Fair Housing at 30: Where We Are, Where We Are Going

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I. INTRODUCTION

Housing is fundamental to the lives of every citizen and family. Our homes are our foundations and building blocks, linking us to schools, employment opportunities, transportation, shopping, recreation, and community life. By limiting housing choice, housing discrimination harms us in each of these important areas. It is also a form of inefficiency in the housing market, and causes other public harms, such as segregated schools, job-housing imbalance, and social discontent.

Thirty years after the founding of this publication it’s appropriate to ask: How effective have the fair housing laws been in achieving their twin goals of ending housing discrimination and promoting community integration? Much progress has been made during this time, but stubborn patterns of bias and segregation persist. At the same time, our laws have expanded to encompass more people and more situations, making the goalpost more distant and elusive. This article will (1) look at how fair housing laws have changed since the first issue of this journal was published, (2) evaluate the efficacy of these laws in promoting housing opportunities, (3) reflect on the challenges facing fair housing today, and (4) make some practical proposals for the future.

II. HOUSING DISCRIMINATION LAWS: AN HISTORICAL PERSPECTIVE

A. A Young Movement

From a historical perspective, fair housing regulation and enforcement is in its infancy. Since America’s founding, common law property doctrines allowed owners to discriminate on any basis they chose in both the sale and rental of housing. While the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866 (42. U.S.C. Sect. 1981 – 1982) ended the formal subjugation of African Americans, Black codes and “Jim Crow laws” quickly rushed in to fill the gap. Housing discrimination by local municipalities was only outlawed in 1917. Even so, private discrimination continued through, among other things, restrictive covenants between or among private parties. The U.S. Supreme Court prohibited judicial enforcement of racially discriminatory private restrictive covenants in 1948, but private individuals continued to enforce them against their neighbors informally. Private housing discrimination was legal in most of the U.S. until the passage of the FHA in 1968. Many argue that because the initial FHA lacked substantial enforcement tools, the real era of fair housing law did not begin until the 1988 amendments.

B. Changes in the Law in the Last 30 Years

When the first issue of the California Real Property Journal was published in 1982, California’s fair housing laws were already 30 years old and the federal law was 14 years old. Yet many groups were unprotected, and residential communities continued, in large part, to be segregated. In 1988 the federal law expanded to embrace additional protected groups, including people with disabilities and families with children. California law then expanded further, protecting unmarried couples, gays and lesbians, and prohibiting discrimination based on source of income. With the addition of these groups came new legal theories, such as reasonable accommodation for people with disabilities, and scrutiny of restrictive occupancy standards that made housing unavailable to families. More recently, there has been an increased recognition that housing discrimination begins as early as the local planning stage, where decisions about appropriate uses cause not only financial discrimination, but effect racial divisions as well.

C. Changes in Enforcement Mechanisms

During this time, fair housing enforcement mechanisms were significantly strengthened. As originally passed, the 1968 federal Fair Housing Act (FHA) had very limited enforcement tools. In 1982 there was only private enforcement, and not much of it. In response to widespread complaints about its ineffectiveness, Congress amended the FHA in 1988, strengthening HUD’s powers and loosening restrictions on the statute of limitations and damages. In response to these changes, California’s Fair Employment and Housing Act (FEHA) was substantially revised in 1992, making the state eligible to receive federal enforcement funds. Since 1987, HUD has provided funding to local fair housing organizations and other non-profit organizations to perform fair housing enforcement work such as investigations and testing.

As a result, enforcement has increased in the last three decades from nearly nothing to what can only be described as robust. With the passage of the federal Fair Housing Amendments Act in 1988 and the subsequent revisions to California’s FEHA in 1992, both federal and state governments began prosecuting fair housing violations in earnest. Today, perhaps half of all fair housing disputes are handled by governmental agencies, with local fair housing councils doing a substantial portion of the remaining cases. The private bar takes over the rest of the enforcement work.

At the same time that enforcement has improved, the goal of a discrimination-free housing market has moved further away; the law has become increasingly ambitious, making enforcement more challenging and complex. The 1968 FHA included four identified protected classes (race, color, religion and national origin) along with a specified range of prohibited acts. Sex was added as a protected class in 1974. The 1988 FHAA added...
“familial status” and “handicap” (or disability) along with an additional type of affirmative right, “reasonable accommodation.” Classes protected by California’s Fair Employment and Housing Act have similarly expanded, but even more so, adding ancestry, marital status, sexual orientation, and source of income. California’s Unruh Civil Rights Act prohibits Californians from “arbitrary discrimination” by “business establishments” (including property owners) leaving it to the courts to determine the extent of coverage. From the perspective of measuring effectiveness, each extension of protected class and prohibited act moves the goalposts farther and farther into the horizon.

At the same time, immigration has drastically changed the California demographic, challenging neighborhoods and local governments to become more open and tolerant. Other social changes have accelerated housing diversity. The Americans with Disabilities Act (ADA), which recently celebrated its 20th anniversary, has transformed the physical infrastructure and made people with disabilities more visible, integrated, and accepted in schools, worksites, and places of public accommodation. Together the ADA and the 1988 Fair Housing Act amendments have expanded the universe of housing opportunities for this group. The movement for gay rights, the AIDS crisis, and now advocacy for gay marriage have challenged and expanded notions of acceptance for the LGBT community.

Another challenge fair housing faces is the broad diversity of situations giving rise to such claims. Fair housing laws apply to sellers and brokers, financial institutions and insurance companies, advertisers, corporate property management companies, homeowners associations, municipalities, mobile home parks, and mom-and-pop landlords. Because the law is so ambitious, it is also difficult to enforce.

Changes in technology and financial product innovations pose additional challenges. The increasing number of financial products in the early 2000’s challenged fair housing attorneys to define and persuade judges that certain subprime mortgages violated the FHAA. As noted below, discriminatory internet ads create difficult enforcement problems.

III. EFFICACY OF FAIR HOUSING LAWS

A. Success in Achieving Goals

The FHA sought both to end housing discrimination and to promote integration. In spite of significant progress, these goals are still far away.

1. Success in Ending Discrimination

Although by some measures discrimination has decreased over the last 30 years, high rates of discrimination in the housing market persist. There are still an estimated four million discrete acts of unlawful discrimination in the United States annually. From the late 1970’s onward, HUD has sponsored a decennial national study on discrimination. Based upon HUD’s national study in 2000, the incidence of discrimination against both African Americans and Hispanics in home sales is still high, but has declined and is substantially lower than comparable numbers in the 1989 study. Homeownership rates for African Americans increased between 1970 and 2000, but there has likely been backsliding because of the mortgage and foreclosure crises.

In response to low home ownership rates among African American and Hispanic populations, both the Clinton Administration and the first Bush Administration pursued policies to increase home ownership among these groups. Some financial institutions and brokers targeted subprime loans to households living in low-income and racially segregated neighborhoods. Consequently, foreclosures of bad loans occur disproportionately among these populations and in those neighborhoods. California has been among the states hit hardest by the foreclosure crisis. Discriminatory patterns continue in the manner in which financial institutions manage foreclosed homes. And there is still substantial evidence of race and national origin discrimination in mortgage lending, home insurance, and other housing-related practices covered by the FHAA.

Racial and national origin discrimination remain prevalent in the rental markets as well. Based on thousands of paired tests in dozens of metropolitan areas in 2000, whites were favored over African Americans for rentals 21.6% of the time, and over Hispanics 25.7% of the time. The rate of discrimination against Hispanics had not changed since the previous study in 1989. Overall, the rate of illegal race and national origin discrimination in housing rentals has remained relatively constant since about 1977. People with disabilities experience discrimination in 30 to 50 percent of all inquiries for rental housing.

2. Success in Integration

California’s population is diverse and includes a wide variety of racial and ethnic groups. By 2000, no single racial or ethnic group constituted a majority of the state’s population. However, the state of housing integration is mixed. Some metropolitan areas in California register low levels of racial segregation relative to other areas of the U.S., such as the Northeast. Some regions in California are relatively diverse at the county level. But individual communities within the counties display a much higher level of segregation. On one measure, California segregation decreased at a relatively rapid rate at the neighborhood level at least through 2000. Yet high levels of segregation continue in many cities and neighborhoods. For example, the city of Los Angeles has a diverse population overall, but that diversity is not reflected in most of its neighborhoods, which are among the most segregated of any large city in California.

To be sure, de jure and explicit discrimination by traditional governmental entities and private parties has essentially ended. The law no longer allows neighborhoods to be restricted by race, and private racially restrictive covenants have been illegal since 1968. Still, governments can limit housing opportunities by indirect means, for example through various forms of exclusionary zoning or by bowing to community opposition against affordable housing developments. Families with children continue to experience high rates of discrimination such as refusal to rent, steering, segregation, and differential terms. And some homeowner associations, governed by volunteer boards, have lagged behind in their level of knowledge and compliance with fair housing laws, particularly in the area of familial status discrimination.

The 2010 Census presents a mixed report on national progress toward integration. The half-full view points to small but regular increases in integration of African Americans and
other racial groups. The half (or more than half) empty view focuses on the persistently high rates of segregation, highlights the glacial pace at which residential integration is proceeding, and predicts that at current rates, we'll remain a segregated nation for a very long time. This data does not include the full fallout from the subprime mortgage and foreclosure crises which disproportionately affects low-income communities of color.

### B. Improving Knowledge and Winning Hearts and Minds

Although success in integrating our communities is mixed, there is reason for optimism. Public understanding and attitudes about race, sex, and disability have changed dramatically in the past 30 years. It would be interesting to know whether the public understands and supports fair housing laws more now than in 1982. Unfortunately, there are no baseline surveys of public attitudes from the early 1980s. Nonetheless, we do have some data about public impressions over the last decade.

National fair housing studies sponsored by HUD in 2000 and 2005 entitled “How Much Do We Know” explored the general public’s knowledge, attitudes, and behavior about housing discrimination. Part of the survey presented participants with ten scenarios describing possibly discriminatory behavior and asked them to judge what was legal and what was not. By way of example, one scenario states: “An apartment building owner who rents to people of all age groups decides that families with younger children can only rent in one particular building, and not in others, because younger children tend to make lots of noise and may bother other tenants.” The 2005 survey revealed that there was essentially no change in the public’s understanding with respect to five of the eight scenarios since 2000. Significantly, in both studies, about half of the public knew the correct legal answer for six or more scenarios.

The same HUD studies show increasing public support for fair housing laws. Separately from their answers regarding legality, respondents were asked whether they would agree with the correct legal result. While support differed for different scenarios, overall public support for the lawful outcome increased from 66% in 2000 to 73% in 2005.

The facts that some of California’s state and local fair housing laws preceded the enactment of initial federal FHA in 1968, and that both the State of California and some local jurisdictions have expanded the coverage of fair housing law since the FHAA in 1988 suggest that public support for fair housing is stronger in California than in some other parts of the country.

The HUD study also indicates what we know about the extent of perceived discrimination—that is, how often people think that they have been the victim of illegal housing discrimination. About 17% of the respondents in HUD’s 2005 study considered themselves to be victims of discrimination, but upon review of their stories, only about half of these situations would probably be actionable. Notably, most of those likely to be actionable involved renting and discrimination on the basis of race.

There is a dearth of polling research about public opinions concerning housing discrimination and residential segregation. However, one poll conducted by the Pew Center for Research in late 2008 showed that 65% of all Americans report they would rather live in a community composed of a mix of racial and ethnic groups, while 20% say they would rather live in a community made up mainly of people of the same race. A similar poll yielded parallel results in California, finding that “a large majority in every ethnic group was either neutral or positive about the effect of people of a different ethnic or cultural group moving into their neighborhood.”

These polls show progress toward making integration the accepted American norm, but they are not conclusive. First, replies may reflect what respondents think they “should” say; and second, the replies are theoretical and not linked to any actual decision like deciding to rent or buy a home in a particular community or responding to an affordable housing development proposed in the neighborhood.

### C. Enforcement: A Qualified Success Story

The Department of Fair Employment and Housing continues to investigate and prosecute fair housing violations, in spite of the financial challenges facing State government. Consistent with civil litigation trends, increasing numbers of fair housing disputes are resolved informally, by conciliation or mediation. For most cases, alternative dispute resolution probably represents the optimal outcome by empowering parties to address intangible harms through interpersonal contact and controlling the process by fashioning their own remedies. But important problems remain, including a lack of systemic enforcement such as class actions, small settlements and verdicts, and fierce competition among local agencies for limited funds.

#### 1. Litigation Achievements

While the magnitude of settlements and verdicts for fair housing violations has been trending up in recent years, dollar figures for housing discrimination lag well behind those for employment. The law, too, is underdeveloped by comparison. The newest subsection of the State Bar’s Real Property Law Section, the Fair Housing and Public Accommodations Subsection, was organized in 2009 to promote a more vigorous and expert private bar for these cases, and to foster development of the law and improved understanding.

#### 2. Discriminatory Internet Ads: One Step Forward, Two Steps Back?

The fair housing laws prohibit discriminatory ads, both because of the harm they cause to individuals and because of the message these publications send—that discriminatory preferences are socially and legally acceptable. But technology has changed the typical form of residential advertising, and enforcement has become more difficult.

In the 1980’s home and apartment seekers used newspaper ads, for sale or for rent signs posted outside buildings, or realtors to find housing. After a number of successful enforcement actions, these discriminatory ads virtually disappeared. More recently, many—perhaps most—people use the internet to advertise and to find housing, including apartment rentals and roommate sharing situations. A large percentage of these advertisements includes language that either certainly or probably violates fair housing laws. Enforcement against individual discriminatory apartment rental ads is difficult and costly.

Enforcement would be more cost efficient and effective if a plaintiff could hold the internet service provider (for example,
Craiglist) liable for all of the discriminatory ads on its website. However, some courts have held that a federal statute, the Communications Decency Act of 1996, specifically exempts internet service providers from liability for FHAA violations. And the Ninth Circuit recently ruled, in the context of on-line ads for roommates, that the roommate selection process is completely beyond fair housing scrutiny, narrowly construing the statutes’ terms “dwelling” and “housing accommodations” to exclude coverage of roommates in order to avoid potential constitutional violations of privacy. The internet has opened up a new venue for the expression of discriminatory preferences with relative impunity, and without a clear path for redress.

3. Potential Claimants Aren’t Accessing the Law

HUD’s “How Much Do We Know” studies revealed another problem: the failure of potential claimants to seek enforcement. Of respondents who believed they had suffered discrimination and whose claims would be plausibly actionable, only 20% had asserted their fair housing rights. The rest reported that they didn’t act for many reasons, including not knowing how to complain, fears about the cost and time demands of trying to vindicate their rights, being too busy, and being fearful of retaliation. Perhaps most disturbingly, a substantial portion didn’t act because they didn’t expect that filing a complaint would accomplish any beneficial result.

III. FAIR HOUSING: SOME PERSPECTIVE

In measuring the efficacy of fair housing laws, it helps to keep things in perspective. One way to gain perspective is to compare the efficacy of fair housing laws with civil rights progress in other areas.

A. Comparing Progress in Fair Housing to Other Areas of Civil Rights: Housing Is Different

Some commentators claim that fair housing law now offers the strongest enforcement tools of all federal civil rights laws. If true, this reveals a paradox: How can fair housing have the strongest enforcement system that appears to be the least effective in reaching its goals?

Comparisons are difficult for many reasons, including lack of data. Still, overall fair housing does lag significantly behind public accommodations and employment if measured by the degree of compliance with the law on some measures. As Professor Robert G. Schwemm (arguably the dean of fair housing law) notes: “For example, with respect to public accommodations, it is rare—and therefore a cause for public outrage—when a hotel or restaurant denies service to customers on the basis of their race or national origin.” Similarly, intentional racial discrimination in employment is “now generally seen as indefensible and worthy of immediate corrective measures.” And, while we know that public grammar schools are as or more segregated now than in the 1950’s, researchers argue that the failure to integrate schools is—at least in a substantial way—a consequence of the failure to desegregate housing. One expert concluded: Housing is the civil rights area “where the possibility for real change is viewed as most remote.”

One way to explain this paradox is that housing is different than employment, public accommodations and schools. Each of these areas of social life is different both because of the social institutions in which they operate and social meanings attached to them. Riding public transit, shopping in the same store, eating in the same restaurant, working in the same company, or even attending school with someone perceived as “other” is different in kind from “living with [or next door to] someone.” The location of one’s residence and identity of one’s neighbors encompasses identity and social position in profound ways that are arguably deeper than casual, brief and temporary periods of occupying the same public space or private work place. Generally, we do not have race-specific social associations with restaurants, hotels, or companies as we do for neighborhoods. Fair housing goes to the heart of things—literally and figuratively—“where people live.” This difference may help explain the relative lack of progress in fair housing because if “the other” is perceived as threatening, then defending one’s “home” will be a top priority and last line of defense.

V. STRATEGIES FOR THE FUTURE

Studies show that people obey laws less out of fear of being caught or to serve a rational self-interest than because of their personal morality, social norms, and the perceived legitimacy of the law. Other research demonstrates that while intentional discrimination still exists, a substantial amount of discriminatory conduct, including housing discrimination, is caused by “implicit bias.” Based on this information, achieving improved compliance with the law will require changing social norms and improving public perceptions about fair housing. The law alone is insufficient to eliminate discrimination and promote integration. As described below, a different set of complementary and coordinated non-legal strategies will be needed.

A. Enforcement

Better education and prevention are likely to be more effective in the long run than fair housing enforcement. High-profile, large verdict lawsuits do educate housing providers and deter future discrimination. But surely the victim of housing discrimination would have preferred that the housing opportunity be made available in the first place. This is particularly true for reasonable accommodation claims, where early and effective advocacy can resolve most conflicts long before they devolve into litigation. Still, when housing discrimination occurs, victims need accessible enforcement mechanisms. Continued funding for fair housing councils and governmental enforcement agencies is essential. Legal Aid organizations also play a vital role in asserting claims on behalf of low-income clients. The private bar, too, plays a role, but is only able to handle a small number of claims, typically the most egregious and remunerative. Enforcement funding should be front-loaded, with an emphasis on education and self-help, free or low-cost counseling, mediation, and early legal intervention. Aggressive litigation should be the last resort.

B. Law

In the last 30 years the fair housing laws have appropriately expanded to protect more people and more housing situations. Further areas of expansion might include making the duty to engage in a timely, good faith, interactive process part of the FEHA’s “black letter law,” explicitly covering home day care providers, and incorporating the protections for immigrants into the FEHA enforcement scheme. Maintaining housing opportunity will also depend on the continued development of housing affordable to all income groups, with the recent elimination of California’s redevelopment agencies representing
a significant loss of funds for this purpose.\textsuperscript{82} Statutory reforms such as the California Homeowners Bill of Rights would go a long way to assist homeowners fighting foreclosure.\textsuperscript{83}

C. New Approaches?

Fair housing advocates and government enforcement agencies have largely employed the same method over the last 30 years — enforcing the fair housing laws against those who engage in discrimination. Other strategies such as reinforcing the social norms that support fair housing laws, wearing down the social norms that undermine them, and working to revise stereotypes are all part of the solution.\textsuperscript{84}

1. Education and Communication

Media campaigns can strengthen the social norms that favor fair housing. If discrimination is caused by implicit bias, then addressing it will require different strategies and activities besides increased enforcement. For this reason many fair housing leaders support education campaigns.\textsuperscript{85}

To be sure, education and media campaigns promoting fair housing do exist.\textsuperscript{86} But they have not been evaluated for their effectiveness in changing social norms. Other ideas have been proposed, for example a media campaign in which popular public figures of all kinds simply looked into the camera and said “I support fair housing because…” or, in light of the return home of many veterans from our wars abroad, a campaign linking fair housing more closely with patriotism. Supporters emphasize that education alone will not effect change on its own, but will do so only in combination with increased enforcement and other strategies.\textsuperscript{87}

Landlords, landlord groups, realtors, and bankers that are committed to fair housing should receive positive public recognition. They comprise the true front-lines of fair housing and have the greatest capacity to prevent discrimination. Yet, to date, most public recognition has gone to fair housing advocates or affordable housing developers.\textsuperscript{88} Public recognition can help promote the perceived importance and value of fair housing law within those professions.\textsuperscript{89} Such recognition will also affirm and support those within the profession who do obey and promote the laws, sometimes at great personal and professional cost.\textsuperscript{90}

Litigation victories need to be communicated to the right audiences. It is widely believed that successful litigation will deter future violations of law.\textsuperscript{91} However, this will only work if the relevant audiences receive the message. To date, communication regarding successful litigation has not necessarily targeted the most relevant audiences. Often, the victorious organization merely issues a press release or posts an announcement on its website that may only be viewed by others already familiar with and supportive of the law. It may be useful to communicate fair housing victories and lessons to mom and pop landlords and rental property management agencies through more effective channels, such as professional property management agencies and local landlord groups.\textsuperscript{92} Professional landlords’ organizations play an important role in raising professional standards and educating their members to avoid fair housing violations,\textsuperscript{93} as do the fair housing councils.

“Friendly” fair housing testing could prevent legal violations and improve working relationships between the fair housing enforcement community and housing providers.

Some professional property management agencies offer fair housing training to their employees. While helpful, in light of what we know about implicit bias, such training may not be sufficient to prevent discrimination. To protect themselves more effectively from liability, organizations could take the next step—organize confidential fair housing testing of their properties. The idea is similar to corporations hiring computer experts to act like “hackers” to test the security of their websites. At least one organization already offers this service to financial organizations subject to fair lending liability.\textsuperscript{94}

Homeowner associations, and especially those in gated communities, are an important new audience for fair housing education. These communities are an increasingly popular choice for Californians.\textsuperscript{95} Because such communities are self-governed, there is a great need to educate board members about fair housing law; reasonable accommodation requests and familial status discrimination are sometimes problematic in these contexts.

2. Focusing on Land Use and Housing Market Trends

We have yet to confront seriously the difficulties of systematically reducing residential segregation.\textsuperscript{96} Many believe that the extent and longevity of residential racial segregation is the primary obstacle to substantial progress in achieving the FHAA’s anti-discrimination goal because residential racial segregation both maintains and perpetuates racial stereotypes and thus reinforces discrimination.\textsuperscript{97} Once segregated neighborhoods are established, stereotypes about “those people” are reinforced, and people are more likely to rely on these stereotypes to discriminate against members of these communities seeking housing in other neighborhoods. Application of fair housing law needs to occur at the planning and land use stages to address this systemic discrimination. Indeed, the bias against multi-family housing is tantamount to de facto segregation against persons who cannot afford the ubiquitous single family home. These persons are frequently persons of color. Efforts will only succeed if they are combined with enforcement of complementary state planning laws, such as the Housing Element law.\textsuperscript{98}

Certainly there is an element of choice in patterns of residential segregation, and perhaps freedom of housing choice is the highest attainable goal for our fair housing laws. Many will seek and settle in homogeneous neighborhoods. The prevailing trend, though, is increasing diversity.

Other market trends provide indications of what types of fair housing claims will arise, and the challenges of bringing equity into these new situations. The dominant market trend of the last five years is of course the massive loss of housing equity through foreclosure and a net increase in renters over homeowners.\textsuperscript{99} Fair housing advocates have gained only limited traction pursuing predatory lending and reverse redlining claims.\textsuperscript{100} Therefore during the foreclosure crisis fair housing laws have been largely ineffective. Now that the number of renters has increased, fair housing claims will likely rise, because complaints involving refusal to rent and wrongful eviction have long been the predominant type of claim received by the DFEH.\textsuperscript{101}

Increased urbanization and small-space living are other important trends. Small and urban living situations tend to give rise to familial status discrimination claims of excess noise and lack of space to play, but countervailing trends such as the increasing number of people choosing to live alone\textsuperscript{102} and decreasing overall family size may keep such claims at a level rate.
VI. CONCLUSION

Much progress has been made toward an integrated society in the last 30 years. Combatting the remaining discriminatory impulses will require a combination of legal, educational, and communication strategies that are applied to both individual housing transactions as well as land use decisions. In another 30 years, these authors hope to have a better toolkit and fewer problems to fix.

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ENDNOTES

1 See, e.g., Tim Iglesias, Our Pluralist Housing Ethics and the Struggle for Affordability, 42 Wake Forest Law Review 511 (2007).


3 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."); 114 Cong. Rec. 2708 Id. at. 3422 (statement of Sen. Mondale that the purpose of the Fair Housing Act was to replace the ghetto with “truly inte-


5 Buchanan v. Warley, 245 U.S. 60 (1917).


8 The Unruh Civil Rights Act was passed in 1959; The Rumford Fair Housing Act in 1963. For a complete history of these statutes, see “Through Struggle to the Stars: A History of California’s Fair Housing Law,” Ann M. Noel and Phyllis W. Cheng, Cal. Real Property Journ., Vol. 27, No. 4, 2009.


10 See supra note 8.


14 Fair Housing Amendments Act § 8; see also Schwemm, HOUSING DISCRIMINATION , supra note 12, § 23:1, at 23-2 (explaining increased enforcement mechanisms of amend-

15 See Fair Housing Assistance Program (FHAP) Agencies, U.S. DEPARTMENT HOUSING & URB. DEV.,http://www.hud. gov/offices/fheo/partners/FHAP/agencies.cfm (last visited Jan. 20, 2011). The state and local fair housing enforcement agencies are called FHAPs, an acronym based on the name of the program by which they are funded, the Fair Housing Assistance Program; Jim Morales, California Enacts Nation's Strongest Fair Housing Law, Cal. Real Property Journ., Vol. XX, No. X, 1994.


17 In amending the FHA in 1988, Congress sought “to fulfill the promise made to the American people 20 years ago … by creating an administrative enforcement system, which is subject to judicial review, and by removing barriers to the use of court enforcement by private litigants and the Department of Justice.” H.R. Rep. No. 711, 100TH Cong., 2ND Sess. 1988, 1988 U.S.C.C.A.N. 2173, 1988 WL 169871, H.R. REP. 100-711 (Leg.Hist.)

18 The DFEH handles about 1,000 complaints of housing dis-

19 In response to local ordinances restricting the ability of undocumented immigrants from renting housing, the California Legislature passed AB 976 (Stats. 2007) c. 403, § 1, prohibiting such municipal action and making it unlawful for any landlord to ask about, or require certification of, a prospective tenant's immigration status. Cal. Civ. Code § 1940.3.

20 Celeste M. Hammond, Predatory Lending—A Legal Definition and Update, 34 Real Est. L. J. 176 (Fall, 2005); Robert G. Schwemm & Jeffrey L. Taren, Discretionary Pricing, Mortgage Discrimination, and the Fair Housing

21 “Although the statute does not use the word ‘integration,’ the Supreme Court has said, and other courts and commentators generally agree, that one of the goals of the statute was integration,” (citations omitted), Florence Wagman Roisman, Living Together: Ending Racial Discrimination and Segregation in Housing, 41 Ind. L. Rev. 507, n. 8 (2008); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211.

22 See generally Symposium issue of the Indiana Law Review: The Fair Housing Act After 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation, 41 Ind. L. Rev. 507 (2008); “Although the 1968 Fair Housing Act has prohibited residential racial discrimination and segregation for forty years, and the 1866 Act has prohibited them for more than a century, the United States is still characterized by substantial racial discrimination with respect to the sale, rental, and occupancy of housing and by pervasive residential segregation (citing articles detailing factual support).” Id. at 508. Also, see Robert G. Schwemm, Why Do Landlords Still Discriminate (and What Can Be Done About It?), 40 J. Marshall L. Rev. 455, 455 - 460 (2007) (Hereinafter “Schwemm, Landlords.”)

23 In its 2009 report, HUD states that HUD and Fair Housing Assistance Program agencies received 10,242 complaints, and that 2009 was the fourth consecutive year that the number of housing discrimination complaints received exceeded 10,000. Annual Report on Fair Housing, FY 2009, p. 9 (HUD, 2010). Based upon the numbers of complaints filed and other data, the National Fair Housing Alliance estimates that approximately four million incidents of housing discrimination occur per year. 2011 Fair Housing Trends Report, p. 14, National Fair Housing Alliance (2011), available at: http://www.nationalfairhousing.org/FairHousingResources/ReportsandResearch/tabid/3917/Default.aspx (last visited December 6, 2011).

24 Turner et al., Discrimination in Metropolitan Housing Markets, National Results from Phase 1 of HDS 2000, HUD (2002) (Key Findings).

25 Id.

26 See, e.g., “Homeownership and its Benefits,” U.S. Department of Housing and Urban Development, Urban Policy Brief, Number 2, August 1995 (“Homeownership rates stagnated at approximately 43 percent for blacks, while homeownership among Hispanics fell from 43 percent in 1980 to 39 percent in 1991….To reverse this trend, President Clinton directed HUD Secretary Henry G. Cisneros to work with leaders in the housing industry, representatives of nonprofit groups, and officials at all levels of government to develop a National Homeownership Strategy that would increase ownership opportunities among populations and communities with lower than average homeownership rates.”).

27 See, e.g., Benjamin Howell, Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination, 94 Cal. L. Rev. 101 (2006); Lisa Rice, An Examination of Civil Rights Issues with Respect to the Mortgage Crisis: The Effects of Predatory Lending on the Mortgage Crisis, Testimony before the U.S. Commission on Civil Rights, March 20, 2009; Reports by the Center for Responsible Lending (“African American and Latino borrowers are about 30 percent more likely to receive the highest-cost subprime loans relative to white subprime borrowers with similar risk profiles.”)

28 Id. The alleged discriminatory targeting of subprime loans and the negative effects on minority neighborhoods (also known as “reverse redlining”) has led to lawsuits by Baltimore (MD) and Memphis (TN) against Wells Fargo bank because of these practices: “Judge Allows Redlining Suits to Proceed” The New York Times (May 5, 2011), available at: http://www.nytimes.com/2011/05/06/business/06redlining.html?_r=2 (last visited, Mar. 30, 2012).


30 Ibid. And see National Fair Housing Alliance (NFHA) and four of its member organizations announced a federal housing discrimination complaint against U.S. Bancorp and U.S. Bank National Bank Association alleging that their foreclosed properties in White areas are much better maintained and marketed than its properties in African-American and Latino neighborhoods. http://www.nationalfairhousing.org/Portals/33/News%20Release%20for%20NFHA%20US%20Bank%20Complaint%20-%2020120417.pdf. For more information about the recent lawsuits against banks for violations of the FHAA in lending and regarding homes in foreclosure, see http://www.nationalfairhousing.org/.

31 Ibid.

32 Ibid.

33 Ibid.

34 Ibid. Schwemm, Landlords, supra note 22 at 457.


Relations, and California Politics, Public Policy Institute of California (2000) (finding that “multiethnic neighborhoods are not the primary locus of ethnic political divisions in California” and that “where there were differences between whites and nonwhites, they often were in the direction of greater tolerance and agreement between whites and non-whites in mixed areas than in homogeneous ones”) at viii.

37 Who’s Your Neighbor, at 3.

38 The study authors constructed an index to measure diversity and segregation ranging from 0 – 100, where 0 is homogeneous and 100 is heterogeneous. The researchers consider a place to be “diverse if its diversity index is 75 or greater, somewhat diverse if its index is 60 – 75, somewhat segregated if its index is 45 – 60, and segregated if its index is 0 – 45.” Id. at 4. For example, with the exception of Marin County, the S.F. Bay Area diversity index ranges between 63.12 and 75.41 (where 100 would signify complete integration). Alejandra Lopez, Racial/Ethnic Diversity index ranges between 63.12 and 75.41 (where 100 would signify complete integration). Alejandra Lopez, Racial/Ethnic Diversity and Residential Segregation in the San Francisco Bay Area, Race and Ethnicity in California: Demographic Report Series, No. 1, Center for Comparative Studies in Race and Ethnicity, Stanford University (2001) at 11.

39 For example, San Mateo County which has an overall diversity index near 70, includes Colma (78.37) and Portola Valley (17.27). Id. at 3 – 4.

40 “In 1990, 43 percent of California neighborhoods were segregated, and by 2000 only 25 percent were.” Who’s Your Neighbor, at p. 1.

41 Who’s Your Neighbor, at p. 2.

42 Section 3604(c) of the federal Fair Housing Act prohibited publication of statements indicating a preference to discriminate based on a protected class. In Shelley v. Kraemer, 334 U.S. 1 (1948), the U.S. Supreme Court found that state judicial action to enforce a private racially restrictive covenant violated the equal protection clause of the U.S. Constitution.


44 “Exclusionary zoning” includes a wide range of planning and zoning rules and policies that local governments use to exclude affordable housing from their jurisdictions. Classic exclusionary zoning cases challenged minimum lot size standards, minimum square footage requirements or zoning ordinances that did not include any multi-family housing zones as constitutionally invalid. While zoning rules and planning standards can systematically exclude affordable housing, localities’ denials of land use approval permits, e.g. special use permits or site plan applications for affordable housing developments—often in response to community opposition—exclude affordable housing just as effectively. Such actions may violate the fair housing law, but are difficult to prove. Marc Seitles, The Perpetuation of Residential Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies, Journal of


45 See, e.g., Landesman v. The Keys Condominium Owners Association, 2004 WL 2370638 (N.D.Cal.) (granting preliminary injunction against rule prohibiting minor children from using main swimming pool.)


49 The passage in 1964 of Proposition 14 (which undercut the Unruh Act) indicates strong public opposition or discomfort with fair housing laws at that time.

50 The results of these studies are published as How Much Do We Know?: Public Awareness of the Nation's Fair Housing Laws, HUD (April 2002) and Do We Know More Now?: Trends in Public Knowledge, Support and Use of Fair Housing Law, HUD (February 2006).

51 Executive Summary, Do We Know More Now?
52 How Much Do We Know?, supra note 50 at 7.
53 ibid.
54 ibid.


57 Executive Summary, Do We Know More Now?
58 ibid.


60 ibid. There are significant variations in the answers on this question by the respondent's race and ethnicity, party affiliation, age, and geography.


62 Section 3604(c) in FHAA.


64 A report by the National Fair Housing Alliance, For Rent: No Kids! How Internet Housing Advertisements Perpetuate Discrimination, at p. 5, Aug. 11, 2009 http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=zbubkJP2rMM%3D&tabid=2510&mid=8347 (last visited April 23, 2012) provides examples of the types of discriminatory ads that are prevalent on-line:

- 2BR: “Mature couple or single with no children” Brooklyn, NY
- 3BR: Duplex: “Christian atmosphere” Evansville, IN
- 2BR: “PERFECT FOR 2 ADULTS….seeking a maximum of 2 tenants” New Haven, CT
- 2BR: “Couples preferred” Chicago, IL
- 4BR: “Looking for responsible adults to enjoy home” Newport, VT


66 Fair Housing Council of San Fernando Valley v. Roommate. Com, LLC, 666 F.3d 1216 (9th Cir. 2012). Interestingly, an earlier 9th Circuit decision in the same case held that immunity generally provided to internet service providers under Section 230 of the Communications Decency Act (CDA) did not apply to Roommates.com because it was an interactive online operator whose questionnaire violated the Fair Housing Act. Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

67 Ibid.
68 Ibid.
69 Ibid.
70 See, e.g., Schwemm, Landlords, supra note 22 at 462 (“The result [of the 1988 amendments] was a civil rights law whose enforcement procedures are second to none.”).

71 Schwemm, Landlords, supra note 22 at 459.


73 Ibid.
74 See, e.g., Orfield and McArdle, The Vicious Cycle: Segregated Housing, Schools, and Intergenerational Inequality, WO6-4, Joint Center for Housing Studies, Harvard University (Aug 2006).


76 The nation’s foremost researchers on residential segregation agree. “Residential segregation has proven to be the most resistant to change of all realms—perhaps because it is so critical to racial change in general.” Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 83 (1993).

77 Schwemm, Landlords, supra note 22 at 489 (citing Tom R. Tyler, Why People Obey the Law (1990)).

78 An “implicit bias” is: (1) a learned, often unconscious, pairing of a category with an emotional judgment (e.g. blacks with negativity) or a category with an attribute (e.g. women and home) (2) which can be activated unconsciously (or without conscious effort), and (3) when activated can affect perception, reasoning process, judgment and decision-making, and behavior because of the pairing. The term “implicit bias” contrasts with “explicit” or self-reported bias. There is an enormous and growing literature on implicit bias. See, e.g. Introduction and Chapter 1 in Implicit Bias Across the Law, Justin D. Levison and Robert J. Smith, eds. (Cambridge University Press, forthcoming 2012); Anthony G. Greenwald & Linda Hamilton Kreiger, Implicit Bias: Scientific Foundations, 94 Cal. L. Rev. 945 (2006); Linda Hamilton Kreiger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161 (1995); Jerry Kang, Implicit Bias: A Primer for Courts (August
Although employers are explicitly required by the FEHA to engage in a “timely, good faith, interactive process to determine effective reasonable accommodations in response to a request” (Cal. Govt Code § 12940(n)), no such language is found for cases of housing discrimination. Instead, case law has found such a duty (Auburn Woods I Homeowners Association v. Fair Empl. & Hous. Com. 121 Cal. App. 4th 1578, 1598 (2004) and the federal government has endorsed it. Joint Statement of the Dept of Hous. and Urban Dev. and the Dept of Justice: Reasonable Accommodations under the Fair Housing Act, http://www.usdoj.gov/crt/housing/jointstatement_ra.php (last visited Dec. 9, 2011); National Fair Housing Alliance multimedia resources, available at: http://www.nationalfairhousing.org/FairHousingResources/MultimediaResources/default.aspx (last visited July 7, 2012).

California Health & Safety Code section 1597.40 makes family day care an “of right” use in single family residential zones, and in rental housing but does not provide the full range of protections that would be available if “home day care” were a protected FEHA class. See Siemore v. Matter Financial, Inc. 151 Cal.App.4th 1386 (Home day care provider who was refused financing to purchase home stated claims under Unruh and the FEHA for source of income discrimination and disparate impact on the basis of sex and familial status).

80 Supra, note 19, discussing Civil Code §1940.3.


83 See, e.g., Schwemm, Landlords, supra note 22.


86 See, e.g., Turner, Limits on Housing and Neighborhood Choice, supra note 84.


89 Professor Schwemm opined, “…[G]overnment officials and private FHA litigants continue to proclaim that their latest lawsuit will ‘send a strong message’ to potential discriminators.”; Also see, Id. at 485 – 486.


91 Organizations such as the California Apartment Association and the Apartment Association of Greater Los Angeles regularly offer fair housing training to their members.


93 Approximately 10% of all Californians live in gated communities, and 40% of new homes in the state are being built within such communities. See, Edward J Blakely and Mary Gail Snyder, Fortress America: Gated Communities in the United States (Brookings, 2000).

94 See see, e.g., Marc Seitles, The Perpetuation of Residential Segregation in America, supra note 43.

95 See, e.g., Schwemm, Landlords, supra note 22.


97 See, e.g., Marc Seitles, The Perpetuation of Residential Segregation in America, supra note 43.


100 Supra, note 20 Celeste M. Hammond, Predatory Lending—A Legal Definition and Update, 34 Real Est. L. J. 176 (Fall, 2005); Robert G. Schwemm & Jeffrey L. Tären, Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act, 45 Harv. C.R.-C.L. L. Rev. 375 (2010). The recent state attorney generals’ mortgage settlement relied on consumer claims such as fraud rather than raising fair housing violations.

101 Internal statistics.