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## **DENIAL OF HOUSING TO AFRICAN AMERICANS: POST-SLAVERY REFLECTIONS FROM A CIVIL RIGHTS ADVOCATE**

*Elaine Gross, MSW\**

### **ABSTRACT**

In this article, I draw on two decades of experience as a civil rights advocate to reflect on the denial of housing to African Americans in post-slavery America. I do so as Founder and President of the civil rights organization, ERASE Racism.

I undertake historical research and share insights from my own experience to create and reflect upon six lessons related to understanding the systematic discrimination and segregation of African Americans. The lessons encompass: (1) the role of the federal government, (2) the role of municipal governments, (3) White supremacy ideation and actions, (4) legislative advocacy and legal actions, (5) modern ideological and political forces, and (6) indelible impressions. These lessons are offered in hopes that they will inform the work of other social justice advocates, including attorneys, to finally end structural racism in America.

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\* Elaine Gross, MSW draws on her experience as the Founder and President of ERASE Racism in writing this article. ERASE Racism is a regional civil rights organization that leads public policy advocacy campaigns and related initiatives to promote racial equity in areas such as housing, public school education, and community development. I would like to thank Olivia Ildefonso, Ph.D. and Folasade Famakinwa, J.D., M.S. for their research assistance.

## I. INTRODUCTION

As founder and president of ERASE Racism, I have spent the past 20 years working to end racial discrimination in housing and education in Long Island, one of the nation's 10 most racially segregated metropolitan regions in the nation. We have had notable successes during those two decades. I have learned valuable lessons that I believe can inform the work of social justice advocates, including attorneys. However, structural racism, which underpins the fundamental problems of housing and school inequity, has remained intact.

Needless to say, I have no illusion that I and my staff alone could successfully unravel structural racism in a mere two decades. However, I thought it would be instructive to explore the post-slavery history of our nation when, supposedly, those who were formerly enslaved were now free; even citizens of the United States. This contradiction of free yet not free, and citizen but not a citizen will be explored in this Article.

## II. THE PECULIAR DISCRIMINATION AND SEGREGATION AGAINST AFRICAN AMERICANS

After the end of the Civil War in April 1865 (June was the surrender of the last sizable confederate armies), the United States government, seemingly, laid the foundation for the formerly enslaved Africans to be full citizens of the United States, with equal access to housing under the law of the land.

In December 1865, the Thirteenth Amendment<sup>1</sup> to the United States Constitution sought to outlaw slavery throughout the United States. Congress passed the amendment, and the former confederate states revised their state constitutions to include abolition of slavery and ratified the amendment. This amendment covered the United States as well as “any place subject to their jurisdiction.”<sup>2</sup>

The Civil Rights Act of 1866, which included multiple provisions, established that all persons born in the United States, regardless of race, color, or “previous condition of slavery or involuntary servitude,” were entitled to basic rights of citizenship “in

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<sup>1</sup> U.S. CONST. amend. XIII.

<sup>2</sup> *Id.* § 1.

every State and Territory in the United States.”<sup>3</sup> The law further declared that all such individuals were entitled to the following specific rights:

[1.] [T]o make and enforce contracts, to sue, be parties, and give evidence [in court] . . . [2. to] give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property . . . and [3.] to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding . . .<sup>4</sup>

The law also provided for the conviction and punishment of individuals who violated the law under what was codified as 18 U.S.C. § 242.<sup>5</sup> This amendment was vetoed by then President Andrew Johnson. After an override of the veto by the United States Congress, it became law in April 1866.

The Fourteenth Amendment, which had been proposed at that time, provided that all those “born or naturalized in the United States,” which included former enslaved persons, were “citizens of the United States and of the State wherein they reside.”<sup>6</sup> It also stated that no State shall “deprive any person of life, liberty or property . . . nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>7</sup> It was ratified in July 1868.

Yet, the evidence in the following six “Lessons Learned” sections of this Article demonstrate the failures of federal, state, and local governments to acknowledge and act on the humanity and citizenship of African Americans. We see time and again the undermining of basic rights, including, but not limited to nondiscriminatory housing for African Americans. We now examine the impact with regard to the housing issue.

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<sup>3</sup> The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (reenacted by the Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)) (codified as amended at 42 U.S.C. §§ 1981-1983).

<sup>4</sup> *Id.*

<sup>5</sup> *See* 18 U.S.C. § 242.

<sup>6</sup> U.S. CONST. amend. XIV, § 1.

<sup>7</sup> *Id.*

For 100 years, between the 1865 ratification of the Thirteenth Amendment<sup>8</sup> and the 1968 Fair Housing Act,<sup>9</sup> there were numerous opportunities for the federal government to put a stop to the institutionalization of explicit race-based discrimination against African Americans. Further, this race-based discrimination to deny African Americans equal access to housing was enshrined in government policies and actions, the courts, and businesses acting under the requirements of government agencies or under the acquiescence, willful support, or willful ignorance of government regulators. Congress, with power to enforce the United States Constitution and its own laws, could have and should have put a stop to the plight of African Americans. Likewise, United States presidents should have and could have forcefully demanded rigorous enforcement of the laws designed to protect African Americans. They clearly did not do enough, and some worked actively to undermine the rights of African Americans.

For the last 54 years since the passage of the Fair Housing Act,<sup>10</sup> all governments and all businesses in private sectors related to the development, purchase, or lease of property and housing could have and should have reversed the buildup of structural impediments to housing equity. They did not. In fact, as discussed below, those structural impediments grew in form and number.

Finally, the fellow Americans of good will who were not African American could have and should have stopped their complicit actions and silence in the face of persistent acts of discrimination and segregation, but they did not and have not.

I have reached these conclusions based on the facts that follow, which are organized under six lessons learned.

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<sup>8</sup> U.S. CONST. amend XIII.

<sup>9</sup> The Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81, 81-92 (codified as amended at 42 U.S.C. §§ 3601-3631).

<sup>10</sup> *Id.*

**III. LESSONS LEARNED FROM A CIVIL RIGHTS ADVOCATE****A. Lesson One: The Federal Government—Executive, Legislative, and Judicial Branches—Have Been a Large Part of the Problem of Housing Discrimination and Segregation Against African Americans and Must, Therefore, Be a Large Part of Any Solution<sup>11</sup>**

In his book, *The Color of Law: A Forgotten History of How our Government Segregated America*, Richard Rothstein uses meticulous research to demonstrate how, throughout modern history, racial segregation in housing has been perpetuated through law and government policies and intentionally not remediated. He posits that:

[U]ntil the last quarter of the twentieth century, racially explicit policies of federal, state, and local governments defined where whites and African Americans should live. Today's residential segregation in the North, South, Midwest, and West is not the unintended consequence of individual choices and of otherwise well-meaning law or regulation but of unhidden public policy that explicitly segregated every metropolitan area in the United States.<sup>12</sup>

Rothstein refers to modern history beginning in the twentieth century when the federal government instituted an official system of segregation through racially explicit laws, regulations, and government practices.<sup>13</sup> In 1933, President Franklin D. Roosevelt's administration took office in the midst of a housing crisis that was made worse because of the Great Depression.<sup>14</sup> The Home Owners Loan Corporation ("HOLC") was created by the administration to refinance mortgages in danger of default.<sup>15</sup> It bought up existing mortgages and then issued new mortgages to homeowners, providing

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<sup>11</sup> The term "Government" is used throughout this Article, broadly referring to such elements as the executive and legislative branches, the judicial branch, and the enforcement authorities at federal, state and local levels.

<sup>12</sup> RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, at vii-viii (2018).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 63.

<sup>15</sup> *Id.*

very low interest rates and longer repayment periods—15 and then 25 years.<sup>16</sup>

HOLC created color-coded maps of neighborhoods for every major metropolitan region. Areas with African American residents were colored red and white neighborhoods were colored green.<sup>17</sup> Real estate agents who knew the racial composition of the local neighborhoods were important partners for this process. At the time, the ethics code of the National Association of Real Estate Boards—the governing body for the real estate agents—stated that the agents should maintain racially segregated neighborhoods.<sup>18</sup>

The purpose of the maps was to gauge risk for issuing the new loans in order to prevent a massive number of foreclosures, and risk was determined by race.<sup>19</sup> A middle-class African American community with single family homes would be colored red just like any other neighborhood with African American residents. When reviewing the information from the completed forms that were used to create the maps, you can see in the section entitled “Detrimental Influences,” there is “Colored infiltration” and “infiltration of negroes.”<sup>20</sup> In accordance with HOLC policy, the race of the resident was used to determine risk and thus the color of red on the map.<sup>21</sup> The presence of African American residents was used as a signal for high risk, and the presence of white residents signaled that the new loans could be used there to forestall foreclosures.

In 1934, the Federal Housing Administration (“FHA”) was created to help first-time homebuyers. Again, this program was designed to benefit white people only.<sup>22</sup> These government-backed mortgages included a whites-only requirement, and the FHA Underwriting Manual stated its preference for physical barriers separating whites from African Americans such as highways or

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<sup>16</sup> *Id.*

<sup>17</sup> *Mapping Inequality: Redlining in New Deal America*, UNIV. OF RICHMOND: DIGIT. SCHOLARSHIP LAB, <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58> (last visited Mar. 7, 2022).

<sup>18</sup> NAT’L ASS’N REAL ESTATE BDS., CODE OF ETHICS 7 (1924).

<sup>19</sup> ROTHSTEIN, *supra* note 12, at 64.

<sup>20</sup> *Mapping Inequality*, *supra* note 17.

<sup>21</sup> ROTHSTEIN, *supra* note 12, at 64.

<sup>22</sup> *Id.* at 64-65.

artificial barriers.<sup>23</sup> It also required that loans not be made if schools might become integrated as a result.<sup>24</sup>

After World War II, both the FHA and the Veterans Administration (“VA”) were using the FHA policy of discrimination to issue loans.<sup>25</sup> Banks required VA or FHA approval before they would issue mortgages to prospective homebuyers.<sup>26</sup> Later, the FHA and VA expanded their racial segregation policy by guaranteeing loans for builders in thousands of locales for the creation of new suburban subdivisions.<sup>27</sup> With Congressional authority, the FHA and VA guaranteed bank loans for mass-produced builders, for almost the entire cost of the subdivision if the builder committed to not sell to African Americans.<sup>28</sup> In addition, the mortgages for homebuyers in these whites-only-developments were automatically approved for white borrowers.<sup>29</sup> All of this minimized the risk for builders—using the government’s money rather than their own (if they had it) to build the developments—and eased the process of home ownership for white buyers.

Racial restrictions or covenants were another tool used to sustain racial segregation in white communities.<sup>30</sup> These were clauses in the deeds of homes that explicitly prohibited people who were not white from buying or leasing a home.<sup>31</sup> It also specified that the only circumstance permitting a non-white person to be in the community was if they were a servant living in the home of a white person.<sup>32</sup> For example, some racial covenants on Long Island included the clause, “This covenant shall not prohibit the engagement or maintenance of colored servants or domestics in the family household.”<sup>33</sup>

In Levittown, these covenants were required to obtain project financing.<sup>34</sup> Levitt and Sons, who served as builders, and Abraham

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<sup>23</sup> *Id.* at 65.

<sup>24</sup> FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING & VALUATION PROC. UNDER TITLE II NAT’L HOUS. ACT 113 (1938).

<sup>25</sup> ROTHSTEIN, *supra* note 12, at 64-65.

<sup>26</sup> *Id.* at 66.

<sup>27</sup> *Id.* at 70-73.

<sup>28</sup> *Id.* at 71.

<sup>29</sup> *Id.* at 63-75.

<sup>30</sup> *Id.* at 78-79.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> John P. Dean, *Only Caucasian: A Study of Race Covenants*, J. LAND & PUB. UTIL. ECON. 428, 432 (1947).

<sup>34</sup> ROTHSTEIN, *supra* note 12, at 85.

Levitt, who led that business, created a whole community called Levittown.<sup>35</sup> Levittown was built on Long Island in the late 1940s and early 1950s and is renowned for being one of the nation's first suburbs—birthed with tens of thousands of newly built federally financed homes affordable enough for white GIs returning from World War II.<sup>36</sup> These federally financed homes were systematically denied to Black GIs.<sup>37</sup>

African Americans were denied an opportunity to acquire wealth, as was the case with their white counterparts, because they were systematically denied an opportunity to purchase housing. A Levitt house in the 1940s and 1950s could be purchased for as little as \$8,000 (or about \$86,000 in 2019 once adjusted for inflation<sup>38</sup>) with no money down.<sup>39</sup> To draw a comparison, as of 2020, the median price of a home in the same area is \$430,900.<sup>40</sup> Only white families were permitted to buy homes in Levittown and benefit from this investment.<sup>41</sup> In the 1960s, the population of Levittown was 0 percent Black, and the 2010 United States Census revealed that by then, the suburb's population was just 1 percent Black.<sup>42</sup>

This wealth-building machine was explicitly for white people only, embracing the federal government segregation policies. Veterans who were African American were summarily blocked from living in these new homes, just because of their race.<sup>43</sup> The racism was structural, brought about by both government and businesses including banks, real estate brokers and housing developers.<sup>44</sup> With restrictive racial covenants in the deeds, which stated that houses could not be sold to anyone who was not “Caucasian”<sup>45</sup> the impact and intention

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 70.

<sup>37</sup> *Id.* at 71.

<sup>38</sup> *CPI Inflation Calculator*, U.S. BUREAU LAB. STATS., [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Mar. 7, 2022).

<sup>39</sup> ROTHSTEIN, *supra* note 12, at 70.

<sup>40</sup> *American Community Survey 5-Year Estimates 2020*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=Housing%20Value%20and%20Purchase%20Price&g=1600000US3642081> (last visited May 26, 2022).

<sup>41</sup> ROTHSTEIN, *supra* note 12, at 68-69.

<sup>42</sup> *Id.*; Rachelle Blidner, *Long Island Divided: Part 8—Favored for Whites: Levittown*, NEWSDAY (Nov. 12, 2019), <https://projects.newsday.com/long-island/levittown-demographics-real-estate>.

<sup>43</sup> ROTHSTEIN, *supra* note 12, at 70-71.

<sup>44</sup> *Id.* at VII, XV, 178-79.

<sup>45</sup> *Id.* at 71.

were clear. As long as the discriminatory laws and practices remained, African Americans would be legally excluded from residing in Levittown as homeowners.

The FHA did not stop financing developers who explicitly refused to sell to Black buyers until the 1962 Executive Order issued by President John F. Kennedy prohibiting the use of federal funds to support racial discrimination.<sup>46</sup> However, the segregation was already firmly in place. Between 1932 and 1968, the government gave \$120 billion to future homeowners, 98 percent of whom were white.<sup>47</sup>

This is Long Island's legacy. Today, housing is still segregated. Using Levittown as an example, in 1960, not one of the 82,000 residents of Levittown's 17,400 houses was African American.<sup>48</sup> In 2020, Blacks comprised about 1 percent of Levittown's population, even though they comprised about 10 percent of Long Island's population.<sup>49</sup> Redlining and racially discriminatory housing were national policies, which Long Island's residents and leadership embraced.

Using 2020 census data, the widely used dissimilarity index measured racial residential segregation, and Long Island is ranked as among the 10 most racially segregated metropolitan regions in the United States.<sup>50</sup> White-to-Black segregation levels remain severe at 65.5. Segregation between whites and Hispanics is moderate at 46.1. Finally, segregation between whites and Asians, while not yet severe, has risen from 38.4 in 2010 to 43.4 in 2020.<sup>51</sup> Mr. Rothstein summarizes the federal government's segregation policies as follows:

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<sup>46</sup> ROTHSTEIN, *supra* note 12, at 88; *see also* Equal Opportunity in Housing, 27 Fed. Reg. 11527 (1962).

<sup>47</sup> *Go Deeper: Where Race Lives*, PBS, [https://www.pbs.org/race/000\\_About/002\\_06\\_a-godeeper.htm](https://www.pbs.org/race/000_About/002_06_a-godeeper.htm) (last visited June 6, 2022).

<sup>48</sup> Olivia Winslow, *Long Island Divided: Part 10—Dividing Lines, Visible and Invisible*, NEWSDAY (Nov. 17, 2019), <https://projects.newsday.com/long-island/segregation-real-estate-history>.

<sup>49</sup> 2020 DEC Redistricting Data, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?t=Black%20or%20African%20American&g=1600000US3642081&tid=DECENNIALPL2020.P1> (last visited May 26, 2022).

<sup>50</sup> John R. Logan & Brian Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2020 Census*, U.S. 2010 PROJECT (2021), <https://s4.ad.brown.edu/Projects/Diversity>.

<sup>51</sup> *Id.* at 18.

The policy was so systemic and forceful that its effects endure to the present time. Without our government's purposeful imposition of racial segregation, the other causes—private prejudice, white flight, real estate steering, bank redlining, income differences, and self-segregation—still would have existed but with far less opportunity for expression. Segregation by intentional government action is not *de facto*. Rather, it is what courts call *de jure*: segregation by law and public policy.<sup>52</sup>

The level and persistence of segregation of African Americans in housing is unique. As an example, historically, there were government-organized residency restrictions or covenants in deeds used to exclude African Americans and some other groups (e.g., Hispanics, Chinese and Japanese). However, as the twentieth century progressed, the courts no longer upheld the restrictions on the other groups. “Only African Americans have been systematically and unconstitutionally segregated for such a long period,” says Mr. Rothstein, “and with such thorough repression, that their condition requires an aggressive constitutional remedy.”<sup>53</sup> Government policies designed to isolate African Americans and the other groups identified above are different from the discrimination that was historically experienced by white immigrant groups (e.g., Irish, Jewish, Italian, Polish, Greek and others), which was absent sustained federal government instigation. Mr. Rothstein explains the differences between government-organized discrimination and segregation of other racial/ethnic groups that is of the more distant past, of being related to economic inequality, or of being related to the normal cycle of immigration.<sup>54</sup>

Convincingly, Mr. Rothstein has made the case that “[w]e have created a caste system in this country, with African Americans kept exploited and geographically separate by racially explicit government policies. Although most of these policies are now off the books, they have never been remedied and their effects endure.”<sup>55</sup>

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<sup>52</sup> ROTHSTEIN, *supra* note 12, at viii.

<sup>53</sup> *Id.* at 235.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at xvii.

While I will not offer a full assessment of how the judicial branch of government was implicated in this government system of segregation, here are a couple of insights included in the *Color of Law*. “Throughout the nation,” says Mr. Rothstein, “courts ordered African Americans evicted from homes they had purchased. State supreme courts upheld the practice when it was challenged,” including the New York Supreme Court.<sup>56</sup>

In 1926, the United States Supreme Court in *Corrigan v. Buckley* upheld racial covenants in deeds, including such court actions as evictions to enforce the covenants.<sup>57</sup> In 1948, the United States Supreme Court in *Shelley v. Kraemer* reversed the 1926 ruling and deemed the enforcement by state courts as unconstitutional.<sup>58</sup> This ruling forbade the practice of court-ordered evictions of African Americans because of the restrictive covenants.<sup>59</sup> However, “parties to restrictive covenants continued for another five years to bring suits for damages against fellow signatories who violated their pacts,” says Mr. Rothstein, “and two state supreme courts upheld the propriety of such damage awards.”<sup>60</sup> Missouri and Oklahoma continued the practice.

Mr. Rothstein reports successful and persistent efforts to undermine the *Shelley* decision. For example, “[t]wo weeks after the Court announced its decision, FHA commissioner Franklin D. Richards stated that the *Shelley* decision would ‘in no way affect the programs of this agency,’ which would make ‘no change in our basic concepts or procedures.’”<sup>61</sup>

“Six months later,” Mr. Rothstein reported, “when Thurgood Marshall, then the NAACP legal counsel (and later a [United States] Supreme Court Justice), challenged the FHA policy of restrictive covenants in deeds of the massive Levittown development, Richards responded, ‘I find nothing in the [*Shelley* decision] to indicate that in the absence of statutory authority the government, or any agency thereof, is authorized to withdraw its normal protection and benefits

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<sup>56</sup> *Id.* at 81.

<sup>57</sup> *Id.* at 82, 268; *Corrigan v. Buckley*, 271 U.S. 323 (1926).

<sup>58</sup> *Id.* at 85.

<sup>59</sup> *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

<sup>60</sup> ROTHSTEIN, *supra* note 12, at 89.

<sup>61</sup> *Id.* at 86.

from persons who have executed but do not seek judicial enforcement of such covenants.”<sup>62</sup>

*Shelley* ruled that courts could not order eviction of African Americans.<sup>63</sup> In 1953, the United States Supreme Court in *Barrows v. Jackson*<sup>64</sup> ruled that “the Fourteenth Amendment precluded state courts not only from evicting African Americans from homes purchased in defiance of a restrictive covenant but also from adjudicating suits to recover damages from property owners who made such sales.”<sup>65</sup>

The FHA continued to finance developments with restrictive covenants, including Levittown.<sup>66</sup> Restrictive covenants, and housing discrimination more broadly, were not explicitly banned until the 1968 Fair Housing Act,<sup>67</sup> which will be discussed later in this Article.

Before there was an FHA, community residents and realtors were freely segregating neighborhoods.<sup>68</sup> Racial covenants in deeds were used.<sup>69</sup> In fact, the FHA adopted the racial covenant practice used in local communities.<sup>70</sup> Local residents and municipalities continued to try a variety of strategies to ensure racial restrictions.<sup>71</sup> They couldn’t count on the original developer to care about what happens with resale.<sup>72</sup> Increasingly, to avoid using the courts, residents created contracts amongst themselves agreeing that neighbors could sue directly if someone broke the contract.<sup>73</sup> That required recruiting everyone in the neighborhood to voluntarily agree, which did not always happen.<sup>74</sup> For further protections, they created neighborhood associations for the same purpose.<sup>75</sup> Bylaws for the association would contain racial restrictions.<sup>76</sup> To mandate participation in the associations, subdivision developers would include a requirement that,

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 85.

<sup>64</sup> *Barrows v. Jackson*, 346 U.S. 249, 254 (1952).

<sup>65</sup> ROTHSTEIN, *supra* note 12, at 90.

<sup>66</sup> *Id.* at 86.

<sup>67</sup> Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619.

<sup>68</sup> ROTHSTEIN, *supra* note 12, at 12-14, 77.

<sup>69</sup> *Id.* at 78-81.

<sup>70</sup> *Id.* at 82-83.

<sup>71</sup> *Id.* at 122-37.

<sup>72</sup> *Id.* at 79-82.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 79.

<sup>75</sup> *Id.* at 80-82.

<sup>76</sup> *Id.* at 79.

as a condition of sale, the purchaser had to agree to join the association.<sup>77</sup> Again, racial restrictions were included in the association documents.<sup>78</sup> The Fair Housing Act also covered these arrangements.<sup>79</sup>

By refusing to lend to African Americans, banks were central partners in implementing the government's intentional policies to discriminate against this racial group. Mr. Rothstein states that: "The Federal Home Loan Bank Board, for example, chartered, insured, and regulated savings and loan associations from the early years of the New Deal but did not oppose the denial of mortgages to African Americans until 1961."<sup>80</sup> As a result, the only "contracts" to which African Americans often had access were incredibly exploitative and now illegal.<sup>81</sup> As NPR reported on these "contracts":

A buyer put down a large down payment for a home and made monthly installments at high interest rates. But the buyer never gained ownership until the contract was paid in full and all conditions were met. Meanwhile, the contract seller held the deed and could evict the buyer. Contract buyers also accumulated no equity in their homes. No laws or regulations protected them.<sup>82</sup>

The inability to accrue equity in their homes along the way made it a lot more likely for Black families to default on their mortgages as well as impossible for them to sell at any point. One estimate found that "85 percent of homes bought by Blacks in Chicago were bought on contract."<sup>83</sup>

More recently, the exploitative "contracts" took on another incarnation as a discriminatory scheme carried out by banks called "reverse-redlining."<sup>84</sup> This is the practice of lending subprime

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 97-99.

<sup>82</sup> Natalie Moore, *Contract Buying Robbed Black Families in Chicago of Billions*, NPR, <https://www.npr.org/local/309/2019/05/30/728122642/contract-buying-robbed-black-families-in-chicago-of-billions> (May 30, 2019).

<sup>83</sup> Emily Badger, *Why a Housing Scheme Founded in Racism is Making a Resurgence Today*, CHI. TRIB., <https://www.chicagotribune.com/business/ct-contract-selling-resurgence-20160513-story.html> (May 16, 2016).

<sup>84</sup> ROTHSTEIN, *supra* note 12, at 109-13.

mortgages disproportionately to homebuyers of color or targeting homes in non-white neighborhoods for terms that are less favorable than those provided to homes in white neighborhoods.<sup>85</sup> It functions as one important reason why the 2008 financial crisis significantly affected Black families.<sup>86</sup>

In 1973, the United States Commission on Civil Rights concluded that the “housing industry, aided and abetted by Government, must bear the primary responsibility for the legacy of segregated housing . . . . Government and private industry came together to create a system of residential segregation.”<sup>87</sup>

The Commission’s statement does not go far enough. The facts presented in this article provide a modest number of compelling examples of the significant body of research and source documents that implicate the federal government (aided by business sectors such as banks, real estate brokerages and developers) as instigating and sanctioning this racist system to explicitly discriminate against African Americans. The facts clearly evidence the systemic efforts by the government to subjugate African Americans.<sup>88</sup>

### **B. Lesson Two: Local Governments Also Play an Essential Role in the Problem of Housing Discrimination and Segregation Against African Americans and Must Be a Part of the Solution**

In 1917, in *Buchanan v. Warley*,<sup>89</sup> the Supreme Court struck down a racial zoning ordinance because of the “Freedom of Contract” clause of the Fourteenth Amendment, not to protect African Americans.<sup>90</sup> The Court felt that people should be able to sell to

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<sup>85</sup> *Id.*

<sup>86</sup> See generally Linda Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & POL’Y 121, 121-55 (2009).

<sup>87</sup> ROTHSTEIN, *supra* note 12, at 75.

<sup>88</sup> For documented examples of how the United States government and local governments have systematically subjugated African Americans, see Kenneth Jackson, *Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Association*, 6 J. URB. HIST. 419, 419-52 (1980). See generally THOMAS SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (2005); ALLAN SPEAR, *BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO, 1890-1920* (1967); DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID* (1993).

<sup>89</sup> 245 U.S. 60 (1917).

<sup>90</sup> *Id.* at 82.

whomever they want.<sup>91</sup> Once again, continuing in the twenty-first century, there were a number of successful schemes to outright oppose and skirt *Buchanan*, which will not be explored here. However, it is instructive to note that one of those schemes, “local control,” is alive and well today, including on Long Island.<sup>92</sup>

New York State is a home rule state, which means that New York has delegated specific powers held by the State to local municipalities enumerated in Article IX of the State Constitution,<sup>93</sup> the Municipal Home Rule Law,<sup>94</sup> and local legislation which includes decisions related to land use (as well as public services and community benefits) and zoning, which determines what can and cannot be built within a given jurisdiction.

First, let us review some basic information about Long Island. In 2019, it had about 2.8 million people, consisting of 9 percent Black, 18 percent non-White Hispanic, 7 percent Asian, 64 percent non-Hispanic White, and 1 percent other racial groups.<sup>95</sup> Long Island is becoming more racially diverse in the aggregate. For example, in 2010 it had about 800,000 people of color, representing 30 percent of the population and in 2019, the number of people of color increased to about 1,000,000—representing 36 percent of the population.<sup>96</sup> In the same time period, the number of Black residents increased from 240,000 to 260,000, continuing to make up about 9 percent of the population.<sup>97</sup> This population is divided between two counties, “13

<sup>91</sup> See ROTHSTEIN, *supra* note 12, at 45.

<sup>92</sup> Elaine Gross, *Housing Discrimination and Local Control*, NYU FURMAN CTR. (Mar. 19, 2019), <https://furmancenter.org/research/iri/essay/housing-discrimination-and-local-control>.

<sup>93</sup> See N.Y. CONST. art. IX, § 2.

<sup>94</sup> See N.Y. MUN. HOME RULE LAW § 10 (McKinney 2021).

<sup>95</sup> *American Community Survey 5-Year Estimates 2019*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?t=Race%20and%20Ethnicity&g=0500000US36059,36103&tid=ACSDT5Y2020.B03002> (last visited May 25, 2022) (providing these statistics which were derived from the Census Bureau’s ACS interactive data tool).

<sup>96</sup> ERASE Racism, *Unequal Resources for Long Island Students Based on Race* 8, (May 2022) [https://www.eraseracismny.org/storage/documents/Unequal\\_Resources\\_for\\_Long\\_Island\\_Students\\_Based\\_on\\_Race\\_ERASE\\_Racism\\_2022\\_Report.pdf](https://www.eraseracismny.org/storage/documents/Unequal_Resources_for_Long_Island_Students_Based_on_Race_ERASE_Racism_2022_Report.pdf).

<sup>97</sup> *American Community Survey 5-Year Estimates 2010 and 2019*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=Suffolk&t=-00%20-%20All%20available%20races&y=2019> (last visited Mar. 7, 2022) (providing statistics which were derived from the Census Bureau’s ACS interactive data tool).

towns, 2 cities and 97 villages.”<sup>98</sup> In addition to other taxing jurisdictions, there are 125 public school districts that mirror the residential segregation.<sup>99</sup> Government is very fragmented with numerous zoning authorities. As discussed, Long Island is the 10th most racially segregated region in the nation, due in large part to the systematic government discrimination and segregation during its birth.<sup>100</sup> Long Island, like communities nationwide, needs a wide variety of housing types and prices to meet the needs of residents with different family sizes and various income levels.

In the past ten years, Long Island’s housing production has not kept up with its population increase. For instance, between 2001 and 2018, Long Island granted building permits to only 56,000 housing units.<sup>101</sup> This comes out to an annual rate of just over 3,000 homes per year in a region with a population of 2.8 million. Meanwhile, between 2000 and 2016 the region’s population increased by about 100,000.<sup>102</sup> In both Nassau and Suffolk, more than a third of the homeowners pay more than 30 percent of their income in mortgage costs.<sup>103</sup>

Since 2000, Long Island’s median income has slightly decreased, while housing costs have increased by 24%. In addition, 350,000 Long Island households are housing cost-burdened.<sup>104</sup> The highest percentage of these households falls within the lowest-income category.<sup>105</sup> Yes, Long Island needs more affordable housing.

Local control has been an effective mechanism for limiting types of housing typically more affordable and associated with lower

<sup>98</sup> *Long Island Housing Data Profiles*, REG’L PLAN. ASS’N (Oct. 2020), <https://tpa.org/work/reports/long-island-housing-data-profiles>.

<sup>99</sup> *Counties*, N.Y.S. EDUC. DEP’T., <https://data.nysed.gov/lists.php?type=county> (last visited Mar. 7, 2022).

<sup>100</sup> John R. Logan & Brian J. Stults, *Metropolitan Segregation: No Breakthrough in Sight*, BROWN UNIV. (Aug. 12, 2021), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report08122021.pdf>.

<sup>101</sup> Noah Kazis, *Ending Exclusionary Zoning in New York City’s Suburbs*, N.Y.U. FURMAN CTR. 1, 9 (Nov. 9, 2020), [https://furmancenter.org/files/Ending\\_Exclusionary\\_Zoning\\_in\\_New\\_York\\_Citys\\_Suburbs.pdf](https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_Citys_Suburbs.pdf).

<sup>102</sup> *2018 Indicators Report*, LONG ISLAND INDEX, at 9, [http://www.longislandindex.org/data\\_posts/long-island-index-2018-report](http://www.longislandindex.org/data_posts/long-island-index-2018-report) (last visited June 6, 2022).

<sup>103</sup> REGIONAL PLAN. ASS’N., *BE MY NEIGHBOR: UNTAPPED HOUSING SOLUTIONS: ADUS AND CONVERSIONS* (July 2020), <https://tpa.org/work/reports/be-my-neighbor>.

<sup>104</sup> *Long Island Housing Data Profiles*, *supra* note 98.

<sup>105</sup> *Id.*

income residents like African Americans in particular, such as multi-family, mixed-income and affordable for sale and rental properties.<sup>106</sup> In effect, municipalities have successfully kept out African Americans.

The reason this home rule scheme can work on Long Island is that overwhelmingly, the housing that can be built as-of-right is single family housing. All other housing proposals must be approved on a case-by-case basis.<sup>107</sup>

Local control legitimizes the power arrangements already in place, allowing white people in charge of local government to perpetuate structural racism in housing—discriminating against and segregating African Americans. This power to exclude creates and perpetuates residential segregation. Local control does not even require overt racial hatred. That is what is so insidious about it. It will automatically perpetuate racial segregation due to the history we have discussed.

Following are some examples of the impact of local control on Long Island. A famous housing discrimination case in Huntington, Long Island, previously went all the way to the United States Supreme Court.<sup>108</sup> In 1988, the United States Supreme Court ruled that Huntington violated the federal Fair Housing Act because its zoning confined the construction of apartments only to a predominantly Black neighborhood, thus creating a discriminatory result.<sup>109</sup> In 2021—43 years later—the affordable apartment project in a predominantly white neighborhood at issue in that case was finally approved by the town board! This means that the project might be able to break ground within the year.<sup>110</sup> That is the impact of local control.

In addition to discrimination and segregation resulting from zoning policies, local government housing policies have also contributed to housing discrimination and segregation. In 2014—26 years after the Huntington Supreme Court decision—the federal government sued the Town of Oyster Bay on Long Island for violating

<sup>106</sup> Kazis, *supra* note 101, at 12-15.

<sup>107</sup> Binyamin Appelbaum, *Long Island, We Need to Talk (About Housing)*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/opinion/long-island-housing.html>.

<sup>108</sup> *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 15 (1988).

<sup>109</sup> *Id.*

<sup>110</sup> Randi F. Marshall, Opinion, *The Point: 43 Years Later, A Huntington Affordable Housing Project Looks Ready*, NEWSDAY (Dec. 15, 2021), [newsday.com/opinion/matinecock-court-o18319](https://www.nydailynews.com/opinion/matinecock-court-o18319).

the Fair Housing Act.<sup>111</sup> The United States alleged that two housing programs to develop below-market rate housing for first-time homeowners and senior citizens discriminated against African Americans, because the programs gave a preference to residents of the predominantly white Town.<sup>112</sup> The Government asserted that this preference produced a discriminatory result, because very few African Americans (3 percent of residents) live in the Town and less than one percent of the Black families living there were eligible for the program.<sup>113</sup> Income-eligible Black residents nearby were blocked from participating. Town officials tried to avoid depositions, but a federal judge ruled in February 2022 that the officials could not do so.<sup>114</sup>

In *MHANY Management Inc. and New York Communities for Change, Inc. v. Incorporated Village of Garden City and Garden City Board of Trustees*,<sup>115</sup> the United States Court of Appeals for the Second Circuit affirmed a lower court's decision that the Village of Garden City intentionally discriminated against people of color and thus violated the federal Fair Housing Act<sup>116</sup> in its zoning decision to abandon a multi-family residential district in favor of a residential townhouse district.<sup>117</sup> At the time, Garden City was largely white and 2.6% minority (defined as Hispanic/Latino or as both non-Hispanic and Black).<sup>118</sup>

ERASE Racism submitted its original administrative complaint with the Department of Housing and Urban Development ("HUD") on April 28, 2014, alleging that Nassau County violated the

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<sup>111</sup> 42 U.S.C. §§ 3601-3619.

<sup>112</sup> *United States v. Town of Oyster Bay*, No. CV-14-2317, 2022 WL 1458176 at \*1 (E.D.N.Y. 2014); *see also* Press Release, *United States Sues Town of Oyster Bay for Housing Discrimination*, U.S. DEP'T OF JUST.: U.S. ATT'YS OFF. E.D.N.Y. (Apr. 10, 2014), <https://www.justice.gov/usao-edny/pr/united-states-sues-town-oyster-bay-housing-discrimination>.

<sup>113</sup> *Id.*

<sup>114</sup> Ted Philips, *Federal Judge Denies Bid by Oyster Bay Officials to Avoid Depositions*, *NEWSDAY* (Feb. 8, 2022), [newsday.com/long-island/Nassau/depositions-lawsuit-housing-discrimination-town-board-n34587](https://www.newsday.com/long-island/Nassau/depositions-lawsuit-housing-discrimination-town-board-n34587).

<sup>115</sup> 4 F. Supp. 3d 549 (2014).

<sup>116</sup> 42 U.S.C. §§ 3601-3619.

<sup>117</sup> *Mhany Mgmt. v. Cnty. of Nassau*, 819 F.3d 581 (2d Cir. 2016).

<sup>118</sup> Decl. of Nancy McArdle at 3, *ACORN v. Cnty. of Nassau*, No. 05CV2301, 2009 WL 2923435 (E.D.N.Y. Sept. 10, 2009).

Fair Housing Act<sup>119</sup> and Title VI of the Civil Rights Act of 1964<sup>120</sup> by discriminating against African Americans and perpetuating racial segregation in the administration of its housing and community development programs.<sup>121</sup> The Complaint identifies violations committed by the County itself, as well as the County's failure to enforce federal civil rights requirements on members of the Nassau Urban County Consortium.<sup>122</sup> The Complaint was amended on May 28, 2014 to include additional facts. HUD accepted the Complaint on July 18, 2014.<sup>123</sup> As of the writing of this Article, this Complaint remains unresolved.

The Complaint's central allegation is that the County discriminates on the basis of race and color, and perpetuates racial segregation by its actions or omissions with respect to: (a) its own funding of housing and community development activities in jurisdictions that are members of the Nassau Urban County Consortium—a collective of Nassau County municipalities that are given access to competitive grant funds from HUD's Community Development Block Grant (CDBG) Program; (b) its own decisions with respect to dedicating County-owned land for the development of affordable housing; and (c) failing or refusing to withhold funding or other County benefits from members of the Nassau Urban County Consortium that maintain zoning and land use laws, policies and practices with a discriminatory effect.<sup>124</sup>

With policies like local control, it is fair to say that residential segregation is firmly and stunningly in place. Local control has no doubt been carried to extremes on Long Island;<sup>125</sup> however, the dynamic is not unique to this region.

In another suburban region just to the north of Long Island, the Anti-Discrimination Center's False Claims Act lawsuit<sup>126</sup> targeting

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<sup>119</sup> 42 U.S.C. §§ 3601-3619.

<sup>120</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17.

<sup>121</sup> Housing Discrimination Complaint against Nassau Cnty., filed by ERASE Racism (Apr. 28, 2014), [https://www.eraseracismny.org/storage/documents/HUD\\_Administrative\\_Complaint.pdf](https://www.eraseracismny.org/storage/documents/HUD_Administrative_Complaint.pdf).

<sup>122</sup> *Id.*

<sup>123</sup> Case Nos. 02-14-0400-8 and 02-14-0029-6.

<sup>124</sup> *Id.*

<sup>125</sup> Kazis, *supra* note 101.

<sup>126</sup> United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., 495 F. Supp. 2d 375, 379 (S.D.N.Y. 2007).

exclusionary zoning in Westchester County, New York resulted in Westchester settling the case and entering into a 2009 consent decree. As the Center describes the outcome, “Westchester was prohibited from ignoring either the residential racial segregation that continues to plague it, or the municipal resistance to affordable housing development that stymies the possibility of changing those patterns.”<sup>127</sup>

At its core, local control is a system of perpetuating advantage for white Americans and disadvantaging African Americans. Housing discrimination will never be successfully combated—including construction of the affordable housing that people with lower incomes, particularly some African Americans, so desperately need—until we recognize and address the extraordinary role that local control has played, and still plays, in creating and perpetuating discrimination and segregation, with its predictable inequities.

In many places, local control is accompanied by intense government fragmentation. As a result of hyper-fragmentation, Long Islanders (e.g., government, real estate, and homeowners) can easily, and often do, act in ways that “protect” local neighborhoods from change. White homogeneity is rewarded with higher property values, incentivizing, and perpetuating racial segregation at the regional level. As a result, Long Island remains one of the 10 most racially segregated metropolitan regions in the United States.<sup>128</sup>

Residential segregation has likewise perpetuated segregation in Long Island’s 125 public schools, and school segregation is still growing. The school districts boundaries mirror the residential segregation and consequently we have schools that are highly segregated with very different resources and outcomes.<sup>129</sup> According to research conducted by ERASE Racism, between 2004 and 2016, the number of intensely segregated school districts (90 to 100 percent non-white) more than doubled. Students attending those segregated districts more than tripled.<sup>130</sup> Unfortunately, with data we collected

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<sup>127</sup> Anti-Discrimination Center, Westchester Case, <http://www.antibiaslaw.com/westchester-case>.

<sup>128</sup> Logan & Stults, *supra* note 100.

<sup>129</sup> ERASE RACISM, UNEQUAL RESOURCES FOR LONG ISLAND STUDENTS BASED ON RACE 8-24, (May 2022) [https://www.eraseracismny.org/storage/documents/Unequal\\_Resources\\_for\\_Long\\_Island\\_Students\\_Based\\_on\\_Race\\_ERASE\\_Racism\\_2022\\_Report.pdf](https://www.eraseracismny.org/storage/documents/Unequal_Resources_for_Long_Island_Students_Based_on_Race_ERASE_Racism_2022_Report.pdf).

<sup>130</sup> ERASE RACISM, 2017 INFOGRAPHIC: SCHOOL SEGREGATION ON LONG ISLAND (2017), <https://www.eraseracismny.org/component/content/article/1/498>.

and analyzed from New York State Education Department (NYSED) for 2019-2020 school year, the number of intensely segregated school districts remains the same, and the number of students attending those districts further increased.

Local control is denying African Americans access to housing in high opportunity areas with high performing schools. For example, Jericho High School, which is placed 147th on United States News Report's list of best high schools in the country is only 2 percent Black and 4 percent Hispanic.<sup>131</sup> It is simultaneously normalizing severe discrimination and segregation for the next generation of African American Long Islanders.

### **C. Lesson Three: White Supremacy Ideation Shapes Government Policy and Legal Actions, Which Animate and Sustain Structural Racism**

Structural racism marginalizes, discriminates, and segregates African Americans, producing advantages for whites and disadvantages and oppression for African Americans. Citizen compliance and ignorance underpin structural racism.

Mr. Rothstein's arguments tying the systematic segregation of African Americans to the law, narrowly defined, are persuasive. However, even if you don't ascribe to his analysis in its entirety, there can be no doubt, based on the evidence presented in this article thus far, that government and institutional remedies are necessary to dismantle Long Island's ongoing housing discrimination and segregation and ensure it does not continue in the future.

At ERASE Racism, when we refer to the instigating and sanctioning of the racist system to explicitly discriminate against African Americans, we use the term structural racism. We define the term in this way: Structural racism is the historical and ongoing racial marginalization, discrimination, and segregation of Black people—African Americans in particular—which is typically instigated or sanctioned by government through its direct actions or its inaction in the face of illegal or immoral policies and behaviors. Structural racism

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<sup>131</sup> See Joie Tyrell, *Long Island Places 20 High Schools on United States News & World Report's Annual List*, *NEWSDAY* (Apr. 27, 2021), <https://www.newsday.com/long-island/education/u-s-news-world-report-long-island-schools-1.50227626>; see also *New York State Education at a Glance*, N.Y.S. EDUC. DEP'T (Mar. 24, 2022), <https://data.nysed.gov>.

creates inequity in every aspect of life. I am referring to systemic oppression perpetrated by all arms of government and most every private institution.

As previously discussed, anti-Black racism is central to structural racism in the United States. This does not mean that the descendants of the enslaved Africans in United States, North America are the only people who have been historically impacted by structural racism. However, the peculiar discrimination and segregation against African Americans warrants our special attention. The evidence of structural racism in housing has been presented.

Structural racism did not appear out of thin air. The racist policies, practices, and legal actions we have discussed related to housing were created by government and business leaders who embraced white supremacy in their life as a whole.

For several centuries, the concept of race was constructed by prominent individuals that held power.<sup>132</sup> They were landowners and owners of enslaved Africans, government officials, religious leaders, judges, and the like—all white Europeans. In the 1800s, so-called “scientific” investigations were confirming the common understanding of race: that enslaved Africans were inherently inferior to white people.<sup>133</sup>

Yes, we now know that what we refer to as “race” is not based on blood, skull sizes, or other so-called biological factors that manifest outwardly in skin color. Scientists from various fields have agreed that there is no “race gene,”<sup>134</sup> and people within the same race have been found to have more genetic differences than people from different racial groups.<sup>134</sup> But race is real in its consequences. The hierarchy

<sup>132</sup> Race—The Power of an Illusion, Episode Two: The Story We Tell, PBS, [https://www.pbs.org/race/000\\_About/002\\_04-about-02-01.htm](https://www.pbs.org/race/000_About/002_04-about-02-01.htm) (last visited Mar. 9, 2022).

<sup>133</sup> *Inventing Black and White: Holocaust and Human Behavior*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/holocaust-and-human-behavior/chapter-2/inventing-black-and-white> (last visited March 9, 2022).

<sup>134</sup> *Race*, NAT’L HUM. GENOME RSCH. INST., <https://www.genome.gov/genetics-glossary/Race> (last visited Mar. 9, 2022).

<sup>134</sup> Megan Gannon, *Race Is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue>; see generally SUNG-MIN AHN ET AL., THE FIRST KOREAN GENOME SEQUENCE AND ANALYSIS: FULL GENOME SEQUENCING FOR A SOCIO-ETHNIC GROUP 1622-29 (2009). We note here that the study found that there were significant genetic variations between individuals from the same racial group as well as genetic similarities between individuals from different racial groups.

that arises from this pseudo-scientific and common understanding of race allowed people to justify chattel slavery. While inaccurate, Africans were “meant” to be slaves because they were fundamentally inferior to white people. In contrast, the controlling thought process was that white people were destined to be at the top of the hierarchy. The foundation and the source of structural racism is white supremacy: the ideation and the actions that uphold the social construction of whiteness as a superior race, and blackness as an inferior race; some people have even believed that Black people are not fully human.<sup>135</sup> White people can uphold white supremacy individually or when banded together in groups.

The white people upholding white supremacy can be members of white nationalist groups, but also elected officials, school board and PTA members, or just random people walking dogs in parks.<sup>136</sup> They may not foment violence, but they may take actions to block African American families from gaining access to white residential neighborhoods, and block their children from white schools, which is a different form of violence. They may believe that Black people are inherently not as smart or that there are positions that “just don’t suit” African Americans. Perhaps they believe that Black people should “just get over it.” After all, they say, my white ancestors came here with nothing, and with our hard work, look what we have achieved.

Listen closely. The subtext of that statement is: white people are superior because they are successful—all on their own. Black people are inferior because they have not been able to do what white people have done. However, the facts do not support this misconception. White people have had plenty of help, and they have used their power to make certain that African Americans do not have non-discriminatory access to housing. Most white people are unable to see and/or acknowledge the massive societal benefits and privileges systematically bestowed upon them. However, every time African Americans were systematically denied housing, white people received massive societal, financial and housing benefits. This has been going on for over 400 years in the United States.

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<sup>135</sup> See generally EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA* (2001).

<sup>136</sup> See Jan Ransom, *Amy Cooper Faces Charges After Calling Police on Black Bird-Watcher*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/nyregion/amy-cooper-false-report-charge.html>.

In her published writings, contemporary writer Peggy McIntosh of the Center for Research on Women at Wellesley College, describes these advantages, which are inherently bestowed upon white people because they are white, even without their realizing it, as a reflection of “white privilege.”<sup>137</sup> She had been taught that racism put others at a disadvantage, “but had been taught not to see one of its corollary aspects, white privilege, which puts me at an advantage.”<sup>138</sup> McIntosh goes on to say, “I have come to see white privilege as an invisible package of unearned assets that I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious.”<sup>139</sup> Her list of twenty-six unearned assets includes the ability to rent or purchase housing in any area that she can afford, going shopping without fear of being followed by employees of the store, and purchasing items with cash or credit, knowing that her skin color will not work against the appearance of financial reliability.

So, when we talk about structural racism, we begin with how race was conveniently constructed to justify the power arrangement of whites on top and Blacks on the bottom and to cement in place that racial hierarchy and power distribution. The ideation of white supremacy is broadly normalized, and all decisions being examined in this paper are made from that perspective. Over time the government policies, practices, and laws provide the scaffolding of structural racism in housing. Overt racism is intentional and is sometimes easily recognized and understood, whether it involves individual acts of malice or institutional policies and practices that isolate Blacks or discriminate against Blacks.

It is enlightening, therefore, to examine how white privilege works. White privilege denies the implications of our history of structural racism, instigated and sanctioned by governments. It supports the rationalization that Blacks and whites really have a level playing field and that differences between Blacks and whites are not due to racism, but are because of Black inferiority, failures of the individual Black person, or due to happenstance.

White privilege hampers the “undoing” of structural racism because it fosters the illusion that the privileges that whites enjoy are entitlements based on merit and should therefore be fiercely guarded.

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<sup>137</sup> Ms. McIntosh is a white woman born in Brooklyn and raised in New Jersey.

<sup>138</sup> Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM, July/Aug. 1989, at 10.

<sup>139</sup> *Id.*

Some of the following statements by white people I have encountered on numerous occasions demonstrate this line of thinking: 1) I want improved schools for Blacks, but that must not have any impact on my school district or the students attending; 2) I think Blacks should have better housing options, but that doesn't mean they should live in my community; and 3) better economic opportunities for Blacks seems fair, but I should still be able to hire my staff through a word-of-mouth system among a circle of my (white) colleagues.

Some whites don't want to acknowledge white privilege, or at least they don't want to talk about it. But unraveling structural racism requires us to examine all systems that disadvantage African Americans and make necessary changes, even if it means changes for whites. Fighting against the perpetuation of white supremacy and structural racism should be a common discussion amongst all government leaders, and the general public if we are serious about addressing the systemic housing discrimination and segregation of African Americans. In other words, structural racism is inescapable, unless and until it is dismantled and unless and until the fallacy of white supremacy ceases to be normalized. Silence or willful ignorance is a recipe for maintaining the status quo.

#### **D. Title Lesson Four: Passing and Enacting Laws Is Necessary but Not Enough**

Ending housing discrimination and affirmatively furthering fair housing are the cornerstones of both federal and state fair housing statutes. However, implementation of these laws requires embracing these cornerstones by government leaders and the general public and a willingness to act. There are two components comprising one's ability to gain housing: there must be housing that one can afford and that housing must be made available in a non-discriminatory manner. We have addressed the first component, access to housing one can afford, under Lesson two, Local Control. Concerning access to housing in a non-discriminatory manner, we will look at the fair housing laws.

In 1968, the United States Congress passed the Fair Housing Act<sup>140</sup> and President Lyndon B. Johnson signed it into law.<sup>141</sup> This law

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<sup>140</sup> 42 U.S.C. §3601.

<sup>141</sup> *History of Fair Housing*, U.S. DEP'T HOUS. & URBAN DEV. (Mar. 25, 2022, 2:00 PM), [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/aboutfheo/history](https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history).

provides enforcement mechanisms to punish people who discriminate in the rental and sale of housing and offer redress for those who have been discriminated against. Congress realized that simply prohibiting discrimination and redressing the injuries that occur when discrimination happens is not enough. The duty to affirmatively further fair housing is a critical component of the Fair Housing Act.<sup>142</sup> It seeks to prevent discrimination and dismantle existing segregation. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together: (1) address significant disparities in housing needs and in access to opportunity; (2) replace segregated living patterns with truly integrated and balanced living patterns; (3) transform racially or ethnically concentrated areas of poverty into areas of opportunity; and (4) foster and maintain compliance with civil rights and fair housing laws. HUD was tasked with enforcing the law. HUD states that the duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.<sup>143</sup> The 2021 New York State legislature passed a law articulating the same duty to AFFH.<sup>144</sup>

Our federal, state, and local governments are failing to abide by the Fair Housing Act<sup>145</sup> and, most especially the mandate to AFFH.<sup>146</sup> New York State Human Rights law and county laws offer additional protections against housing discrimination.<sup>147</sup> That does not

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<sup>142</sup> 42 U.S.C. § 3601.

<sup>143</sup> *Affirmatively Furthering Fair Housing (AFFH)*, U.S. DEP'T HOUS. & DEV. (March 25, 2022, 2:03 PM), [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/affh#\\_Who\\_must\\_comply](https://www.hud.gov/program_offices/fair_housing_equal_opp/affh#_Who_must_comply). The guidelines specifically state the following: "In general, the AFFH mandate applies to HUD and its grantees, as well as all executive agencies and departments of the federal government and relates to the administration of any program or activity relating to housing and urban development." *Id.*

<sup>144</sup> *See Governor Hochul Signs Legislative Package to Combat Housing Discrimination*, N.Y.S. (Dec. 21, 2021), <https://www.governor.ny.gov/news/governor-hochul-signs-legislative-package-combat-housing-discrimination>.

<sup>145</sup> The Fair Housing Act of 1968, 42 U.S.C. §3601.

<sup>146</sup> *Id.*

<sup>147</sup> *See generally* Unlawful Discriminatory Practices, 15 N.Y. EXEC. LAW § 296 (2015) (prohibiting discrimination in advertising, buying, renting, and selling of housing); N.Y. Unlawful Discriminatory Acts, SUFFOLK CNTY. EXEC. LAW § 528 (2020); LOCAL LAW NO. 9-2006, A Local Law to Amend Chapter 272 of the Laws of 1939, Constituting the Nassau County Administrative Code, In Relation to the Nassau County Commission on Human Rights (Jan. 1, 2007).

negate the positive steps that have been taken by the Obama and now the Biden administrations. Nor am I ignoring the positive steps taken by the New York State Assembly, Senate, and the New York State Governor in December 2021 when nine bills were signed into law, which would increase accountability and enforcement of fair housing laws.<sup>148</sup> Even in the face of these gains, when we add in the actions of non-government entities such as banks and the real estate agencies, we are failing to protect African Americans.

The United Nations (“UN”) Fact Sheet 21 entitled *The Right to Adequate Housing* can be used as a framework to examine more deeply the state of Long Island housing.<sup>149</sup> This UN document provides that adequate housing was recognized as part of the right to an adequate standard of living in the 1948 Universal Declaration of Human Rights and in the 1966 International Covenant on Economic, Social and Cultural Rights.<sup>150</sup>

When Fact Sheet 21 talks about “[k]ey aspects of the right to adequate housing” in the section called entitlements, it includes “[e]qual and non-discriminatory access to adequate housing.”<sup>151</sup> It further describes what is meant by discrimination:

Discrimination means any distinction, exclusion or restriction made on the basis of the specific characteristics of an individual such as race, religion, age or sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms. It is linked to the marginalization of specific population groups and is generally at the root of structural inequalities within societies . . . . In housing, discrimination can take the form of discriminatory laws, policies or measures; zoning regulations; exclusionary policy development; exclusion from housing benefits; denial of security of tenure; lack of access to credit; limited participation in

<sup>148</sup> Governor Hochul Signs Legislative Package to Combat Housing Discrimination, *supra* note 144.

<sup>149</sup> See generally OFF. U.N. HIGH COMM. FOR HUM. RTS., THE RIGHT TO ADEQUATE HOUSING: FACT SHEET NO. 21 (2009), [https://www.ohchr.org/sites/default/files/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf).

<sup>150</sup> *Id.* at 3.

<sup>151</sup> *Id.*

decision-making; or lack of protection against discriminatory practices carried out by private actors. Non-discrimination and equality are fundamental human rights principles and critical components of the right to adequate housing.<sup>152</sup>

Our laws and the UN document are quite similar; however, this document offers an important ingredient, a blueprint for action. Furthermore, ordinary citizens and civic and government leaders must take seriously the obligation to fight housing discrimination with concrete actions. Individuals, businesses, and governments must not be allowed to violate laws and carry out acts and plans of housing discrimination against people because of characteristics they possess, which are named in our fair housing laws, and which have been upheld in case law as unlawful for decades. Those “protected characteristics” include race and ethnicity, among others. If violators do discriminate, the punishment must be severe and specific enough that it keeps them from being repeat discriminators. This is the blueprint that should be followed for New York State and Long Island.

How do we know that the housing segregation on Long Island is bad enough that we need to actually implement AFFH? Analysis from Brown University with data from the 2020 census uses a Dissimilarity Index to measure segregation, which accounts for the percentage of a group's population that would have to change residence for each neighborhood to have the same percentage of that group as the metropolitan area overall. The report reveals that, on Long Island, the Black-White segregation is 65.5, meaning that 65.5% of Black people would need to move to another neighborhood to achieve racial integration in the region.<sup>153</sup> A score that is greater than 60 connotes severe segregation.<sup>154</sup> The score for Hispanic-White segregation is 46.1 and Asian-White is 43.4.<sup>155</sup> When looking at Black-White segregation of 50 metro areas with the largest Black population: Long Island maintains its position as the 10th most racially segregated metro region in the nation.<sup>156</sup> Long Island's Hispanic-White ranking is nineteenth and Asian-White is fourteenth.<sup>157</sup>

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<sup>152</sup> *Id.* at 10.

<sup>153</sup> Logan & Stults, *supra* note 100, at 17.

<sup>154</sup> *Id.* at 16.

<sup>155</sup> *Id.* at 20.

<sup>156</sup> *Id.* at 6.

<sup>157</sup> *Id.* at 21, 25.

Furthermore, the results from a random telephone research study conducted in 2012 for ERASE Racism found that, contrary to popular opinion, only one percent of the Black respondents said they only wanted to live in neighborhoods that were 100 percent Black.<sup>158</sup> The remaining Black respondents preferred racially diverse communities. Most Long Island Blacks live in racially segregated communities not because of a preference for self-segregation. This mirrors research studies that have been conducted on other areas.<sup>159</sup>

While ERASE Racism and other nonprofits have had successful settlements in housing discrimination lawsuits, there is no indication that the problem has lessened. The findings from the groundbreaking three-year investigation issued by *Newsday* in 2019, showed that Black testers received disparate treatment forty-nine percent of the time (thirty-nine percent for Hispanics and nineteen percent for Asians) when telling real estate agents that they wanted to purchase a home.<sup>160</sup> We see clearly that the segregation of African

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<sup>158</sup> ERASE RACISM, 2012 SURVEY RESEARCH REPORT: HOUSING AND NEIGHBORHOOD PREFERENCES OF AFRICAN AMERICANS ON LONG ISLAND (2012), [https://www.eraseracismny.org/storage/documents/FINAL\\_ERASE\\_Racism\\_2012\\_Housing\\_Survey\\_Report\\_web\\_version.pdf](https://www.eraseracismny.org/storage/documents/FINAL_ERASE_Racism_2012_Housing_Survey_Report_web_version.pdf).

<sup>159</sup> Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 SOC. FORCES 937 (2002). “African Americans overwhelmingly prefer 50–50 areas, a density far too high for most whites . . . [w]hite preferences also play a key role, since whites are reluctant to move into neighborhoods with more than a few African Americans.” *Id.* at 937; Reynolds Farley et al., *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 HOUS. POL’Y DEBATE, 763–800 (1997). “Whites’ willingness to move into a neighborhood is inversely related to the density of blacks living there. Blacks prefer integrated neighborhoods, but ones with a substantial representation of blacks.” *Id.* at 763; Maria Krysan, *Community Undesirability in Black and White: Examining Racial Residential Preferences through Community Perceptions*, 49 SOC. PROBS. 521, 521–43 (2002). “[B]lacks rate most communities as more desirable than whites, and African Americans find desirable many of the communities in which they are the numerical minority. Whites rate mixed race communities as undesirable, in part because of a desire to avoid black neighbors, but also because of what may be an over-inflated perception of crime in those communities.” *Id.* at 521; Maria Krysan et al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOCIO. 527, 527–59 (2009). “Whites said the all-white neighborhoods were most desirable. The independent effect of racial composition was smaller among blacks and blacks identified the racially mixed neighborhood as most desirable.” *Id.* at 527.

<sup>160</sup> Ann Choi et al., *Long Island Divided*, *NEWSDAY* (Nov. 17, 2019), <https://projects.newsday.com/long-island/real-estate-agents-investigation/>.

Americans on Long Island is not self-imposed by themselves or happenstance.

Finally, the UN document talks about the obligation of states, (in the United States we would use the word countries or national governments), to prohibit and eliminate discrimination on all grounds.<sup>161</sup> The governments of these countries have an “immediate obligation to *take steps*, which should be concrete, deliberate and targeted, to fulfill the right to adequate housing.”<sup>162</sup> It further identifies that “[t]he obligation to protect requires States to prevent third parties from interfering with the right to adequate housing.”<sup>163</sup> This document was printed in 2009 and reprinted in 2014.<sup>164</sup> Again, Fact Sheet 21 is the blueprint for how to dramatically alter systematic housing discrimination and segregation on Long Island.

### ***1. ERASE Racism as a Case Study of Potential Solutions***

For twenty years, ERASE Racism has researched various aspects of housing discrimination and segregation. It uses that knowledge to expose and challenge racial segregation and discrimination in housing, educate the public and then engage them to promote enhanced fair housing laws, nondiscriminatory affordable housing policies, and vigilant fair housing enforcement, including affirmatively furthering fair housing. We’ve engaged hundreds of individuals directly in this work and amplify our efforts with an aggressive communications strategy, which includes broadcast and print media outreach, as well as a robust social media presence spreading our message to tens of thousands more. I will share two examples.

### ***2. Fair Housing Legislation and Enforcement***

We began fair housing-related work almost immediately when we launched in 2001. We researched fair housing complaints from Long Island, processed by the New York State Division of Human Rights. We didn’t like what we saw; too many cases were dismissed

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<sup>161</sup> OFF. U.N. HIGH COMM. FOR HUM. RTS., *supra* note 149.

<sup>162</sup> *Id.* at 31 (emphasis in original).

<sup>163</sup> *Id.* at 33.

<sup>164</sup> *Id.*

without cause. Too many cases took undue time to complete investigations and reach a determination. Local agencies that assist residents with landlord-tenant issues—and take housing discrimination complaints—told us about poor service from the state and the county enforcement agencies as well. Further, these county laws needed to be strengthened. Plus, residents frequently had to travel long distances to get to the state offices to which their cases had been transferred.

A fair housing working group, which consisted of housing advocates, civil rights attorneys, and interested others, convened in 2005. We decided that we would seek amendments to Nassau and Suffolk Counties' human rights laws and work to make the county enforcement agencies more effective. Both changes would be more convenient for local residents. We also gained agreement, initially, to do this in collaboration with the two counties so that both laws would match. After all, we reasoned that we are one region on an island where residents move easily between the two counties. There simply was no reason to offer different protections in the laws within Long Island.

Nassau was willing to work with this arrangement, but Suffolk went its own way. In the end, we succeeded in garnering willing support for both bills that were quite similar. The next step was to get our new and improved laws, featuring more robust protections than the amended 1968 Fair Housing Act, recognized by the federal government.<sup>165</sup> Little did we know, the HUD process for seeking substantial equivalency<sup>166</sup> for our county law was only on paper. Nassau County staff told us that, based on the repeated replies to questions asked by HUD, they believed HUD had no intention of granting substantial equivalency of the Nassau Human Rights Law.<sup>167</sup> It would seem that HUD did not want to expand its accountability to match a new local law.

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<sup>165</sup> The Fair Housing Act of 1968, 42 U.S.C. § 3601.

<sup>166</sup> See *Fair Housing Assistance Program (FHAP)*, U.S. DEP'T HOUS. & URB. DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/partners/FHAP](https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP) ("HUD provides FHAP funding annually on a noncompetitive basis to state and local agencies that administer fair housing laws that provide rights and remedies that are substantially equivalent to those provided by the Fair Housing Act.").

<sup>167</sup> Nassau County, N.Y. LOCAL LAW NO. 9-2006 (2012). This is a local law to amend chapter 272 of the Laws of 1939, constituting the Nassau County Administrative Code, in relation to the Nassau County Commission on Human Rights.

I won't recite all the details, but the short story is that even though we got the amended laws passed, we had limited success in implementing the full impact and intent of the laws. One County Executive was fully supportive. He had already begun to revamp the Human Rights Commission governing board and was looking to beef up the staff. But after he lost his bid for re-election, our conversations with the new County Executive made it clear that they had no interest in supporting fair housing.

What the Nassau law included that the New York State law did not have at the time was source of income protection (SOI) which prohibits discrimination against renters and homebuyers based on such legal sources of their income other than a paycheck, including social security payments, any form of government assistance, or child support. At a later date, SOI protection was included in the Suffolk law as well, under a new, more supportive County Executive.

Fair housing laws offer protections to groups of people with certain characteristics or protected classes, such as race and religion. Our new law protected people from being discriminated against based on legal SOI. This phenomenon involved building managers refusing housing to tenants who were using some forms of legal non-wage income—private or public assistance such as housing vouchers, alimony payments, and disability payments or government subsidies. If the county was not going to be a refuge, we needed to change the state statute. In 2016, we organized a statewide coalition to push for an SOI amendment to the New York State Human Rights Law. In 2019, that amendment passed and was signed by Governor Cuomo.<sup>168</sup>

There's a lot more to tell about this story, including lobby days in Albany and supportive op-eds, but I'll just say that I was very grateful to our partners in this journey, especially the New York Office of Enterprise Community Partners, a national nonprofit that exists to increase the supply of affordable homes and to advance racial equity in housing, which assumed key coordination responsibilities in collaboration with our leadership team of four nonprofits.

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<sup>168</sup> N.Y. EXEC. LAW § 296 (McKinney 2015); see also for an announcement: *Governor Cuomo and Legislative Leaders Announce FY 2020 Enacted Budget Includes Measure Prohibiting Discrimination Against Tenants Based on Source of Income*, N.Y.S. DIV. HUM. RTS. (Apr. 26, 2019), <https://dhr.ny.gov/source-of-income-press-release>.

### 3. Legal Action

In addition to working on the laws and enforcement, ERASE Racism took legal action against owners and management companies that denied rental housing to Black testers while encouraging White testers to apply.<sup>169</sup> Two legal actions utilized undercover paired testing to document disparate treatment between African American/Black testers and White testers seeking rental housing. In both Nassau and Suffolk Counties, our lawsuits resulted in successful court settlements.<sup>170</sup>

Following our own experience with fair housing enforcement utilizing paired testing, I recommended to *Newsday* that they utilize paired testing to undertake a broad fair housing investigation on Long Island. *Newsday* credits this recommendation as the impetus for its landmark three-year investigation, “Long Island Divided.”<sup>171</sup> That investigation exposed widespread evidence of housing discrimination: with 40 percent of the Black testers, 39 percent of the Hispanic testers, and 19 percent of the Asian testers being discriminated against when seeking to purchase homes.<sup>172</sup> Following *Newsday*’s publication of “Long Island Divided,” ERASE Racism played a leadership role in educating the public and advancing statewide action to redress the exposed discrimination, with town halls, op-eds, and various forums.

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<sup>169</sup> A fair housing tester is an individual who is trained by a fair housing organization(s) and acts as a prospective renter or homebuyer. Individuals are usually paired in a way that allows the fair housing organization to uncover possible discrimination based on a protected characteristic, such as Black-White pairings to investigate racial discrimination or woman-man pairings to investigate gender discrimination. At the same time, paired testers are provided profiles that show them to be the same in characteristics that might influence their rental or home buying prospects or process, such as same income, the number of bedrooms they seek, etc. For example, a Black tester and a White tester might both attempt to rent from the same landlord. They are given profiles that are similar in terms of their income, occupation, preferences for number of bedrooms, gender, etc. The testers record their interactions with the landlord, allowing the fair housing organization to evaluate whether the landlord treats the White tester more positively than the Black tester and/or rents the apartment to the White tester over the Black tester.

<sup>170</sup> See generally *ERASE Racism Inc. v. LLR Realty LLC*, No. CV 13-4821, 2013 WL 11089020 (E.D.N.Y. Aug. 28, 2013); *ERASE Racism Inc. v. Empire Management American Corporation*, No. CV 15-03376, (S.D.N.Y. 2015).

<sup>171</sup> Choi et al., *supra* note 160.

<sup>172</sup> *Id.*

#### 4. *Local Action Leads to State Action*

On December 12, 2019, I was invited to offer extensive testimony, at a joint hearing on Long Island before three New York State Senate Committees: The Committee on Housing, Construction and Community Development; the Committee on Investigations and Government Operations; and the Committee on Consumer Protection.<sup>173</sup> I called on government and the real estate industry to address housing discrimination on Long Island.<sup>174</sup> Realtors were invited but did not attend this hearing. I was then asked to testify at a second hearing in September 2020. The realtors identified in the *Newsday* investigation who were captured on video engaging in discriminatory behaviors against testers of color were subpoenaed and compelled to attend.

On January 27, 2021, the same three Senate committees released a ninety-seven page investigative report on housing discrimination on Long Island.<sup>175</sup> The report, which responds to testimony that I and others presented at the Committees' hearings, includes key recommendations to develop a New York State fair housing strategy, provide more proactive enforcement of fair housing laws and increased penalties for violators, and ensure that government at all levels is part of the solution by taking concrete steps to address discrimination and segregation. That last recommendation pointedly underscores the need for local governments to be "part of the solution."<sup>176</sup>

Many times, the question we ask ourselves is, "so, what can be done?" Sometimes, with perseverance, we get closer to unraveling structural racism. In December 2021, the New York State Governor signed nine bills into law that are designed to increase fair housing enforcement.<sup>177</sup>

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<sup>173</sup> Elaine Gross, *ERASE Racism Testimony on Governor Hochul's ADU Proposed Legislation*, ERASE RACISM (Jan. 27, 2022), <https://www.eraseracismny.org/component/content/article/28/968>.

<sup>174</sup> *Id.*

<sup>175</sup> FINAL INVESTIGATIVE REPORT FAIR HOUSING & DISCRIMINATION ON LONG ISLAND, REPORT FROM THE NEW YORK STATE SENATE STANDING COMMITTEES ON INVESTIGATIONS & GOVERNMENT OPERATIONS; HOUSING, CONSTRUCTION & COMMUNITY DEVELOPMENT; & CONSUMER PROTECTION 58-59 (Jan. 27, 2021).

<sup>176</sup> *Id.*

<sup>177</sup> *Governor Hochul Signs Legislative Package to Combat Housing Discrimination*, *supra* note 144.

We have also learned about addressing fair housing at the national level: First, research is crucial. A great example is our national report issued in October 2019 titled “Civil Rights Rollback: United States Government Actions to Reduce Civil Rights in Housing and Public Education,” which was created by ERASE Racism, with essential research by the Lawyers’ Committee for Civil Rights Under Law.<sup>178</sup> It provides an analysis of the US government’s efforts to roll back civil rights in housing and education under the Trump administration.<sup>179</sup> The report spotlights implications for Long Island and calls for a new level of monitoring, vigilance, and activism. It is the basis for ERASE Racism’s ongoing efforts to draw attention to federal actions and their ramifications for Long Island and similar locales.<sup>180</sup>

Second, commenting on proposed federal action is vital. ERASE Racism strongly opposed and worked to generate broad opposition to two proposed HUD Rules that would undermine civil rights in housing: a proposed rule on “Disparate Impact” that would make it dramatically more difficult to fight housing discrimination in court; and a proposed rule on Affirmatively Furthering Fair Housing that would allow federal and local governments to relinquish responsibilities for addressing existing racial segregation in housing.<sup>181</sup> We have since publicly applauded President Biden’s Executive Order to begin undoing the Trump administration rollbacks. In an article published in *USA Today*, we make five suggestions for the Biden administration to keep the momentum moving towards equity.<sup>182</sup>

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<sup>178</sup> ERASE Racism, Civil Rights Rollback: United States Government Actions to Reduce Civil Rights in Housing and Public Education (Oct. 2019), [http://www.eraseracismny.org/storage/documents/Reports/rollback\\_report\\_FINAL\\_REPORT.pdf](http://www.eraseracismny.org/storage/documents/Reports/rollback_report_FINAL_REPORT.pdf).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See generally Implementation of the Fair Housing Act’s Discriminatory Effects Standard, Final Rule, 78 Fed. Reg. 11459 (Feb. 15, 2013).

<sup>182</sup> Elaine Gross, *Erase Structural Racism: 5 Steps Joe Biden Can Take to Make U.S. Laws, Policies More Just*, USA TODAY (Feb. 4, 2021), <https://www.usatoday.com/story/opinion/2021/02/04/5-steps-joe-bide-can-take-erase-structural-racism-american-law-column/4369978001>. The five steps are as follows:

First, treat violent white nationalists as domestic terrorists...Second, employ a racial equity lens as a decision-making tool to ensure that the federal government no longer

Third, research should be the basis for shaping programmatic initiatives and advocacy campaigns, both of which address structural impediments to equity. It is crucial to base tactics on facts that can be proven and demonstrated. Research can bring to light what might otherwise be invisible.

Fourth, it's important to connect national urgency to regional knowledge and vice versa. That enables one to be recognized regionally and nationally as a structural racism expert grounded by theory and practice, and recognized in academia, in the media, by civic and political leaders, and by the general populace.

Fifth, it is vital to have a range of tools at your disposal, so that you can effectively choose between an array of intervention strategies, differentiating between educating and organizing the public for change, taking legal action, and collaborating with private and public institutions.

Being a community resource helps to make the change. Some of ERASE Racism's work is available in the form of research reports, infographics, a documentary, and formal comments to federal agencies about changes to federal policies which are available on our website. In addition to being available to the greater public, the ERASE Racism research is cited in academic publications and the media and utilized in secondary schools, colleges, and universities.<sup>183</sup>

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institutes or leaves unchanged policies and practices that promote structural racism. . . . Third, focus on justice and hold law enforcement accountable. . . . Fourth, address housing discrimination. . . . Fifth, tackle school segregation.

*Id.*

<sup>183</sup> See, e.g., Corianne Payton Scally, *The Nuances of NIMBY: Context and Perceptions of Affordable Rental Housing Development*, 49 URBAN AFFS REV., 718-47 (2013); Jeanette Rebecchi, *Building Established Suburbs Upwards: Case Studies of New Development Projects in Long Island, NY*, (Nov. 2011) (unpublished M.A. thesis, Tufts University) (on file with Graduate School of Arts and Sciences Scholarship, Tufts University); Eric Kay, *Population Change in the United States: Response to Demographic Change by One Suburban Community's School Districts, 1997 to 2017*, (May 16, 2018) (unpublished Ph.D. dissertation, Hofstra University).

**E. Lesson Five: Ideological and Political Forces Actively Fight to Keep White Supremacy and Structural Racism in Place**

Since the end of the civil rights movement, social scientists have extensively documented and illustrated the emergence of colorblind racism—a racist ideology that has so far operated in a more subtle way and focused on “cultural” or “character” differences among racial groups.<sup>184</sup> Instead of highlighting genetic or biological inferiority/superiority, colorblind racism functions to “explain away” differences in life outcomes between whites and people of color — especially between whites and African Americans as well as between non-Black minorities and African Americans—as differences in upbringings, characters, education backgrounds, or feelings of self-confidence. Further, it functions to downplay the persistence or even the existence of contemporary discrimination and the importance of historical discrimination; it is a belief system that is adopted by both politically conservative and liberal individuals.<sup>185</sup> As a result, colorblind racism is most prominent in conversations around affirmative action or any race-targeted and race-conscious policies that aim to remedy racial gaps and historic inequities.<sup>186</sup> At the same time, since the election of Barack Obama, social scientists have also found evidence of a return to what they coin “old-fashioned” racism, especially the effect that this type of racism has on political behaviors (such as partisan identification and voting preferences).<sup>187</sup>

We can see both old-fashioned racism and colorblind racism playing a prominent role in debates around critical race theory (“CRT”) within the last two years.<sup>188</sup> State lawmakers rushed to ban

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<sup>184</sup> See generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2d ed. 2016).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Michael Tesler, *The Return of Old-Fashioned Racism to White Americans’ Partisan Preferences in the Early Obama Era*, 75 J. POL. 110, 115-16 (2013).

<sup>188</sup> Critical race theory is an academic legal concept which argues that structural racism is a significant factor in the legal system, including how laws are written, passed, enacted, and implemented. Further, its tenets argue that race is a social construct and racism is not simply a product of individual bias or interpersonal prejudice; instead, they argue that racism is deeply entrenched in legal systems and policies. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 21 (3d ed. 2017).

discussions of racism and its impact and acknowledgements of a racial system at all. These legislative efforts began by focusing exclusively on critical race theory, and quickly extended to include banning books on the Holocaust.<sup>189</sup> They sought to restrict curricula, how teachers might implement their lessons, and the scope and content of class discussions.<sup>190</sup> Their implicit strategy and desired end result is clear: we cannot begin to solve racism if we cannot even talk about it, and so white supremacy continues to live on in our culture unchallenged.

Both the political anti-CRT movement and the ideological color-blind racism analysis contribute to the lack of movement to eradicate and address structural racism in housing. If white supremacy and structural racism have been explained away, there is really no reason to consider the plight of African Americans who are denied non-discriminatory housing.

**F. Lesson Six: Indelible Impressions of Racial Injustice are Extremely Helpful But Not Sufficient to Create the Impetus For Structural Changes**

The television images during the 1960s of peaceful Black southerners, adults, and especially children, fighting to stand upright against the water from powerful fire hoses, left an indelible impression on viewers across the nation and the world. Those images could not be easily ignored or erased from memory.

Indelible images leave a mark and generate a human response. I believe the violence of the incidents produced unforgettable impressions, but, most importantly, the viewing public could not easily escape the images. I remember that every news program had pictures of the flying bodies being thrown by the force of the water. Every promo for the upcoming news program had images, along with magazines and newspapers. Over time, the sustained images, along with stories of murders and the everyday oppression under Jim Crow, touched the conscience of many in the general public, religious leaders, civic and cultural leaders, as well as some elected officials. Requiring people to experience the human suffering experienced by others made it difficult for those seeing it to ignore and/or deny it.

At the height of the Civil Rights Movement of the 1960s, Blacks and whites, Jews and Christians, and, in fact, a large number of

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<sup>189</sup> See *Educational Gag Orders*, PEN AM., 2016, at 1.

<sup>190</sup> *Id.* at 8.

US citizens, eventually embraced the formal dismantling of Jim Crow segregation in the southern states. For many, it was a moral cause that had an impact not only on the rights of African Americans; changing the course of segregation was viewed as a requirement in order for the nation to live up to its self-perception of “one nation, under God, with liberty and justice for all.”<sup>191</sup> Plus, as Americans, we are uncomfortable under the international spotlight, calling into question our self-perception of superiority and being the beacon of justice and freedom.

Rev. Dr. Martin Luther King, Jr. and other civil rights leaders during that period could make a direct connection between the oppression of slavery and Jim Crow segregation—a vestige of slavery that embraced the pseudo-science of racial hierarchy with its “God-given” right to oppress Negroes and keep them in their proper place.<sup>192</sup> Nightly television images reinforced the narrative of church-going Blacks not asking for much, just to be treated like the human beings that they were, yet suffering under the cruelty of police and other establishment figures operating within a legal structure that was blatantly bigoted and immoral. The shift toward a change in national opinion did not happen overnight. Readers are reminded that there was no universal outcry to the rampant lynching of African Americans, with lynching still being recorded as late as 1964.<sup>193</sup> Between 1882 and 1964, 3,445 African Americans were lynched, mostly in the South; whites were occasionally lynched, too, although less frequently once Jim Crow took hold.<sup>194</sup>

Even though northern liberal whites clearly recognized Blacks as being different from themselves, the southern segregationists were so egregious in their behavior that many people of goodwill finally sympathized with the “Negroes” and wanted to support their cause. The “Negroes” were “deserving” of their care and support. They did nothing to deserve the treatment they were receiving; disparities, such as in public school education and achievement, could readily be traced

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<sup>191</sup> *The Pledge of Allegiance*, UShistory.org, <http://www.ushistory.org/documents/pledge.htm> (last visited Mar. 9, 2022).

<sup>192</sup> See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* (2010).

<sup>193</sup> *Lynchings by Year and Race*, UNIV. MO., KANSAS CITY, <http://law2.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html> (last visited Mar. 7, 2022). University of Missouri, Kansas City has compiled lynching figures by state, race, and year.

<sup>194</sup> *Id.*

to racial segregation, which intentionally maintained separate and unequal school curricula, facilities, staffing and resources. They were urged to be sympathetic to the plight of Blacks by white religious leaders from Christian and Jewish denominations who saw continued segregation as a moral issue. It should be noted, however, that the lack of racial integration and the existence of racial disparities in the North would more likely elicit a charitable response of helping those less fortunate but not a demand for structural changes to structural problems.<sup>195</sup> Television, too, helped make the case that the brutality of southern racial politics was indeed shameful.<sup>196</sup> Jim Crow laws were legal, structural impediments that intentionally denied southern Blacks access to numerous opportunities which therefore demanded legal, structural, intentional solutions. The northern version of racial discrimination received short shrift in the media and in the minds of northern whites.<sup>197</sup> The indelible images were necessary, but not sufficient for structural change. In modern history, at the turn of the twentieth century, the creation of the National Association for the Advancement of Colored People (NAACP), comprised of African Americans and some white allies, had a vision, strategically planned, and took actions to advance equality for African Americans. So, there was an infrastructure in place of trained leaders, attorneys, and citizen activists who were mapping out how to dismantle the carefully constructed, systematic subjugation of African Americans.

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<sup>195</sup> When the first school cases were brought challenging northern segregation, the United States Supreme Court curtailed remedies by creating the distinction between *de jure*, or intentional, legally sanctioned segregation which warranted judicial intervention, and *de facto*, or unintentional social segregation that occurred “naturally” through alleged choice rather than government action. *De facto* segregation does not trigger judicial remedies. Thus, there could be no inter-district busing between urban and suburban schools to integrate rather than desegregate northern schools without a showing of intentional illegal government action intending to keep the races apart. See *Milliken v. Bradley*, 418 U.S. 717, 756-57 (1974); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1098, 1100-02 (1978) (highlighting the courts’ flawed distinction of *de jure* segregation in the early school cases as a justification for separation).

<sup>196</sup> See Alexis C. Madrigal, *When the Revolution was Televised*, ATLANTIC (Apr. 1, 2018), <https://www.theatlantic.com/technology/archive/2018/04/televisions-civil-rights-revolution/554639/>.

<sup>197</sup> See WILKERSON, *supra* note 192.

The journey to the United States Supreme Court decision of *Brown v. Board of Education*<sup>198</sup> in 1954 and the landmark civil rights legislation in the 1960s would not have happened if not for all the work that had been accomplished in the previous decades.<sup>199</sup> This is a success-filled story which has not been repeated. However, even this story is incomplete. I believe that the Rev. Dr. Martin Luther King, Jr.'s untimely murder, at least partly, explains why a campaign for the wholesale rejection of white supremacy and dismantling of structural racism has not been accomplished. He was the ostensible head of the movement and with his passing, momentum was lost. Do we need an indelible image of the housing injustice of discrimination and segregation of African Americans? Is there some other way to generate the widespread agreement amongst the citizenry that structural racism in housing must be dismantled? And how do we do that in a way that clearly connects and stops the normalization of white supremacy, especially given the ideological and political forces previously discussed? I do not have a simple answer to that question. I do, however, address some aspects of a way forward in the conclusion.

#### IV. CONCLUSION

Why is it so hard to make change and what are the signs of a way forward? The ongoing segregation and discrimination in housing create indefensible advantages for white Long Islanders and deprive Long Island of the talent and skills of African American Long Islanders that the region needs to compete successfully in a twenty-first century economy. Structural racism is a self-inflicted drag on Long Island's economic prosperity.<sup>200</sup> We must remember that structural change is needed, not just charity. We must look at the racial impact, disparities, and outcomes from policies, practices, and behaviors, not just whether someone intends to discriminate or whether some policy, practice or behavior is intended to produce disparities or disproportionalities or block access to housing and segregate African Americans in separate communities.

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<sup>198</sup> *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

<sup>199</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17; The Fair Housing Act of 1968, 42 U.S.C. § 3601.

<sup>200</sup> POLICY LINK & USC PROGRAM ENV'T & REG'L EQUITY: AN EQUITY PROFILE OF LONG ISLAND 15-16, 100-04 (2017).

How can the current trajectory be reversed? A sizable proportion of the current silent bystanders on Long Island will need to become champions for change in their own communities and with local and state governments. They will need to support laws, policies, and practices that dismantle segregation. Structural problems require structural solutions. Yet too often the instinct is to leave structural racism in place and then wonder why efforts around the edges don't make a lasting difference.

Regional cohesion and empathy across racial groups is far less likely on Long Island because people from different racial groups do not know each other, do not live together or go to school together, and, as a result, inhabit very different realities. Solving structural racism will require a shared understanding of history, objective facts about current challenges and how to address them, and familiarity with and empathy for people who are not like oneself. The familiarity and empathy gaps on Long Island will not lessen if segregation remains so widespread and unchallenged. Central to the prosperity and sustainability of Long Island is the extent to which Long Islanders tackle white supremacy, discrimination, and segregation against African Americans in housing head-on. Why is it so hard to make change?

Point One: On the whole, the general public and civic and political leaders reject the argument that the disparities between whites and Blacks have anything to do with structural impediments. Even a plurality of justices (according to 2013 publications and it is probably worse now) on the United States Supreme Court refuse to acknowledge that anything other than intentional discrimination can be legally addressed through government action.<sup>201</sup> “*Why can't they pull themselves up by their bootstraps?*” is the familiar refrain.

Point Two: Nightly TV news reinforces the idea that Blacks are responsible for the socio-economic challenges they disproportionately face by overrepresenting Black criminality. Even though most people who commit crimes are white, Blacks are more likely to appear as criminally threatening on local television news.<sup>202</sup> Missing, almost completely, are news stories that provide an historical context and a

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<sup>201</sup> See generally MICHAEL AVERY & DANIELLE McLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM THE LIBERALS (2013).

<sup>202</sup> Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, J. CONTEMP. CRIM. JUST. 276, 281-84 (2007).

structural analysis to the problems facing Blacks, which brings me to Point 3.

Point Three: Another common refrain is that the “problem” is economic, not racial. Many people cite the wealthy Black high achievers in entertainment, sports, even some corporate leaders, and, of course, the former President of the United States, Barack Obama, in order to substantiate their claims to a post-racial society.<sup>203</sup>

Most recently, an article from *The New York Times* reported that income inequality can adversely affect any economic recovery.<sup>204</sup> One percent of earners accumulated ninety-three percent of income gains made during the first full year of the economic upswing after the 2008 economic crisis.<sup>205</sup> However, in reporting on income disparities, there was not a single mention of race or the intersectionality of race and poverty. Similarly, a report by The Century Foundation noted the following: “Aggregate net worth among [the richest 7 percent of households] rose 28 percent during the first two years of the recovery, from \$19.8 trillion to \$25.4 trillion. The bottom 93 percent, meanwhile, saw their aggregate net worth fall 4 percent, from \$15.4 trillion to \$14.8 trillion.”<sup>206</sup> It, too, did not discuss the intersectionality of race and poverty. Looking back at the November 2012 election, we can unfortunately say that neither candidate discussed poverty and race nor the increasing relationship between poverty and race in any of the three Presidential debates, and consequently ignored the impact of the 2008 economic meltdown.<sup>207</sup> Nor was there any discussion from either

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<sup>203</sup> John R. Logan, *The Persistence of Segregation in the 21st Century Metropolis*, CITY CMTY., June 1, 2013, at 1, 4-5.

<sup>204</sup> Annie Lowry, *Income Inequality Might Take Toll on Growth*, N.Y. TIMES (Oct. 16, 2012), [http://www.nytimes.com/2012/10/17/business/economy/income-inequality-may-take-toll-on-growth.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/10/17/business/economy/income-inequality-may-take-toll-on-growth.html?pagewanted=all&_r=0).

<sup>205</sup> *Id.*

<sup>206</sup> Benjamin Landy, *A Tale of Two Recoveries: Wealth Inequality After the Great Recession*, CENTURY FOUND. (Aug. 28, 2013), <https://tcf.org/content/commentary/a-tale-of-two-recoveries-wealth-inequality-after-the-great-recession>.

<sup>207</sup> PBS NewsHour, *Obama v. Romney: The First 2012 Presidential Debate*, YOUTUBE (Oct. 3, 2012), <https://www.youtube.com/watch?v=KfaBRyCKRhk>; PBS NewsHour, *Obama v. Romney: The Second 2012 Presidential Debate*, YOUTUBE (Oct. 16, 2012), [https://www.youtube.com/watch?v=jhXgbrkFJ\\_s](https://www.youtube.com/watch?v=jhXgbrkFJ_s); PBS NewsHour, *Obama v. Romney: The Third 2012 Presidential Debate*, YOUTUBE (Oct. 22, 2012), [https://www.youtube.com/watch?v=jhXgbrkFJ\\_s](https://www.youtube.com/watch?v=jhXgbrkFJ_s).

candidate about the increasing racial isolation found in American metropolitan areas, including the suburbs.<sup>208</sup>

As our news gets broken into sound bites, the media avoids complicated issues like disparate impact,<sup>209</sup> the need to intentionally plan and implement fair housing policies, and post-*Brown v. Board of Education*,<sup>210</sup> inter-district school segregation. We know that, especially here on Long Island, the 125 school districts, which mirror the racially segregated communities they serve, produce separate and unequal public-school education for Blacks and Latinos as compared to whites.<sup>211</sup> It's easier on Long Island to talk about economic segregation rather than racial segregation; however, in reality we remain much more segregated by race than by income, with segregation between Blacks and whites being the most severe.<sup>212</sup>

The standard narrative explains the cause for underachievement academically among these racial groups as the students themselves and their parents. The parents do not value education and their kids do not apply themselves. This is a much more comprehensible sound bite than describing a complex cause and effect relationship between segregation and underachievement for media, government officials, and the general voting public. Furthermore, a new narrative explains that public school education is itself the problem. The story goes: Unionized teachers are overpaid and deliver poor instruction. This narrative is particularly helpful for those who

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<sup>208</sup> Richard Fry & Paul Taylor, *The Rise of Racial Segregation by Income*, PEW RSCH. CTR. (Mar. 26, 2022, 2:29 PM), <http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/1/>. Here on Long Island, despite increased diversity, racial isolation, especially among Hispanics, is rising.

<sup>209</sup> Disparate impact is a focus on “discriminatory effects” as a way to provide evidence for discrimination. As noted in a brief by the Federal Register, “discrimination under the [Fair Housing] Act may be established through evidence of discriminatory effects, i.e., facially neutral practices with an unjustified discriminatory effect.” Reinstatement of HUD’s Discriminatory Effects Standard, 86 Fed. Reg. 33590 (proposed June 25, 2021) (to be codified at 24 C.F.R. pt. 100). This means that a fair housing organization can demonstrate fair housing violations without needing to demonstrate an *intent* to discriminate.

<sup>210</sup> 347 U.S. 483 (1954).

<sup>211</sup> ERASE Racism, *Unequal Resources for Long Island Students Based on Race* (May 2022), [https://www.eraseracismny.org/storage/documents/Unequal\\_Resources\\_for\\_Long\\_Island\\_Students\\_Based\\_on\\_Race\\_ERASE\\_Racism\\_2022\\_Report.pdf](https://www.eraseracismny.org/storage/documents/Unequal_Resources_for_Long_Island_Students_Based_on_Race_ERASE_Racism_2022_Report.pdf).

<sup>212</sup> John R. Logan. *The Persistence of Segregation in the 21st Century Metropolis*, 12 CITY & COMMUNITY 4, 5 (2013): 10.1111/cico.12021. doi:10.1111/cico.12021.

wish to dismantle public school education and replace it with profit-making charter schools or voucher programs.<sup>213</sup>

Questions of access to opportunity, self-determination, and the right not to be discriminated against for Blacks remain a heavy lift in today's climate. Fundamentally, they are portrayed as and considered "undeserving" by elected officials, civic leaders and the average white citizen. Addressing racial inequities through affirmative action and voluntary accommodations has been redefined in the twenty-first century as offering special treatment to those who do not deserve it at the expense of innocent whites. This is the underlying ideology of reverse discrimination cases which has found its way into dominant culture and perceptions.<sup>214</sup> A recent survey found that far fewer whites and Hispanics strongly disagree that "racism is by and large a thing of

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<sup>213</sup> See, e.g., Republican National Party, The 2012 Republican National Convention Platform 35, N.Y. TIMES (Aug. 28, 2012). The Platform states:

School choice—whether through charter schools, open enrollment requests, college lab schools, virtual schools, career and technical education programs, vouchers, or tax credits—is important for all children, especially for families with children trapped in failing schools. Getting those youngsters into decent learning environments and helping them to realize their full potential is the greatest civil rights challenge of our time.

*Id.* at 36.

<sup>214</sup> The first reverse discrimination cases were brought on behalf of men, represented by the ACLU's Women's Rights Project headed by then Associate Justice Ruth Bader Ginsburg. The strategy was to do away with gender classifications that had previously been labeled "benign" or protective of women. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion). On the same day as *Kahn* was argued before the United States Supreme Court, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) was also heard. *DeFunis* was the first reverse race discrimination case to arrive at the Court, but was dismissed as moot because the plaintiff had been admitted to University of Washington School of Law and was about to finish law school. *Id.* at 317-18; see Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J. L. & GENDER 1, 5-9 (2011). For the reverse race discrimination cases that began reaching the Supreme Court in the late 1970s, see *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (discussing employment); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (discussing medical school admissions); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (discussing a minority set-aside program); *Gutter v. Bollinger*, 539 U.S. 306 (2003) (discussing law school admissions); and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (discussing college admissions).

the past”—34% and 32%—whereas African Americans strongly believe that racism is here and as virulent as ever—58%.<sup>215</sup>

Given this reality, how does one enact civil rights public policies in the twenty-first century that advance equal opportunity and equal access to such unequivocal basic rights as quality public school education and decent, safe housing for Blacks in a neighborhood of their choosing?

First, one cannot minimize the pervasive success of the leaders of the Republican Party nationally and certain conservative religious leaders and their organizations in creating a new narrative about the United States heading in the wrong direction.<sup>216</sup> There is an urgent call to reverse at any cost everything that liberals or progressives have stood for, including dismantling the gains of the Civil Rights Movement, like the bold-faced efforts to disenfranchise Black voters.<sup>217</sup>

The traditional approach to developing public policy is to identify problems and then develop the policy solutions to those identified problems. Some policy experts have gone about their work by first establishing a paradigm or broad vision of what society should look like for all its inhabitants and then think about the specific policies that will produce the end goal. Others are less focused on a world view and instead, perhaps more pragmatically, target their efforts narrowly, looking to solve one specific problem at a time without seeing the interconnectedness among problems.

However, if we don't know where we are going and why, we will likely never get there. So, we do need a vision of where we want to go. I want our society to embrace the dignity and diversity of this

<sup>215</sup> *Harper's Index*, HARPER'S MAG., Apr. 2013, at 15.

<sup>216</sup> Kevin Phillips, the architect of the Republican Party's "southern strategy" admitted that the very basis of the strategy was to optimize racial hostility among working class white ethnic voters and African Americans who now saw hope in the 1964 Civil Rights Act and 1965 Voting Rights Act. James Boyd, *Nixon's Southern Strategy: It's All in the Charts*, N.Y. TIMES (May 17, 1970), <http://www.nytimes.com/packages/html/books/phillips-southern.pdf>. The red state-blue state maps tracking the 2012 Presidential election demonstrated how effective the strategy has been in luring white southern Democrats to the Republican rolls.

<sup>217</sup> *Voting Laws Roundup: February 2022*, BRENNAN CTR. JUST. (Feb. 9, 2022), [https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022?ms=gad\\_voting%20laws\\_587514441261\\_8626214133\\_130570618446&gclid=CjwKCAjwxZqSBhAHEiwASr9n9CG\\_riMTKfLpn0y6facg1EHNjXW4SqSwS3UWVMY5Ee5GogzHQayeNhoCXBgQAvD\\_BwE](https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022?ms=gad_voting%20laws_587514441261_8626214133_130570618446&gclid=CjwKCAjwxZqSBhAHEiwASr9n9CG_riMTKfLpn0y6facg1EHNjXW4SqSwS3UWVMY5Ee5GogzHQayeNhoCXBgQAvD_BwE).

nation. The elected and civic leadership should reflect that diversity and power should be shared. That is my vision: where race and ethnicity will not be determinative of one's ability to access nondiscriminatory housing, and more broadly one's place in the economic, social, or political order. How we get there requires a structural analysis, because any attempt to stop re-segregation and to promote an integrated public life requires structural change. Furthermore, where we want to go needs to reflect structural alternatives to seemingly intractable problems like housing discrimination and racially segregated schools, as is the case for Long Island. Blacks and Latinos in the region do not have access to highly resourced school districts, especially when compared to districts that are predominantly white.<sup>218</sup> Despite the fact that student enrollment for all districts on Long Island is 16 percent Black, 28 percent Hispanic, 10 percent Asian, and 41 percent white, the number of school districts with over 90% Black and Latino is increasing.<sup>219</sup> And it's these hyper-segregated districts that have the least access to resources, such as overall per pupil funding, AP courses, and guidance counselors.<sup>220</sup>

If our vision only addresses how individuals treat other individuals and does not recognize the power of institutions to maintain the status quo, our efforts will fall far short.

As an example, under No Child Left Behind<sup>221</sup> and now Race to the Top,<sup>222</sup> the prescription for addressing the achievement gap in Long Island schools includes a multitude of strategies but does not challenge the existence of racially segregated schools which have unequal resources for their Black and Hispanic students.<sup>223</sup> But don't,

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<sup>218</sup> ERASE Racism, *supra* note 211.

<sup>219</sup> *Id.* at 11.

<sup>220</sup> *Id.* at 16-24.

<sup>221</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered section of 20 U.S.C.) (repealed by Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended in scattered sections of 20 U.S.C.)).

<sup>222</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14005-6, 123 Stat. 115, 282-84 (2009). U.S. Dep't Of Educ., Race To The Top Program Executive Summary (Nov. 2009) <https://files.eric.ed.gov/fulltext/ED557422.pdf>. In 2007, the United States Congress passed, and President Barack Obama signed it into law.

<sup>223</sup> *Unequal Resources for Long Island Students Based on Race*, ERASE RACISM (May 2022),

under any circumstances, utilize a proven strategy to increase the academic achievement of Blacks in the United States, school and classroom integration, which gives Blacks and Latinos access to the same high performing educational environment and rigorous curriculum as whites by allowing access to the same schools and classrooms as the white students.<sup>224</sup>

I also believe that while we work on the longer-term structural changes, we need to identify opportunities where an immediate strategy can both make a difference and move us toward our longer-term structural alternative. The United States narrative about our success, even as a young nation, was that we caught up with older European counterparts and surpassed them in economic development in large part because of the system of public education, which was largely for whites. Now the population of our public schools increasingly includes more Blacks and Latinos, mirroring global demographic changes. As such, this is not the time to dismantle our public school system. This is not the time to replace public education with a fragmented patchwork of private schools with little government oversight and even less community investment and control. These highly visible, yet unsuccessful interim strategies that help dismantle the public schools, such as the promotion of charter schools, will not help us to reach our long-term vision or ensure that children of color can be productive in our future economy.<sup>225</sup>

Institutions are needed to help guide this work. Institutions that both nurture our preferred values, collect the evidence that proves the discrimination and disparate impact, and institutions that analyze specific power relationships, government and social structures that warrant changes. Alternative structures (laws, policies, frameworks, and institutions) are needed that support greater racial equity, and an external narrative is needed that can change the hearts and minds of decision-makers and the general public.

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[https://www.eraseracismny.org/storage/documents/Unequal\\_Resources\\_for\\_Long\\_Island\\_Students\\_Based\\_on\\_Race\\_ERASE\\_Racism\\_2022\\_Report.pdf](https://www.eraseracismny.org/storage/documents/Unequal_Resources_for_Long_Island_Students_Based_on_Race_ERASE_Racism_2022_Report.pdf).

<sup>224</sup> See generally Dennis J. Condon et al., *Racial Segregation and the Black/White Achievement Gap, 1992-2009*, 54 SOCIO. Q. 130 (2013).

<sup>225</sup> See CTR. FOR RSCH. EDUC. OUTCOMES, *Multiple Choice: Charter School Performance in 16 States*, STAN. UNIV., June 2009, at 1. A longitudinal study showed that 17 percent of charter schools outperformed public schools; however, nearly half showed no difference, and 37 percent performed considerably below public schools. *Id.*

Too often, there are those who think we just need a different discourse based on the facts and those who think, “Enough talking, let’s just push through policy changes that we need using direct action.” Both groups would probably agree that they also need to map out a strategy for change that takes into account political realities. Even if they are both interested in structural changes, which some social justice activists may not be, they may skip two additional important components of the policy change strategy: 1) figuring out exactly how existing institutions can support the values underpinning the change we want, i.e., systematically considering power dynamics in our democracy; and 2) creating a narrative that is easy to understand, that ties into familiar values and constructs that ordinary people, thought-leaders, and decision-makers can embrace.

The narrative will need to re-legitimize the role of government, re-affirm the call for well-meaning people of all races to take a stand for racial equity, and reconstruct who we are as “Americans.” We would need to dismantle the normalized white supremacy ideology. Despite the abolition of slavery and legalized Jim Crow, the white supremacy ideology is not dead. As discussed in this Article, white supremacy is inscribed in our society’s geography, government, laws, and private and public institutions. We need to replace it with a narrative of racial equity and inclusion, which would be embraced by a large segment of our political leaders, civic leaders, and the general populace.

Lawyers played a pivotal role throughout the Civil Rights Movement of the 1950s and 1960s, which pushed through sweeping, societal changes to enfranchise disenfranchised Blacks.<sup>226</sup> There are many lessons to learn from the successes during that period. Clearly, the ability of lawyers to use the rule of law in support of greater equity is priceless. Unfortunately, the rule of law is now, once again, being used to protect racial inequity and cement in place structural impediments that deny racial groups, which are perceived as undeserving, access to opportunity.<sup>227</sup> I would suggest that civil rights attorneys revisit the demand for equal rights and the principle that separate is not equal, neither for housing nor public-school

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<sup>226</sup> See generally JACK GREENBERG, *CRUSADERS IN THE COURTS* (Basic Books 1994).

<sup>227</sup> Wendy Leo Moore, *Maintaining Supremacy By Blocking Affirmative Action*, 17 *CONTEXTS* 54-59 (2018).

education.<sup>228</sup> My observation is that protest alone is not sufficient and no legal or policy strategy is sufficient without engagement of the general citizenry. Bayard Rustin was one civil rights leader who talked about transitioning from protests to political power. He cautioned that by destroying Jim Crow we would not in fact gain equality.<sup>229</sup> He suggested that the post-Jim Crow era would be even more challenging than the legal battles under Jim Crow.<sup>230</sup> That was a profound analysis, especially given that even today, structural racism is not seen by many otherwise intelligent individuals.

There were strong, organized, trained voices of dissent during the 1950s and 1960s, but our voices are more muted today. There were clear, often coherent visions of freedom and equality then, but our visions, when we have them, are frequently fragmented and blurrier today. There was thoughtful, strategic leadership then, which sometimes made mistakes, but, on the whole, was effective and fearless. Today, there are more demagogues than leaders, and we have clearly not coalesced into a fearsome force for change.

I close with an optimistic hope, however, that as individuals increasingly understand the sheer power of the white supremacy ideology, there will be a collective movement to unravel it and create a new narrative for Long Island and the nation that is rooted in a vision of racial equity and inclusion. We will create the laws, policies and culture that will underpin that narrative. Ultimately, that is what we, as a nation, need to do to radically alter the continuation of race-based discrimination and segregation of African Americans.

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<sup>228</sup> Gary Orfield *et al.*, *E Pluribus...Separation: Deepening Double Segregation for More Students*, CIVIL RIGHTS PROJECT (Sept. 19, 2012), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students>.

<sup>229</sup> Bayard Rustin, 'Negro Revolution in 1965' Speech at the Center for Democratic Institutions, AM. RADIOWORKS, <http://americanradioworks.publicradio.org/features/blackspeech/brustin.html>.

<sup>230</sup> *Id.*