible analysis"; "Resegregation Syndrome"; "Long-term integration".

On being "Morally responsible" with regard to integration, the priority issue is whether such integration is going to be instituted and enforced by governmental interposition; in which case Black citizens must be subjected to restrictive covenant-type measures as the favored techniques to forestall whites fleeing areas. But morally responsible could mean confronting the question at its core; addressing racial prejudice and stereotype that sustains all the enabling acts which lead to existing housing patterns. Proponents of managed integration incline to integration by fiat, however, Thus, in effect blaming the victims for the patterns.

Mr. Polikoff's call for "Responsible analysis" of the issue of housing patterns might indeed contribute significantly to the diminution of racially related housing concerns. But a responsible analysis would have to proceed from a recognition that whites move away from the presence of Black people, not the other way around. Responsible analysis would meet this reality head-on. And this voluntary moving by whites would be treated as the free choice it is; for which the movers' incur the major responsibility, not Black families who are doing nothing more than moving into a community,

neighborhood, or building. This would mean that no limitations would be put on Black peoples' freedom of choice in housing for racial balance.

Since the term "Resegregation" is utilized as a scare word in so much of the proponents of managed integration justifications, it is imperative that the word not only be used in a self-serving context. Some community housing patterns are, or were, the result of deliberate policies of excluding Black people from residence in areas. Many did not want Blacks in the area, so, with the cooperation of governments, financial institutions, real estate agencies, and private citizens, Black people were literally barred. This is, and was, segregation in the truest sense. Its basic element is that Black families are deliberately kept out.

Current practice of managed integration supporters is to add the prefix "re" onto the now disclaimed "segregation", to conjure up support for managing integration. But "resegregation" is not a valid description of the recurrence of the disavowed "segregation". In the first place, in many of the areas where resegregation is claimed to be occuring, or a fact, the communities started out integrated (generally as a condition for Federal funding of some sort, or to fulfill Fair Housing Law). Then the white residents started leaving, or declined to move in; the vacancies being filled by Black families. Some of the Black families moved in by their own choice, some were "steered" in by real estate brokers; but the communities did not start out with their eventual housing patterns, and can only loosely be referred to as "resegregated".

Secondly, and highly important, segregation implies and embodies deliberate practices and policies to deny Black people residency in an area. The voluntary withdrawal of whites from a community does not constitute such deliberate limitation on Blacks, and adding the "re" to segregation does not validate the usage. And using "resegregation" inappropriately trivializes the actual malice of segregation, by deflecting attention off the

malediction of governmental officials, financial institutions, real estate brokers, and others, conspiring to disenfranchise a whole people.

Finally, there is the empathy Mr. Polikoff, and other proponents of managed integration, profess for "Long-term integration". Twenty years or so of try at it should, by now, have taught us all that racially stable, diverse communities, neighborhoods, and buildings, cannot be maintained through purposeful management. That is, unless it is done by abridging the rights of Black people to live whereever they choose. Short of such an abridgement the inclination of whites to flee areas, coupled with the quite natural desire of Black people to want to live around their families, other Black friends, and other Black people in general, and the profit-making dictates of the American capitalistic system, will always conspire to defeat any long-term integration.

Nor is it patently clear that manipulating for integration is a desirable goal. Racial, religious differences should not be glossed over, as if they did not exist in the deepest recesses of human beings. Possibly the best to be striven for is equal application of the laws to all people. If integration follows from that, then all to the good. Managed integration is something more than that. however; and because of its appeasement of the desire of most white people to be rid of the uncomfortable presence of Black people (all the while appearing benevolent), is unworthy of its lofty justifications.

Mr. Polikoff, as well as other proponents of managed integration, can obviously make the most reasonable sounding cases for the institution of programs and policies incidental to the concept. But failure of such management is certain. The basic reason is: No human beings can be expected to long cooperate with activities that adversely affect family ties. Managed integration supporters can point to any number of impediments to the success of racial diversity in housing, but in the final analysis is is the refusal of peoples to accede to the suppression of their proclivity to "keep the

family together".

Further, maintaining integration through management means Black people must accept the pervasive assumption that the presence of Black families spoils communities, neighborhoods, and buildings, merely by that presence, without regard to individual attributes of Blacks. To accept this is to accept oneself as racially inferior; an acceptance which can only lead to losses in self-esteem and self-worth, and the encumberance of Black progress. One cannot believe oneself inferior, and act in the modes of equality at the same time.

Yours truly,

William Simpson

William Simpson, Chairman,
Housing Committee
Chicago Far-South Suburban Branch
NAACP

Chicago Far-South Suburban Branch Post Office Box 343 Park Forest Illinois 60466 312 748—5557
(After 5:00 p.m.)

Perspective

A forum—ideas, analysis, opinion

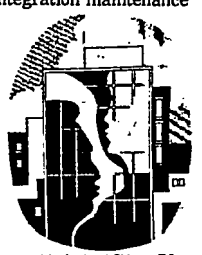
Chicago Tribune, Thursday, March 29, 1984 Section 1 19

An insulting housing policy

By William Simpson

Last August, Samuel R. Pierce, secretary of Housing and Urban Development, delivered a speech to the National Association of Realtors in which he said all things to everybody concerning a subject of much controversy between many municipalities and the real estate industry. That dispute, over "integration maintenance" housing programs, has to do with efforts by municipalities and housing centers to implement policies and programs deemed necessary because of the following axiom: The economic stability of municipalities, neighborhoods and buildings and the welfare of citizens are directly dependent upon stable, integrated and balanced living patterns.

Although Secretary Pierce hedged his remarks on the subject, supporters of "integration maintenance" seized upon them as a definitive stand in favor of managing population percentages to maintain desirable ratios between black and white families in communities, neighborhoods and buildings. The secretary heads the department, but the depth of his acquaintance with the controversy can be measured by his comments, such as, "I do not see this issue as a question of quotas.... The communities deny that their programs involve quotas or other predetermined numerical relationships...." This is a case of foxes pledging to the chickens that they will not eat them.



John Locher / Chicago Tribune

The fact is, "integration maintenance" is a masquerade; it poses as an expansion of "fair housing" and a preserver of integration when it is not. What it is instead is an attempt to prevent whites from moving when an unacceptable number of black families arrive.

The unrelenting reality in housing is that although black people, in large measure, do not mind living with other black families, even to the extent of the neighborhood being majority black, whites do not prefer to live in communities that are as much as 20 percent black, and certainly not majority black. If that is so, then no matter how strongly promoters of housing programs to "maintain diversity" may deny such intent, numerical limitations on families must be the goal, in order to keep or attract whites.

This poses a supreme paradox for black families wishing to live in a racially diverse neighborhood: how to maintain integration while avoiding the badge of inferiority implied by the operating principle that majority-black communities cannot be viable. Black people who attend black churches, support and send their children to black colleges, belong to black social groups and own black businesses must at the same time deal with the assertion that black communities, or even 30-percent-black communities, are not good.

My family and I have lived in integrated settings for 27 years. My children went to integrated schools all the way up through college. The block I live on still has few black families, even after 20 years. All of that integrated living has given rise to a number of judgments pertaining to maintaining integration.

I am willing for my children, and the rest of my family, to come and take up the homes and apartments around our house. Not only that, I think this is a freedom the families of blacks unknown to me should have also. I find it impossible to deny them the opportunity to live in places I live just because their presence may be followed by white families moving out, or refusing to move in.

On the other hand, I have found hardly a handful of whites who would be comfortable with, or particularly desire, living in places with a majority of black families; which is their right, except when that aversion leads to programs to limit the access of black families [and by implication, me] to housing of their choice, in the cause of maintaining integration.

The possibility of diversity does not justify the abridgment of civil rights to maintain it. Many who make the most eloquent pleas for the "richness" of diversity and plurality in a community's racial makeup profoundly insult black families. Consider: Is it not the grossest disregard of the black family to suggest to blacks [maybe even in an integrated church], that life would be more livable if black people remained at a level that would not tip population in the direction of white move-outs? Is there a more effective way of perpetuating the stereotype of black inferiority?

Yet, I would be willing to take odds that in the majority of instances, entreaties to black families to avoid clustering or to shun self-steering will not be perceived as supporting such a stereotype. Why? Because in the subtleties of racism black people are not seen as having families. Blacks are not thought of as having a range of parents, siblings and other family members, friends and acquaintances to whom we can sing the praises of our communities. Otherwise, how could it be suggested, many times by the most well-meaning individuals, that black people ought to accede to programs designed to limit the number of black families in communities? And what else is implied here, if not that my son, daughters, other relatives and black friends are not welcome to live next door to me?

It is laudable to aspire to live in a pluralistic, diverse racial atmosphere, but not at the expense of my children's [or friends'] freedom to live where they choose. Not at the expense, either, of my children—and their children—accepting a badge of inferiority.

I do not think it is possible for black people to develop a positive sense of self while acceding to a rule of thumb that life with black families on each side as neighbors [and across the street] is in itself to be avoided. Agreement to that proposition destroys the validity of our contention of equality that has been fought for diligently for these many years.

William Simpson, who lives in Park Forest, is chairman of the housing committee of the Chicago Far-South Suburban branch of the NAACP.

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