Between Resistance and Embrace: American Realtors, the Justice Department, and the Uncertain Triumph of the Fair Housing Act, 1968-1978

_In the south, they don’t mind how close you get as long as you don’t get too big. In the north, they don’t mind how big you get as long as you don’t get too close._

Dick Gregory, 1967

_Sue the bastards._

National Neighbors’ fair housing slogan, 1970

Introduction

On the eve of the Fair Housing Act’s passage in 1968, discrimination in residential housing was routine and commonplace. Blacks could not purchase homes in white neighborhoods or rent apartments in white buildings. Realtors would not show properties to Black families, white homeowners would not sell to Blacks, and of course Blacks could not get financing for such purchases.¹

Less than a decade later, the situation had dramatically improved. A good, although not comprehensive, measure can be found in discrimination rates for housing availability, i.e. whether a searcher is told that a unit is available.² In the HUD survey, Blacks encountered net discrimination³ 27% of the time for rentals, and 15% for sales. This was, of course, still far too high, especially because discrimination rates are cumulative: if, say, 25% of encounters yield discrimination, by the time someone goes to three different rental agents, she has a three in four chance of facing discrimination. Nevertheless, it represented a steep decline from the previous decade.⁴

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¹ I emphasize housing discrimination against African-Americans as opposed to other groups because 1) those studies and surveys existent in 1968 all focused on white/Black disparities; and 2) the common view among historians is that housing discrimination against Latinos, while significant and debilitating, was less severe than against African-Americans. *See Lilia Fernandez, Brown in the Windy City: Mexicans and Puerto Ricans in Postwar Chicago* 146-47, 152 (2012).

² Housing availability might be the most damaging and prominent form of discrimination, but it is not the only one. For example, rental or sales agents might be less courteous, or not make available important financing options, which would clearly constitute discrimination, but would not represent a refusal to show a house or apartment. A further discussion of the 1977 HMPS findings can be found in Section I *infra.*

³ “Net” discrimination refers to the amount of negative encounters minus the amount of positive encounters. For example, if Blacks testers encounter worse treatment 50% of time, but better treatment 25% of time, the “net” discrimination rate is 25%. The highest quality research uses this method because of the randomness in so many aspects of a housing search and the vagaries of the search process. There might be many reasons for disparate treatment, not simply invidious discrimination, and few researchers would believe that positive treatment of Blacks and other minorities suggests that agents are unduly favoring them. *Cite to methodological discussion.*

⁴ See Section I for a discussion of what is known about discrimination rates on the eve of the Fair Housing Act.
How did this happen? This paper will argue that the enforcement of the Fair Housing Act and the Civil Rights Act of 1866 serves as a major part of the answer. More precisely, the interaction of the enforcement of these laws and the ecology of the American real estate industry led to a striking success of the last major legislation of the Civil Rights Movement.

Such a conclusion directly challenges the regnant scholarly consensus, which usually derides the Fair Housing Act as tepid, toothless, and ineffective. The leading text on housing discrimination states that the FHA was crafted so that it “would not and could not work.” Virtually every other significant study echoes this sentiment. Our findings, however, show the opposite.

By 1979, discrimination existed in numbers completely unacceptable in any society, and importantly—the trend did not mean an end, or even a large dent, in segregation—a closely related but quite different phenomenon. But we should not overlook a striking—and hidden—policy success.

I. Trends in Discrimination, 1968-1977

Because systematic paired testing for discrimination only began in the 1970’s, we lack precise knowledge of discrimination rates. But virtually all commentators, contemporary and subsequent, agree that it was rampant; in the words of the Kerner Commission, it was “pervasive.” “By the late 1960’s, Detroit’s suburban residents, realtors, and officials had helped ensure that most neighborhoods remained off-limits to black people.” Robert Self sees a purposeful strategy of “containment” across the country in Oakland, California and environs. During the debate on the Fair Housing Act in 1968, Congressmember John B. Anderson of Illinois, whose crucial vote in the Rules Committee paved the way for full House consideration, recounted the story of a Black schoolteacher in Rockford, Illinois who “answered some 100 ads in vain seeking a home or an apartment and who in each and every case was turned away.”

And this was outside the South. In August 1967, Senator Walter Mondale’s Senate Subcommittee on Housing and Urban Affairs held hearings on that year’s fair housing bill, and heard testimony from Navy Lieutenant Carlos Campbell, an African-American fighter pilot detailed for service at the Defense Intelligence Agency at the Pentagon.

5 Massey and Denton, American Apartheid.
6 See, e.g., Sugrue, Matusow, Lamb, Metcalf. Alan Matusow’s "The Unraveling of America," a pioneering standard work about the decline of liberalism in the 1960s, on the 1968 Act: "A great victory for civil rights it was not. Without an enforcement agency to issue cease and desist orders...the act was little more than a gesture toward the principle."
8 DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 384 (2007).
11 Mondale recalled that “the guy looked like he came directly out of central casting.” Interview with Walter Mondale.
That meant Campbell had to find housing in northern Virginia, and no one would rent to him within a 25 mile radius around the Pentagon: “I continually ran into a brick wall of sheer unadulterated prejudice. I might as well have been dressed in dungarees as in my dress blues which were complete with gold stripes and gold wings.”12

Within a decade, the situation had changed rapidly. In 1977, HUD commissioned the “Housing Market Practices Survey,” which endeavored to determine the extent of continuing discrimination. Over the next year, HUD’s research team conducted more than 3,200 paired-test audits – by far the most comprehensive and methodologically sophisticated operation up until that time. And HUD’s contractor – the National Committee against Discrimination in Housing – did not figure to be a soft touch when it came to making findings.

The HMPS found several key facts:

<table>
<thead>
<tr>
<th>Failure to show, apartments:</th>
<th>27%</th>
</tr>
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<tbody>
<tr>
<td>“Courtesy,”</td>
<td>15%</td>
</tr>
<tr>
<td>“Terms and Conditions,”</td>
<td>-2% (South +4)</td>
</tr>
<tr>
<td>Information Requested</td>
<td>6%</td>
</tr>
<tr>
<td>Information Volunteered</td>
<td>4-8%</td>
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Statistically significant relationships between the variables, so you can’t just add them up.

<table>
<thead>
<tr>
<th>Failure to show, houses</th>
<th>15%</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Courtesy”</td>
<td>12%</td>
</tr>
<tr>
<td>Information requested</td>
<td>15</td>
</tr>
</tbody>
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“Both blacks and whites were accorded services with very high frequency,” although when there was differentiation, it did favor whites. (ES-18)

Blacks were screened more than whites in terms of housing, but that did not mean anything in terms of availability, so “more rigorous screening of black customers need not result in their being offered fewer housing choices.” (ES-20).

Small SMSAs:

“Black auditors encountered far less discrimination in small SMSAs, on average, than in large SMSAs, on average, for each of the categories of treatment reported. In fact, as measured by the indices of courtesy and service, black auditors were systematically favored in small metropolitan areas. This finding of less discrimination-in small than in

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12 Subcommittee on Housing and Urban Affairs; Senate Committee on Banking and Currency, Fair Housing Act of 1967, Aug. 21-23, 1967, 90th Cong. 1st Sess., HRG-1967-BCS-0002, Y4.B22/3:H81/54/967, p. 193. Campbell testified that he eventually found a place to live by renting a room in an Army Colonel’s house; he had to send his wife and infant son back to Chicago.
large metropolitan areas is generally consistent with the results of the rental housing audit.” (ES-20).

II. The Argument from Attitudes

To the extent that there is an explanation about the decline in discrimination rates through the 1970’s, it is that attitudes changed sharply. But the data does not show this. White attitudes toward housing discrimination demonstrated relatively continuous trends from the 40’s through the late 60’s, gradually revealing greater tolerance to integrated neighborhoods and opposition to outright discrimination. Moreover, one demographic group – those under 40 with college-educations – drove the changes. Every other demographic group, whether they were from North or South, male or female, only very gradually changed their attitudes.

Similar trends persisted from 1968 through the end of the 1970’s. Three organizations – Gallup, the National Opinion Research Center (NORC) and the Institute for Social Research (ISR) polled questions about segregation and open housing throughout the period.


14 Bobo et al conclude: Changes in white attitudes to integration occurred more slowly depending upon how “intimate” the contact was between Blacks and whites. We have long known that white attitudes regarding more intimate matters as housing and interracial dating came from a lower baseline, but they also changed more slowly. For example, in a survey of whites in Texas before and after the murder of Martin Luther King, Jr., virtually all responses reflected more favorable attitudes toward integration. But in those areas that were more formal and public, e.g., sharing the same buses, jobs, and restaurants, the increase in tolerance was more than twice as large as it was regarding attitudes if a Black person lived next door, roughly the same as the question regarding the “same swimming pools.”

15 NORC asked a four-part question concerning respondents attitudes toward segregation, as well as a question asking whether respondents would support an open housing law. ISR asked whether respondents opposed segregation. NORC and Gallup also asked more pointed questions. NORC framed the question this way:

Here are some opinions other people have expressed in connection with [Negro/black] – white relations. Which statement on the card comes closest to how you, yourself, feel? White people have a right to keep [Negroes/blacks/African Americans] out of their neighborhoods if they want to, and [Negroes/blacks/African Americans] should respect that right. Agree strongly, agree slightly, disagree slightly, or disagree strongly?

ISR asked:

Which of the statements would you agree with: White people have a right to keep [Negroes/black people] out of their neighborhoods if they want to, or [Negroes/black people] have a right to live wherever they can afford to, just like anybody else? [Framed as:] 1. Keep blacks out 2. Blacks have rights.

General segregation question from ISR: “Are you in favor of desegregation, strict segregation, or something in between?”

Although the patterns of responses vary, they all undermine the thesis that discrimination rates dropped because of sharply dropping prejudice among whites. The sharpest increase in anti-segregation sentiment comes in the NORC survey, showing opposition to segregation rising from 40% to 60% between 1968 and 1972, and strong opposition to segregation doubling in that time from 20% to 40%. But between 1972 and 1978, this opposition waned, dropping from 60% to 50% in opposition and from 40% to 25% in strong opposition. If anything, the FHA appears to have jolted people briefly into thinking segregation wrong, but then returning more closely to the pre-FHA upward slope afterwards. This cannot account for the far more spectacular decreases in discrimination during that time.

The rest of the surveys essentially continue the mild upward slope from the pre-FHA era. The ISR “oppose segregation” number in 1963 is at 65%; in 1968, 72%; in 1972, 79%; 1976, 86% -- essentially, a straight line.

On the eve of the passage of the FHA, actual discrimination in housing was routine. Thus, if attitudes drove discriminatory behavior, an observer would expect that discrimination rates would change, but would gradually decline over the period. But this is belied by the data.

III. Enforcement and Its Framework

Another hypothesis might center on the fact that for the first time in US history, strong laws existed banning discrimination at the federal level, most prominently the Fair Housing Act, and in the wake of the Supreme Court’s decision in Jones v. Mayer, the Civil Rights Act of 1866.

But were these laws enforced? The scholarly consensus answers this question resoundingly in the negative, focusing primarily on the United States Department of Housing and Urban Development. Such a focus makes sense if one looks at the Fair Housing Act’s formal language, which vests “[t]he authority and responsibility for administering this Act . . . in the Secretary of Housing and Urban Development.” And if one does focus on HUD, the story is basically accurate. HUD could not bring its own lawsuits, and inside the Department, the program bureaus resisted fair housing directives from the well-meaning but overmatched HUD Secretary, George Romney. As the west coast director of the National Committee to End Discrimination in Housing put it, HUD bureaus had spent decades creating segregation through discriminatory siting and funding practices: “It was something like giving a cat responsibility for guarding a plate of cream.” Romney also faced resistance from the Nixon White House for his “Operation Breakthrough,” which aimed to place integrated HUD projects in all-white suburbs.

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17 42 U.S.C. § 1982. This section provides that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Jones held that this provision prohibits private as well as public housing discrimination.
18 §808(a).
19 1971 Subcommittee hearing, p. 113.
But HUD did not actually have primary responsibility for the public enforcement of Title VIII – a crucial fact missed in every other treatment of the Act’s history. The Fair Housing Act gave that responsibility in the Justice Department, which could bring, on its own initiative, either lawsuits alleging a pattern and practice of discrimination, or cases raising an “issue of general public importance.” Soon after the Act went into effect, courts quickly gave wide discretion to the Department to define “pattern and practice” and held that “general public importance” could mean just about anything the Attorney General wanted it to mean. Courts also ruled that DOJ and private litigants could bring cases together – a powerful holding because including a private litigant meant that DOJ could effectively sue for monetary damages instead of just injunctive relief.

DOJ quickly put together an aggressive litigating team led by Frank Schwelb, a Civil Rights Division lawyer who escaped the Nazis from his native Czechoslovakia at age 8. In 1969, Nixon’s first assistant attorney general for civil rights, Jerris Leonard – whose claim to fame as a Wisconsin state legislator had been the authorship of the state’s fair housing law – reorganized the department from regional to substantive specialty bureaus. Fourteen attorneys were placed at Schwelb’s command, and his Housing and Credit Bureau was soon bringing roughly 35 cases a year, generating praise from unlikely quarters. William R. Morris, the NAACP’s Director of Housing Programs, testified that the lawyers at DOJ “have shown a lot of initiative.” In 1970, the US Civil Rights Commission, which in its report lambasted virtually every federal agency for malfeasance in enforcing the FHA, praised DOJ for its actions.

DOJ faced a daunting challenge, given the massive size and decentralized nature of the nation’s housing market. Thus, the Civil Rights Division focused on institutional change and targeted the biggest developers, apartment referral services, and real estate trade associations to change their default positions. It often meant bringing suit even if the Division could initially find one act of deliberate discrimination. Scholars have viewed the FHA’s language restricting DOJ authority to “pattern and practice suits” as limiting its scope, but no court ever threw a suit out on the grounds that this was a

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20 § 813(a); codified at 42 U.S.C. §3613.
23 1971 Subcommittee hearing.
24 See, United States Commission on Civil Rights, Federal Civil Rights Enforcement Effort 540 (1970)(“The Department of Justice is one of the few Federal agencies with fair housing responsibilities that has attempted to carry them out vigorously and effectively. . . . Despite staff restrictions, the Housing Section has undertaken an aggressive program of litigation under Title VIII. It has instituted sensible priorities to govern its activities and has attempted to bring wide publicity to the lawsuits it institutes to inform as many people as possible of their rights under Title VIII and to make it known that the law is being enforced.”).
26 Massey & Denton; Sugrue; Goering; Lamb.
misinterpretation of the law, and the Division never felt constrained in terms of jurisdiction.\textsuperscript{27}

The Bureau thus decided to focus on the largest housing developers and landlords as well as major apartment referral services. Within the first 24 months of the Act’s full existence, DOJ brought cases against Samuel Lefrak, the biggest landlord in New York City, and Ben Weingart one of the biggest in Los Angeles.

The first Fair Housing Act lawsuit brought by the Department of Justice in Los Angeles appears to have been an action filed March 10, 1970 against a prominent businessman whose companies owned some 283 apartment buildings.\textsuperscript{28} The front-page story in the \textit{Los Angeles Times} quoted U.S. Attorney Matt Byrne calling it the largest Fair Housing Act lawsuit filed by the government so far in the western United States, and one of the biggest in the entire country.\textsuperscript{29} It accused landlord Ben Weingart and his companies of violating the Act through a pattern of making rental units unavailable to black apartment-seekers, and of publishing statements indicating race-based preferences.\textsuperscript{30} Not only did officials target a major landlord with units all over Los Angeles, but they chose for their first local lawsuit a well-known figure, described by the \textit{Times} as being “prominent in real estate, investment, development and construction here for many years.”\textsuperscript{31} It likely was no coincidence that federal officials sought out such a high-profile figure for their first target in Los Angeles, as it sent a strong message to the entire real estate community.

The government entered into a consent decree with Weingart’s company, Consolidated Hotels, Inc., in the summer of 1970.\textsuperscript{32} Once again the story made the front-page of the \textit{Times}, this time with a focus on the “novel” relief ordered as part of the settlement, which affected about 8,000 apartment units in Los Angeles.\textsuperscript{33} Consolidated was enjoined from discriminating on the basis of race, and ordered to notify fair housing groups each week of any vacancies in buildings with less than 15 percent black occupancy.\textsuperscript{34} Further, the company had to advertise in black newspapers, include racial minorities in any ads that depicted people, and step up nondiscrimination training efforts for employees.\textsuperscript{35} U.S. Attorney General John Mitchell announced the resolution in Washington, and Frank Schwelb, head of the housing section of the Justice Department’s Civil Rights Division, promised “significant additional litigation in the Los Angeles area.”\textsuperscript{36}

Indeed the Justice Department brought at least two more Fair Housing Act cases in Los Angeles in 1970, one of which also seemed designed to have a sweeping impact. In August the government sued a rental agency with eight offices in the Los Angeles

\textsuperscript{27} Schwelb Interview.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
area, contending that it had unlawfully refused to inform apartment-seekers about vacancies on account of their race.\textsuperscript{37} The potentially massive scope of the case was revealed when federal officials suggested that hundreds of landlords who used the agency might have also violated the Fair Housing Act by giving discriminatory instructions about what kinds of tenants they would be willing to accept.\textsuperscript{38} The Justice Department sought to use its new enforcement powers specifically enumerated in the Fair Housing Act, asking a judge for permission to inspect the rental agency’s records – which supposedly included special codes for landlords’ racial restrictions – and to take depositions.\textsuperscript{39} A third case from 1970 targeted the owners and manager of four Los Angeles buildings with 65 units, alleging discriminatory rental practices.\textsuperscript{40}

The Justice Department brought another substantial case the following year, filing a lawsuit that ended with a consent decree between the government and the president of the Apartment Association of Los Angeles County.\textsuperscript{41} The case originated with a complaint from the Hollywood-Wilshire Fair Housing Council, and the consent decree barring future discrimination covered 40 buildings in the Los Angeles area with more than 1,400 units.\textsuperscript{42} The Justice Department entered into a consent decree in July 1973 with Westside Building Company and Santa Monica Construction, a pair of affiliated construction and management firms that owned and operated more than 300 units.\textsuperscript{43} The companies were enjoined from discriminating and ordered to institute an educational program for employees, add a non-discrimination statement to rental forms and advertisements, and notify a local fair housing agency representative of existing and expected vacancies.\textsuperscript{44}

These actions against large-scale landlords with hundreds and even thousands of units across the city must have had a dramatic impact on Los Angeles’ real estate community. By targeting prominent property owners and finding cases that implicated the practices of hundreds of landlords, the government seemed to get off to a strong start in enforcing the Fair Housing Act in Southern California. However, this early burst of high-impact litigation does not seem to have lasted. Rather, there appears to have been a steep drop off in local housing bias cases filed by the Justice Department after 1970-1971 – certainly a drop in those cases that were prominent enough to generate local press coverage, which is especially significant given the crucial deterrent value of these cases in the real estate community. There were some well-publicized cases throughout the remainder of the 1970s, including suits against the owners and managers of some 800 Los Angeles-area apartments,\textsuperscript{45} a 110-unit apartment complex in Garden Grove,\textsuperscript{46} and a pre-litigation compliance agreement between the Justice Department and West Los Angeles apartment builder and operator accused first by the Westside Fair Housing

\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{41} See Agreement in Rental Bias Case Reached, L.A. TIMES, Aug. 24, 1971, at B4.
\textsuperscript{42} Id.
\textsuperscript{44} Id. at 149-151.
\textsuperscript{46} See Discrimination In Garden Grove, WATTS STAR-REV., Dec. 23, 1976, at A2.
Council of a pattern of discrimination. But these cases became fewer and farther between.

IV. The Transformation of American Realtors

The real estate system contained one other key pressure point. The chief obstructer of fair housing throughout the 1960’s was the powerful southern bloc in the Senate, which managed to sustain a filibuster on housing even after it collapsed for the rest of civil rights legislation. But the southerners had a powerful ally, with a vast constituency throughout the north, west, and Midwest: America’s realty boards. As William Taylor of Center for National Policy Review told the House Judiciary Subcommittee on Civil and Constitutional Rights: “We don’t think you can get at the dual housing market without getting at the brokers.” (11/4/71 Judiciary subcomm. Hearing, p. 131). A contemporaneous scholarly study concluded that “the most influential element among the discriminating forces seems to be the white real estate broker or salesmen.”

Realtors were and are a quintessentially American species: small businessmen who make their living through drumming up clients, making connections throughout towns and cities, fiercely independent, reliant on personal connections for their business, and seeing themselves as pillars of their local communities (because it is helpful to get clients). And they hated fair housing.

Perhaps more accurately, they hated what they called “forced housing”: organized real estate interests refused to call the proposal “fair housing” at all. The Realtors’ opposition appeared to be essentially ideological. John Williamson, the Realtors’ executive vice president during the 1960’s, recalled a government agency doing “continuity-of-government” work, i.e. how to keep public order going in the event of a nuclear war – it “presupposed the death of 20 million, 30 million people, and all the big centers of population destroyed.” So the agency envisioned an “executive reserve that would run the country,” and among other things it would control the prices of housing, everything from cost control to rent control.” The agency asked NAREB to designate someone for the executive reserve:

I’ll always remember how [NAREB President] Morgan Fitch responded. His exact words were: ‘Even in the event of a nuclear attack, even in the event of the destruction of all our great population centers and the deaths of 20 millions to 30 million people, even then, I will not concede the right to control a man’s property.’ What he said was absolutely consistent with the position he held all of his life and I’ll grant him that. The executive committee just went along with his analysis and accepted it.

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48 Joe T. Darden, Afro-Americans in Pittsburgh: The Residential Segregation of a People 46–47 (1973); see also Lynn W. Eley, Introduction, in THE POLITICS OF FAIR-HOUSING LEGISLATION: STATE AND LOCAL CASE-STUDIES 7 (Lynn W. Eley & Thomas W. Casstevens eds. 1968)(“Real-estate brokers have been the group most stubbornly opposed to fair-housing laws.”).
Throughout the 1960’s and up to the passage of the FHA, NAREB’s newsletter and statements of its leaders were filled with invective about the impending disaster that “forced housing” would bring. Realtors in California spearheaded Proposition 14, which repealed the state’s 1963 fair housing law. They generated thousands of letters to Congress opposing the FHA in 1966, when it ran aground on a southern filibuster backed by Republican votes.

And then, suddenly, in April 1968, fair housing became federal law. This came as a shock to the realtors. As late as January, their newsletter did not foresee a fair housing bill on the horizon. And in any event, Everett Dirksen— one of their most reliable allies on Capitol Hill— had been saying for years that fair housing was unconstitutional. In March, once again the realtors delivered thousands of letters of Congress, but they had been caught flat-footed.

The Realtors’ surprise was not only political: it was ideological. For decades, NAREB’s motto had been “liberty under the law.” Its self-image centered on the idea of the solid, sober, law-abiding businessman, bound by a code of ethics that stressed adherence to the law. Politicians could smoothly turn positions on a dime, but thousands of realtors would have a harder time of it. The last use of the phrase “forced housing” occurred NAREB’s April 22, 1968 newsletter, which devoted its first three pages to printing Title VIII in full. Its editorial, “Living With Law,” snidely referenced Martin Luther King’s practice of civil disobedience, it rejected it, and said that “[t]his Association holds that laws are to be observed. Failure to observe laws applicable to our business violates the code of ethics.” Whether or not NAREB’s position was correct, “national policy has been declared.”

The Supreme Court’s decision in Jones v. Mayer, 50 handed down just a few weeks after the FHA’s passage, administered another gut punch to NAREB’s position. Jones declared that the Civil Rights Act of 1866, heretofore thought of only as barring formal discriminatory legislation, applied to all private sales and rental of property. NAREB’s newsletter ran five separate editorials on the decision, which focused on two points: 1) the decision as well as the FHA, were the law of the land and disobedience was futile; and 2) realtors needed to take proactive steps to avoid lawsuits.

Even before LBJ signed the bill, realtors were well aware of it and began covering their tracks. Two days before the signing ceremony, the Los Angeles Realty Board

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49 In contrast to students, professors and hippies who were destroying the country. NAREB’s editorial of April 14, 1969 provides a typical example:

[The] vast majority of the people are thoroughly fed up with the antics of the shaggy-haired, slovenly, unkempt, and foul-mouthed mobs of pseudo-collegians who have been making themselves so conspicuous with the help of much of the news media. The wanton destruction of property that they have committed is enough to condemn them. But the despoiling of their minds in their efforts to appear intelligent [sic] is more serious to the future of the nation.

revised its annual handbook, excised its section on getting rid of “undesirable tenants” because of fear of FHA liability.\textsuperscript{51}

The philosophical challenge posed by the Fair Housing Act coincided with a changing of the guard at NAREB, away from an ideologically driven core to a practical and transactional orientation.\textsuperscript{52} The idea of realtors making contributions deeply offended the old guard. As Williamson recalled, Morgan Fitch, who also fought the idea of government housing after a nuclear war, “was so upset. He was very emotional about it. It was demeaning, Fitch believed, even to suggest that Realtors had to give people in politics money to get a fair hearing.” Fitch may have had a point, but Washington had changed – and so did the Realtors. NAREB began focusing on “bread and butter issues. By that I mean getting down to business figuring out what role we could play in using government to help realtors and property owners sell houses. We stopped viewing the government from the outside and moved to be a force that shaped the policies of government itself.” The Realtors began aggressively supporting government housing subsidies and “searching for ways that we could use them” instead of seeing everything through an antigovernment lens.

The new pragmatism at the top of NAREB helped realtors accommodate themselves to fair housing. After all, fair housing did not figure to hurt the realty business – if anything, just the opposite. Williamson recalled, “Secretary Bob Weaver of HUD called me about an hour after the President had signed the Civil Rights Act of 1968. ‘Congratulations, Jack,’ he said. ‘I’ve just returned from the White House where the President by the stroke of a pen has increased your market by 35 percent.’” That was a significant overstatement, but the overall point made sense: hard-headed businessmen had little reason to hate fair housing, especially if noncompliance made them susceptible to lawsuits.

Indeed, the California Real Estate Association, the most prominent and powerful real estate group in the state and the driving force behind Proposition 14, opted to publicly embrace the new law. The group spent $50,000 to have Universal Studios produce a half-hour documentary entitled “A House to Live In” touting realtors’ commitment to open housing.\textsuperscript{53} In advance of a preview screening at the CREA’s statewide gathering in the fall of 1968 – the first such conclave since passage of the Fair Housing Act – association president Robert W. Karpe said the film was “intended to

\textsuperscript{51} Public Relations Committee Report, Apr. 9, 1968, Los Angeles Realty Board Papers, Special Collections, UCLA. The discussion does not explicitly mention the FHA: instead, after observing a moment of silence in memory of Martin Luther King, Jr., “the Committee . . . discussed the many legal problems and possible future court decisions and new laws.” The Committee excised this portion of the Handbook “because future court decisions and laws that may be enacted after the Book is published might present a liability to the Board.” The only relevant difference from the previous year, when no one expressed problems with the Handbook, was the FHA.

\textsuperscript{52} Williamson recalled: “Throughout my twenty years with the Realtors [1951-73], the emphasis was constantly on issues like rent control, public housing – all ideological issues. When the association finally realized that we had used up so many years on these things, finally saw that the old guard had really kept it at a standstill for too long, it also had to make some fundamental changes.”

make clear to the general public that realtors will give equal service to everyone, no matter what his ethnic background.” However, lest anyone think that the new approach was an admission of past bad behavior, Karpe added that the film documents the fact that realtors are barred from discriminating by their code of ethics, “and have been successfully following that policy since 1963.”

By late 1968, The FHA prompted the CREA to end its long-running effort to repeal the Rumford Act. After Proposition 14 had been struck by the courts, the CREA had supported several bills to repeal the California fair housing law through the legislature. Only 12 months earlier, the State Senate actually voted to repeal the Rumford Act in 1967, but after the Senate broke the southern filibuster on fair housing, Gov. Ronald Reagan shifted his position from supporting the CREA’s position to indicating that he would veto the repeal. Finally, in December of that year, CREA officials announced that they would no longer seek to repeal or modify the Rumford Act because passage of the federal fair housing law made it clear the legislature would not pass such a bill.

Back on the ground in Los Angeles, fair housing activists and sympathetic local government officials seized the momentum provided by the new federal law by immediately launching new outreach campaigns. Soon Los Angeles County joined in, launching a public relations campaign aimed at increasing white acceptance of integrated housing. The County Commission on Human Relations marshaled $250,000 in private donations to fund 200 billboards across the city, thousands of bumper stickers, signs on 4,000 roving telephone company trucks, radio and television messages and newspaper ads, all carrying slogans such as “Is Your Neighborhood All-White or All-American?” Herbert Carter, the executive director of the human relations panel, said that even with the passage of the Fair Housing Act, “we’re going to have to change the attitudes of the great middle-class, white Los Angeles.” Such a campaign had been recommended as far back as 1965 in the aftermath of the Watts riot, but it took recent developments including passage of the Fair Housing Act to provide the spark to realize the project.

54 3,000 to Attend, supra note 72.
55 Id.
56 Fairbanks, supra note --.
58 See Fairbanks, supra note --.
60 Id. The campaign did not get off to a perfect start: an error placed 10 “Is Your Neighborhood All-White” billboards in South Central Los Angeles, which should have gotten signs reading “Good Neighbors Come in All Colors.” Id.; Art Seidenbaum, Wrapping White, Black and Brown in Red, White, Blue, L.A. TIMES, Mar. 5, 1969, at E9.
“Maybe the time wasn’t right then,” said Meyer Price Stern of the Human Relations Commission. “Now, we feel the time is ripe.”

In late August, the Times checked in on local fair housing organizations and found that in the wake of the publicity surrounding the Fair Housing Act and the Jones v. Mayer decision, complaints had doubled from an average of 2 to 4 per day. The head of one group, Ola Pacifico of the Centinela Bay Human Relations Committee, said the developments out of D.C. had already given advocates greater leverage in helping black families find housing. “There has been a gradual change in real estate people,” she said. “They’re ready to sell if a little pressure is applied, they’re scared of the new law.”

Joining in the efforts was the California Real Estate Association, which now had a dedicated fair housing specialist, who described the organization’s new procedure for handling discrimination complaints that could lead to the suspension of offending realtors or even entire local realty boards.

In short, then, a few months after Jones and the passage of the FHA, the nation’s realtors felt betrayed and angry, but had a committing to obeying the law and little financial reason to disobey it. And at the top of NAREB and leading organizations such as CREA, new leadership was anxious to make a break with the patterns of the past. Into this scenario stepped the Justice Department.

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The Civil Rights Division moved quickly. Six months after the FHA became applicable to private home sales, DOJ brought suit West Suburban [Chicago] Board of Realtors for FHA violations, including steering, denying access to MLS, telling them units were not available when they were, and forcing financial disclosures not required of whites. The suit got front page coverage in both the NAREB newsletter and the Chicago Tribune.

Importantly, the civil rights division had an unlikely ally: DOJ’s antitrust division, which for its own part was actively pursuing a series of lawsuits against local real estate boards for blocking access to multiple listing services and setting forth fee schedules. Growth of these antitrust suits “ultimately led to a complete rethinking of where NAREB was and where it wanted to be.” Jack Pontius, who took over from Conser as NAREB’s newsletter editor in 1970, conceded that “many of the suits were prompted because of an underlying current of the minority issue.” In the early 1970’s, “the entire mood of the times was different than it is today [1984]. There was civil rights. There was antitrust. There was suspicion divided between industry and government.” For the Realtors, the issues were – with good reason -- linked, and it scared them.

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61 Jones, supra note --.
63 Id.
64 Id.
65 Such a link made good legal sense, as an agreement between realtors, or between realtors and sellers or purchasers, could amount to a “conspiracy in restraint of trade” under antitrust laws. In 1971, fair housing
NAREB’s official yet unpublished history expressed the prevailing mood:

For the first time in history, the National Association found itself the target of a concerted attack by no less powerful an opponent than the federal government. Dispelled finally and forever was the comfortable notion prevalent among local boards of REALTORS that they did not need any help to fight their battles.

Scrambling, NAREB established an equal opportunity committee, with members from some of the most prominent local real estate boards. In an especially telling turnabout, the committee invited the attendance of the leadership of the National Association of Real Estate Brokers, also known as NAREB, the leading organization of Black real estate agents, whose members were (and still are) known not as “realtors” but “realtists.” The equal opportunity committee started work on affirmative practices for local realtors comply with fair housing laws – and thereby avoid lawsuits.

And those lawsuits were coming. DOJ soon put “new emphasis on ‘steering’practices of realty rental and sales organizations.” Alexander Ross, the deputy chief of housing services at the Civil Rights Division, delivered a speech to the national meeting of ASK, an international homes sales network that operated as an affiliate of Baltimore’s Donald E. Grempler realty firm, and turned over to the group a 14-page memorandum of DOJ “don’ts” to the audience. Ross emphasized that DOJ would inspect internal realtor records, their patterns of advertising, how much realtors told prospective buyers about financing, and even data on the nature of personal service. To show it meant business, a few days later, DOJ filed suit against Grempler, who said that he was a target “because we are the largest broker and because we do have the computers” to provide Justice with detailed compliance data. “We’re not the last broker in Baltimore that they’ll be going to,” Grempler warned, and suggested that other realtors get on board with the consent decree that he signed. A week after the suit was filed, US Attorney George Beall announced that his office had received several more complaints and more suits could be expected shortly.

In 1973, NAREB – now known as the National Association of Realtors, or NAR – invited the Assistant Attorney General for Civil Rights, J. Stanley Pottinger, to give the keynote address at the annual convention of its State and Urban Boards Program.

advocates in Washington State brought such a suit under state antitrust laws, and settled it under a consent decree after the trial judge rejected defendants’ contention that antitrust laws do not apply to discriminatory behavior. See Wash. State Suit, TRENDS IN HOUSING, First Quarter 1971, at 5. Such an argument had already attracted academic support. See Norman Dorsen, Critique of Racial Discrimination in Private Housing, 52 CAL. L. REV. 50, 53-55 (1964).

66 In part for this reason, the National Association of Real Estate Boards changed its name in the early 1970’s to the National Association of Realtors (NAR).

67 Carleton Jones, Clearing the Air on Open Housing, BALT. SUN, Jun. 25, 1972, at 101.

68 Id.


70 Fred Barbash, More Bias Suits Suits Predicted Here, BALT. SUN, Aug. 2, 1972, at C24.
Pottinger did not assuage their fears. In the speech, he announced a new DOJ policy of finding individual litigants to file along with DOJ itself, in order to get maximum money damages. Pottinger observed that “there are often dozens, and on occasion, hundreds of victims, many of whom are not aware that they received discriminatory treatment from the defendant.” And in case the realtors thought perhaps he was talking about landlords and developers, Pottinger disabused them:

I regret to tell you that a significant number of incidents have come to our attention involving realtors and their associates who have preyed on racial fears while concentrating their solicitation for listings in racially transitioned neighborhoods and have contributed to resegregation by steering blacks into and whites away from such neighborhoods.

These practices must cease. *We intend to concentrate our enforcement activities on these violations and will support the efforts of state licensing agencies to use license revocation as an enforcement tool.* We have brought what we call ‘steering’ cases in Baltimore, Cleveland, Chicago, Atlanta, New Orleans, Dallas, Detroit, Toledo, St. Louis and Houston among others, and will continue to do where litigation is necessary to put an end to violations.\(^{71}\)

By the time Pottinger spoke, the Housing and Credit Bureau had nearly doubled in size, to 25 lawyers, 7 paralegals, with FBI agents also available for investigations.\(^{72}\) NAR’s leadership got the hint. A few months later, NAR’s General Counsel, William D. North, published a pamphlet entitled “Realtors and the Law,” and sent it to the Association’s membership around the country. On the first page, he warned,

Already we have seen a proliferation of civil rights suits against real estate brokers by the Civil Rights Division of the Department of Justice; an estimated sixty-three suits in 1973. We have seen increased activity by enforcement section [sic] of the Department of Housing and Urban Development. And we have observed a significant increase in the number of private civil rights suits, include a recent massive class actions suit against all real estate brokers in a major metropolitan area on behalf of all buyers and sellers or residential housing in that area.\(^{73}\)

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The effort to control the real estate broker goes even further. As revealed in the terms of proposed consent decrees and demands for relief in suits

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\(^{72}\) See Newson, supra note –; *see also* Schwelb interview.

filed by the Department of Justice, the government is demanding the right
to require real estate brokers to advertise in specified minority medias and
to determine the amount of money and the amount of advertising which
shall be devoted to such media.

Realtors’ Code of Ethics

Faced with the prospect of DOJ lawsuits, and committed, at least publicly, to “law and
order,” Realtors attempted to clean up their image, and to some extent, their practices.
Nowhere was this seen more clearly than in the Realtors “Code of Ethics,” which formed
a key section of the group’s self-conception.

At the time of the FHA’s passage, Realtors’ codes of ethics practically demanded
discrimination. The Original Article 34 of the Code promulgated in 1928 read: “A
Realtor should never be instrumental in introducing into a neighborhood a character of
property or occupancy, members of any race or nationality, or any individuals whose
presence will clearly be detrimental to property values in that neighborhood.”

By the late 1940’s, in light of Shelley v. Kraemer, several members of NAR’s Committee
on Professional Standards became nervous about the explicit language in the Code.74
Thus, the Realtors made fairly direct attempts to preserve the intent while also excising
smoking guns from the actual language. In 1950, NAR overhauled the entire Code, and
in doing so, replaced the old Article 34 with a new Article 33: “A Realtor should not be
instrumental in introducing into a neighborhood a character of property or use which will
clearly be detrimental to property values in that neighborhood.” Some realtors insisted
that they were not at fault for any racial strife, with one commenting that “the fault lies
with unscrupulous white real estate agents, not Realtors.” But the overall intent was
clear: “When approached for a ruling on Article 34,” Mr. McLallan is to ask the question,
‘Whom do you want living next to you. Read Article 34 and answer the question
yourself.’”75 Such hedging persisted through 1962, the last time the Code of Ethics was
reviews prior to the enactment of the FHA.

But by 1974, the year of the first post-FHA revision, the realtors realized that they could
no longer get away with such subterfuge. The entire article was excised and replaced
with new Article 10: “The REALTOR® shall not deny equal professional services to any
person for reasons of race, creed, sex, or country of national origin. The REALTOR®
shall not be a party to any plan or agreement to discriminate against a person or persons
on the basis of race, creed, sex, or country of national origin.” Any realtor belonging to
NAR had to sign it.

74 Committee of Professional Standards Service Letter (Dec. 1947). Mr. Ray Nichols of Oakland brings up
Article 34 of the Code, “which deals with racial discrimination.” Mentions that this is relevant in light of
Shelley. 11/17/1949 Meeting: “Correspondence from the Christian Friends of Racial Equality was read and
considered. This matter as tabled by the Committee.”
75 5/9/1950 Meeting.
Affirmative Marketing Agreements

The threat from DOJ also sent the Realtors back to the more-pliable HUD. HUD and NAR concluded their nationwide “Affirmative Marketing Agreement” in 1975. It was often vague and somewhat tepid. Given the decentralized nature of NAR, it also did not bind individual realty boards or real estate agencies. But it was light-years ahead of what had been the norm only seven years previously.

If nothing else, the publicity was extensive. NAR sent copies of the Agreement to 1,696 member boards across the country, with a cover letter and an explanatory booklet urging endorsement of the Agreement through local HUD office.

Much of the Agreement centered on publicity and education: a Board adopting the Agreement would place an ad in a newspaper of general circulation and would try to put an HUD-approved “Publisher’s Notice” in the local press and on television. It would provide educational materials to participating realtors, recruit minority brokers to join local boards, sponsor outreach and training programs, monitor progress and (significantly) pay the administrative costs of doing so. For their part, individual Realtors adopting the Agreement needed to display equal opportunity posters in advertisements, brochures, and all places of business, and inform their clients of legal requirements.

The Agreement’s teeth, such as they were, centered on office procedures and techniques that HUD and NAR argued were designed to prevent discrimination. These procedures were not mandatory, but HUD and NAR noted that “the failure to provide some effective safeguards against racial steering—which these procedures were primarily designed to prevent—could be construed as lack of commitment by the signatory firm in question.” (8021.1. Page 3-4). And in case anyone missed the point, the Agreement clearly specified that “In no way is any exemption or immunity from compliance with Title VIII or any other fair housing law granted or implied by the Agreement.”

Many of the provisions of the Affirmative Marketing Agreements would have been familiar to realtors, because they were standard components of consent decrees that DOJ had been pushing since 1969. But of course, Affirmative Marketing Agreements were voluntary and unenforceable. And for many realtors, presumably that was the point. But only by adhering to an affirmative marketing agreement could a realtor defend itself against a fair housing lawsuit. And for NAR’s leadership, that was the point.

NAR President Arthur Veitch explained to San Fernando Valley Realtors in 1976 why the realtors moved to the Affirmative Marketing Agreement. First, DOJ brought antitrust lawsuits against realtors, leading to the creation of the Fourteen Points program guiding the operation of Multiple Listing Services against antitrust actions. The antitrust experience, Veitch said, showed that “the National Association must constantly strive to ensure that industry programs, policy, and practice are consistent with law and the National Association must anticipate trends in enforcement activities to help avoid costly litigation.”
Veitch pulled no punches. The Affirmative Marketing Agreement served as a way to avoid DOJ consent decrees: “Realtors, however innocent they may be, desiring to accept a consent decree to avoid ruinous defense costs are finding themselves confronted with terms which are equally, if not more ruinous.” He continued:

All of these developments – the need to anticipate trends in legal enforcement, the oftentimes prohibitive cost of legal defense and increasing use of consent decree which go beyond the requirements of the law caused the National Association to consider the development of the Affirmative Marketing Agreement.

Veitch’s address was included in the Affirmative Marketing Handbook sent to every realty board in the country. For his part, NAR General Counsel Nolan included in the handbook an essay praising the Affirmative Marketing Agreement as insurance to litigation, and highlighted a case in Detroit where the judge, pointing to the defendant realtor’s signing and adherence to the Agreement threw out fair housing charges.

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Did the prospect of litigation and sanctions matter with realtors on the ground? It appears to have had some effect. Even in Chicago, the home of the bitterest open housing battles, began to see a change. The Leadership Council’s legal action, noted above, together with the DOJ lawsuit against the West Suburban Realtors association, got the attention of the region’s realtors.

In Park Forest, an inner ring southern suburbs, local whites in 1970 protested influx of Blacks into their neighborhoods, in an effort to avoid tipping (it was integrated beforehand). The local realtor’s response was telling:

We can’t keep track of where people live by race. We could be accused of violation if blacks asked to buy a specific house and we did not show it. Every Realtor is being tested by Blacks. We have no choice. There are law suits against brokers who have refused to show properties to certain people. Some have settled out of court, some are in process. I am not going to lose my license over this. I can’t call anybody up or contact them in any way legally and ask them where they are selling to colored.76

In 1972, the Chicago Real Estate Board distributed several hundred copies of the Leadership Council’s Guide to Practice Open Housing Under Law to its members. (Id.).

Just west of Chicago, in Oak Park, the threat of private and DOJ fair housing lawsuits also drove realtors into compromise. “The local real estate industry, at first strongly opposed to ‘forced housing’ – the catchword of fair housing opponents – subsided in its opposition when the Federal Civil Rights Act was passed in April 1968, possible feeling that compliance with a local ordinance might decrease their susceptibility to prosecution.

76 Berry, p. 116.
under stricter federal law.”77 At times, the FHA looked like the Borg: “The local real estate industry is reasonably cooperative with the integration effort. Many local real estate men seem to have concluded that containment is futile and that scattered integration serves their own best business interests.”78

Realtors across the country echoed the attitude of their Chicago colleagues. In early 1970, even before the FHA had fully come online, and before DOJ had sued the major realtors in New York, NCDH surveyed realtors in the Tri-State New York Metropolitan Region, and found that:

[r]egardless of their personal attitudes…most realtors are on the horns of a dilemma: to conform to the law because of the threat of losing their license (and thereby their livelihood) or to lose listings because of refusal to accept restricted offerings. Few brokers expressed concern about adverse findings by human rights commissions or about fines or court orders. But fear of losing their license was a cited as a major deterrent to discriminatory practices.79

Kale Williams, the Leadership Council’s Executive Director, summed it up toward the end of 1975. Williams told the New York Commission on Human Rights “the procedures for handling [fair housing] cases have now been refined, and the education of the bar and the bench has proceeded to the point where it now can be said, in our jurisdiction, that enforcement of the federal fair housing law is a prompt and effective remedy to racial discrimination in housing.” Williams noted that lawsuits were filed within one or two days of receiving complaints and pressure for damages meant that the procedures were working. Moreover, he noted, the lawsuits were having an effect:

The repeated enforcement of that law begins to have an effect on the real estate industry. A success record of eighty-five percent, the time and trouble of defending a lawsuit, the damages and fees are leading to changes in behavior on the part of the real estate industry. These are not yet adequate, but they are of great significance.80

Williams, of course, was biased: he wanted to show success for his agency and urge its replication elsewhere (as indeed he did later in the speech). But he was also someone at the center of the city’s civil rights community, who had founded the Leadership Council with Martin Luther King, Jr. in 1966, spearheaded its program of litigation, had helped bring the famous Gautreaux lawsuits and developed the eponymous program that came out of that case. He was no shill for the realtors. But even he had to acknowledge, in light of the nationwide Affirmative Marketing Agreement, that “the recent policy

77 Berry, p. 282.
78 Berry, p. 302.
declarations by the National Association of Realtors represent a major turning point in . . . affirmative efforts to overcome the effect of past discrimination.

This most assuredly did not mean that discrimination had vanished or that realtors had given up. In the (then) more-conservative suburb of Evanston, for example, roughly half of the realtors engaged in discriminatory practices, and the Leadership Council found several instances of realtors soliciting restrictive listings. As noted above, the 1977 HDS found discriminatory treatment in fully one-third of tests. But such practices were more and more on the defensive each year, and they represented a very sharp drop from less than a decade before.

**And now, a little theorizing…**

America’s real estate industry, and particularly its realtors, did not because civil rights proponents overnight. Indeed, they did not become civil rights proponents at all. Instead, the hydraulic pressure of DOJ and private lawsuits, and the ideological turbulence brought about by the FHA’s passage and the *Jones* holding achieved major changes in their behavior within just a few years.

The pressure of lawsuits need little theoretical explanation for deterrence in and of itself. But a skeptic might well wonder how the DOJ and private litigants, all by themselves, could have achieved what they appear to have achieved. The answer is that they did not do these all by themselves. They were necessary, and crucial, but they were not alone.

Tom Tyler’s famous work suggests that adherence to law is not simply a matter of deterrence. Nor is it a matter of agreeing with the law itself. Instead, for Tyler, the key variable is legitimacy, that is: did those who enacted the law have the right to do so? Was the process credible, sound, and done with integrity? If so, people will obey the law even if they might disagree with it.

This seems to have been the case with the realtors. They did not particularly like the law, but they accepted its legitimacy. They said as much in 1968. NAREB editorial, writing about the *Jones* decision, commented:

> There should be no thought that the case, on either side, was inadequately presented. A careful study of the briefs indicates the most exhaustive study by counsel for both sides. Not only were the applicable Constitutional amendments and the laws passed by the Congress analyzed virtually word by word, but arguments in prior case before the Court were re-argued as to their intent.

> Debates in Congress of a century ago were quoted, analyzed, and argued, as were newspaper reports of that day commenting on the debates. There can be no apology for the presentations to the court. They were exhaustive.

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81 *Id.*
Neither can be it be said that the court acted hastily or prejudicially, or peremptorily. The arguments pro and con were exhaustively analyzed and accepted or discarded with reason carefully noted. It would be a mistake to charge the court with inadequate consideration. Rather, a thorough study of the majority (7-to-2) opinion of Mr. Justice Stewart can lead only to the conclusion that it was most ably presented.82

The editorial almost could serve as the ideal type for Tyler’s thesis. Combined with the realtors’ traditional, almost talismanic commitment to “liberty under law,” and a professional self-conception based upon an adherence to a Code of Ethics that now demanded nondiscrimination, it led to a period of malleability, and then grudging acceptance, for the majority of US realtors.

Two other factors played important roles. First, as noted above, adherence to nondiscrimination did not disrupt realtors’ bottom lines. Weaver may have been overoptimistic to say that realtors’ business would increase by 35%, but there is no evidence nondiscrimination hurt it. This is not to suggest that nondiscrimination is a fundamentally “irrational” norm: privileged groups might well wish to enforce it as a way of bolstering their privilege and place in hierarchies.83 But an individual realtor is looking for buyers and sellers, and the law’s allowing her to increase the prospective pool of clients hardly figures to buttress her resistance to it.

Perhaps other realtors, and other community members, might press her to resist nonetheless. This prospect points to the second additional factor in play. Lawrence Lessig has observed that legal changes can produce a change in the “regulation of social meaning.”84 In other words, passage of a law might give a different meaning to an action that it had beforehand. For example, before the outlawing of dueling, refusal to accept a duel might open a person up to charges of cowardice. After outlawing it, refusal to accept could simply represent a desire to maintain social order and carry no stigma.

The enactment of fair housing might well have performed the same function. Before fair housing, many realtors, buyers and sellers may very well have had no problems to transactions involving other races. Poll numbers show small although clear majorities of white Americans having no problems with selling to, buying from, or living next door to Blacks. But before 1968, such people would have been subject to pressure from neighbors, churches, chambers of commerce, “improvement associations,” and other groups not to sell or do business with Blacks. They might also have been subject to threats.

After 1968, however, they had a ready-made response: “will you pay my legal bills if I am sued?” The south Chicago realtor’s actual response spoke volumes: “I am not going

82 Eugene P. Conser, “Import of Jones v. Mayer – I,” Realtors’ Headlines, June 24, 1968, NAR.
83 The classic account of this is EDMUND S. MORGAN, AMERICAN SLAVERY/AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975).
to lose my license over this” – exactly the response that Pottinger had promised in his NAR address. Put another way, Jones and the passage of the FHA allowed much of the latent nondiscrimination that built up in the country to manifest itself.

Merely because such latent nondiscrimination had built up says virtually nothing about whether it would have eventually become the norm. Recent events have demonstrated that the mere fact of even overwhelming public support means little in a political system characterized by a proliferation of veto points. Law matters. Fair housing mattered as much as anything.

A final repetition of caveat is in order: 1977 did not see an end to discrimination. It did not see an end to the substantial and real costs that Americans of color bore because of it. And most significantly, it came nowhere close to seeing an end to residential segregation, which continues to have severe negative effects on American society. But it did represent a profound policy success. For that, we can be grateful.

**On the Convergence Thesis**

The Justice Department’s experience with the realtors, and with fair housing enforcement more generally, runs counter to Derrick Bell’s influence “convergence thesis” of racial equality in the United States. “Measurable improvements in the status of some blacks and predictions of future progress have not substantially altered the maxim: white self-interest will prevail over black rights. This unstated, but firmly followed principle has characterized racial policy decisions in this society for the three centuries.” Bell later refined the thesis thus:

Translated from judicial activity in racial cases both before and after Brown, this principle of “interest convergence” provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

Although Bell framed his argument as relating to judicial activity, there is no reason why it does not apply to legislative or administrative activity. Just the opposite: to the extent that legislatures and agencies are responsive to the public will, they should be less likely to challenge white privilege.

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85 See, e.g., http://www.politifact.com/truth-o-meter/statements/2013/apr/18/gabrielle-giffords/gabby-giffords-says-americans-overwhelmingly-suppo/ (Rating “true” the claim that “Americans ‘overwhelmingly’ support expanded background checks.”).
86 Derrick A. Bell, Jr., Racial Remediation: An Historical Perspective on Current Conditions, 52 NOTRE DAME LAW. 5 (1976)
But the record at least of DOJ during the Fair Housing Act’s first decade suggests that it did mount just that sort of challenge. Its lawyers brought hundreds of cases, and aggressively pursued litigation against the largest and most important defendants. It strategized about pressure points in the ecology of discrimination, and targeted those points. Political appointees in a conservative Republican administration backed up their line attorneys and gave pointed threats to potentially recalcitrant groups.

How does this evidence relate to the convergence thesis? The thesis’ imprecision makes it somewhat hard to say. To the extent that DOJ aggressively pursued FHA enforcement because its lawyers thought fair housing was “good for the country,” one might say that the record confirms the convergence thesis.

Colleagues: want more evidence from the ground? Here are some notes on California in general and Los Angeles in particular – JZ

The real estate industry had long been subject to some state oversight, but the 1970s saw a dramatic increase in California, as the state legislature added new laws governing the supervision and control of real estate brokers. These moves toward the regulation and professionalization of the industry included a focus on fair housing, with California law being amended to require real estate brokers to familiarize salespeople with 30 detailed separate types of prohibited discriminatory conduct. A state regulation that became effective in 1981 created new disciplinary procedures for real estate professionals who engaged in such discriminatory behavior.

The California Real Estate Association had tried to implement some institutional fair housing measures in the wake of its massive effort to pass Proposition 14. Aware that its advocacy of the measure had proved extremely divisive and alienating to minorities, the group formed its first Equal Rights Committee in 1965, and with subsequent legal developments including the passage of the Fair Housing Act the organization began formally training real estate agents in fair housing law. This infrastructure became more meaningful in the 1970s as minority real estate agents were finally admitted into the ranks of the state’s professional organizations. The Los Angeles Realty Board elected Lillie R. Evans as its first black director in 1971. Evans had been a director of the Consolidated Realty Board, a black organization that formed because the Los Angeles board excluded African-Americans until 1962. Upon becoming a director of the Los Angeles Realty Board, Evans said racial barriers in the real estate industry were coming down, but "open housing is not really a reality yet."

Aside from high-profile battles like that between TOPIC and the South Bay realtors, by the end of the 1970s most Los Angeles-area real estate groups seemed to be at least cooperating with fair housing groups and making public commitments to

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89 Id. at *20-21; CAL. CODE REG., tit. 10, §2780.
90 Id.
91 See Cobb, supra note 29.
93 Id.
combating racial discrimination. The changing racial attitudes of the 1970s, the changing political power structure in Los Angeles, and the professionalization and regulation of the real estate industry surely were major contributing factors, in addition to the Fair Housing Act and the activism of community groups and local government. However, these relationships were strained by what would prove to be one of the defining characteristics of the fair housing fight in Los Angeles in the 1980s: the expansion of the classes of people protected by such laws.

The Westside was becoming more open to minority residents, but they tended to settle in lower-income areas such as Culver City and Mar Vista.94 A Times article from 1978 quoted real estate agents as denying that ethnic steering was at work, saying it was simply a matter of economic resources. “This whole racial thing, it’s been finished with,” said one Brentwood real estate broker. “People have gotten to the point where if they can afford it, they got it.” Harris and Rosloff were quoted in the piece as saying that discrimination persisted, though it had become more subtle.95 In the 1980s, the Council formally created an alliance with the Santa Monica and Venice/Marina del Rey boards of realtors after the realty boards entered into an “affirmative marketing agreement” with HUD. The joint effort involved disseminating information about fair housing laws to prospective renters and buyers, but primarily to real estate professionals. “My attitude toward realtors in the past was always ‘sue the bastards,’” Rosloff told the Times. “But with this I think we’re beginning to learn about each other.”96

Much of this was driven by coordination between DOJ and the Leadership Council for Metropolitan Open Communities. The Leadership Council received a substantial HUD grant to develop a legal action program, and by the end of 1972, it had filed some 202 cases and had at that time over 40 cases pending.

In southern California, the Housing Opportunities Center of Greater Los Angeles or its affiliates between July 1969 and December 1970 “filed more than 70 discrimination lawsuits…; none has been lost.”97

94 See Baker, supra note 203.
95 Id.