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WHERE DOES NEW YORK CITY GO FROM HERE: CHAOS OR COMMUNITY?

Victor A. Bolden*

A year before his death, the Rev. Dr. Martin Luther King Jr. asked America in the title of his last book: *Where Do We Go From Here: Chaos or Community?*¹ Despite the passage of the Civil Rights Act of 1964² and the Voting Rights Act of 1965,³ King seriously questioned America's continued commitment to justice and equality for all in 1967.⁴ For many African-Americans at that time, despair and nihilism about the progress of the civil rights struggle replaced euphoria and optimism.⁵ The prospects for maintaining a non-violent movement for racial justice and equality ebbed as riots seemed an acceptable means for expressing discontent with the sta-

* Assistant Counsel, NAACP Legal Defense and Educational Fund, Inc. Adjunct Professor, New York Law School. A.B., Columbia, 1986; J.D., Harvard, 1989. The views expressed in this article are the author's and do not reflect the views of the NAACP. The author would like to acknowledge the assistance of Jennifer Baszile, Marianne Engelman Lado and Dennis Parker.

1. DR. MARTIN LUTHER KING JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (Beacon Press 1967).

2. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at scattered sections of 42 U.S.C.).

3. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at scattered sections of 42 U.S.C.).

4. See KING, *supra* note 1, at 5 ("Overwhelmingly America is still struggling with irresolution and contradictions. It has been sincere and even ardent in welcoming some change. But too quickly apathy and disinterest rise to the surface when the next logical steps are to be taken. Laws are passed in a crisis mood after a Birmingham or a Selma, but no substantial fervor survives the formal signing of legislation. The recording of the law in itself is treated as the reality of the reform."); *id.* at 10 ("The legal structures have in practice proved to be neither structures nor law. The sparse and insufficient collection of statutes is not a structure; it is barely a naked framework. Legislation that is evaded, substantially nullified and unenforced is a mockery of the law. Significant progress has effectively been barred by equivocations and retreats of government — the same government that was exultant when it sought political credit for enacting the measures.").

5. *Id.* at 44-47 ("What was new about Mahatma Gandhi's movement in India was that he mounted a revolution of hope and love, hope and nonviolence. This same new emphasis characterized the civil rights movement in our country dating from the Montgomery bus boycott of 1956 to the Selma movement of 1965. We maintained the hope while transforming the hate of traditional revolutions into positive nonviolent power. As long as the hope was fulfilled there was little questioning of nonviolence. But when the hopes were blasted, when people came to see that in spite of progress their conditions were still insufferable, when they looked out and saw more poverty, more school segregation and more slums, despair began to set in."). See also *id.* at 32-36.

tus quo.⁶ At the same time, King contended that “white America has had a schizophrenic personality on the question of race,”⁷ taking a step backward on the issue of racial justice every time it took a step forward.⁸ For King, that time in history may have been the “last chance to choose between chaos and community.”⁹

Nearly thirty years later, the New York City Human Rights Commission (“Human Rights Commission”) must ask, Where does New York City go from here: chaos or community? If the prevalent degree of residential segregation is any indication, Professor Michael H. Schill’s article suggests that the answer may be “chaos.”¹⁰ The degree of residential segregation experienced by African-Americans in New York City is quite high.¹¹ These housing patterns are affected by the fact that whites prefer neighborhoods where few, if any, blacks reside, and their existence cannot be explained by economic factors, such as income.¹² Indeed, the empirical evidence indicates that African-American residents of New York City experience a considerable degree of housing discrimination and at a higher rate than residents of several other cities.¹³ Professor Schill recommends as a solution that, *inter alia*, the Human Rights Commission focus on systemic investigations and prosecutions of housing discrimination complaints.¹⁴

This Article will chart a different course. New York City must move away from “chaos” and move towards “community.” Maintaining or increasing the current levels of residential segregation will only lead to “chaos.” Reducing segregation is necessary for the building of one free and fair society for all in the “community.” The Human Rights Commission must develop a legal agenda for investigating and prosecuting housing discrimination cases and, in so doing, seek to foster “community.” The purpose of this Article

6. *See id.* at 54-63.

7. KING, *supra* note 1, at 68.

8. *Id.*

9. *Id.* at 191.

10. Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination In Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L. J. 991 (1996). Professor Schill’s article discusses other aspects of housing discrimination, such as discrimination on the basis of sexual orientation, familial status and physical capabilities. I will focus only on the issue of race.

11. *Id.* at 994. This Article will discuss the issue of residential segregation in terms of whites and blacks, although issues involving Latinos are included in Schill’s analyses.

12. *See id.* at 995.

13. *See id.* at 996-99.

14. *Id.* at 1026-29.

is to assist the Human Rights Commission in a move towards "community."

Part I briefly explains or "makes" the case for "community." A critical question to be raised and answered is whether there is an incentive to seeking "community" rather than "chaos." The case for "community" begins with finding a basis for continuing the struggle and returns to the words of Dr. King. The struggle for justice and equality may be marked by periods of despair, but will not end this way. Moreover, the consequences of not continuing the struggle are too dire to contemplate.

Part II defines the barriers to community. Assuming that current patterns of residential segregation suggest "chaos," the evolution of and the forces perpetuating "chaos" must be understood. The two critical barriers to "community" are institutional and individual acts of discrimination. Both institutional and individual acts of discrimination make up the present structure of residential segregation. In analyzing institutional acts of discrimination, the interrelationship between public and private entities and their role in creating and perpetuating residential segregation must be discussed. Professor Schill's analysis is deficient in this respect.¹⁵ In analyzing individual acts of discrimination, the set of assumptions behind these acts must be discussed. Institutional and individual acts of discrimination must be examined together as well as separately. The combined effect of these acts is synergistic, creating and perpetuating a cycle of housing discrimination.

Part III considers strategies for dismantling the two barriers to "community." This section outlines a litigation strategy that addresses residential segregation generally and suggests how the Commission can implement this strategy specifically. Any viable litigation strategy must address institutional and individual acts of discrimination. Given these barriers, any such viable litigation strategy must include both systemic and individual litigation that seeks to dismantle the structure of residential segregation. As one example of the type of systemic litigation suggested, this part discusses *NAACP v. American Family Mut. Ins. Co.*,¹⁶ an insurance "redlining" case. The Commission should adopt the litigation strategy that this case utilized. It should not pursue only systemic litigation, as Professor Schill suggests.¹⁷ By continuing to file and prosecute both individual and systemic cases, the Commission posi-

15. See *id.* at 992-99.

16. 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

17. See Schill, *supra* note 10, at 1026.29.

tions itself most effectively to address the structure of residential segregation.

I. Making The Case For Community

Creating "community" is not simple. In New York City, some might argue that the task is impossible. Mourning the reality of residential segregation seems easier than engaging in a dedicated struggle against it. Nevertheless, there cannot be a meaningful discussion about changing the law or changing the focus of an institution, like the Human Rights Commission, without evidence that the goal of creating "community" is a vital one. The case for "community" is not easy, but it can be made.

Dr. King offered a framework for looking past today's turbulent times to tomorrow's promise of something better. Any strategy to end residential segregation must be realistic. Impending "chaos" did not emerge suddenly. "Community" will not be created immediately. More importantly, to abandon the effort now suggests that no progress was ever made.¹⁸ King adopted a broader view of efforts to create "community":

A final victory is an accumulation of many short-term encounters. To lightly dismiss a success because it does not usher in a complete order of justice is to fail to comprehend the process of achieving full victory. It underestimates the value of confrontation and dissolves the confidence born of a partial victory by which new efforts are powered.¹⁹

Professor Schill also makes the case for "community." Schill paints a bleak picture of the reality of residential segregation, which compels a response. "[R]ace discrimination plays an important role contributing to high levels of racial segregation in the City and inferior neighborhoods and housing conditions for racial and ethnic minorities."²⁰ The resulting "concentrated poverty has enormous social consequences for New York City's minority residents."²¹ African-Americans who live in racially isolated and poverty-stricken neighborhoods will be far more likely than other Americans to live in substandard housing, have dim job prospects

18. KING, *supra* note 1, at 12 ("[T]he line of progress is never straight. For a period a movement may follow a straight line and then it encounters obstacles and the path bends. It is like curving around a mountain when you are approaching a city. Often it feels as though you were moving backward, and you lose sight of your goal; but in fact you are moving ahead, and soon you will see the city again, closer by.")

19. KING, *supra* note 1, at 12-13.

20. Schill, *supra* note 10, at 1003.

21. *Id.* at 1004.

and be mired in poverty.²² The cost of not addressing residential segregation is too high. As Massey and Denton put it:

For America, the failure to end segregation will perpetuate a bitter dilemma that has long divided the nation. If segregation is permitted to continue, poverty will inevitably deepen and become more persistent within a large share of the black community, crime and drugs will become more firmly rooted, and social institutions will fragment further under the weight of deteriorating conditions. As racial inequality sharpens, white fears will grow, racial prejudices will be reinforced, and hostility toward blacks will increase, making the problems of racial justice and equal opportunity even more insoluble. Until we face up to the difficult task of dismantling the ghetto, the disastrous consequences of residential segregation will radiate outward to poison American society. Until we decide to end the long reign of American apartheid, we cannot hope to move forward as a people and a nation.²³

Therefore, the case for "community" is clear. There is no reasonable alternative for a civilized society. The cost of doing nothing is far greater than the risk of doing something.

II. Defining The Barriers To "Community"

An apocalyptic vision of a racially divided America may propel a movement towards "community." Progress is not possible, however, absent an analysis of the barriers to "community." What put America at the brink of "chaos?" What prevents the reality of "community?" There are two such barriers: institutional and individual acts of discrimination.

Professor Schill discusses only private actors or entities in describing residential segregation. While private actors have played and continue to play a critical role in the development of residential segregation, it is also critically important to understand the role played by government as public actors in contributing to and influencing residential segregation in both private and public housing. In order to understand the roots of residential segregation, the full range of institutional acts of discrimination must be examined.

Public actors have played a role as critical as private actors in the creation and maintenance of residential segregation. Federal, state

22. *See id.* at 999-1004.

23. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS*, 235-36 (1993).

and local governmental entities have all fostered racial discrimination in housing. Indeed, "redlining" was introduced by the Home Owners' Loan Corporation (HOLC), a federal New Deal program designed to provide debt payment relief for those who were in danger of default on their home mortgages or whose homes had already been foreclosed.²⁴ The practice of rating neighborhood value and quality by designating colors, with red being the least desirable, resulted in the agency channeling funds away from the "redlined" neighborhoods: those becoming or already predominantly African-American.²⁵ The Federal Housing Administration (FHA) and the Veterans' Administration (VA) later adopted this rating system for use in its underwriting guidelines.²⁶ While the FHA and VA made it possible for many white Americans to own a home, "redlining" by the FHA and the VA foreclosed the same opportunity for African-Americans.²⁷

Racial discrimination by governmental entities extended to the public housing market as well. Race became a means of determining how scarce public housing resources were allocated. For example, between 1950 and 1965, the Chicago Housing Authority (CHA) adopted a number of racially discriminatory policies.²⁸ The "CHA followed a policy of informally clearing proposed family public housing sites with the alderman in whose ward the proposed site was located and of eliminating each site opposed by the alderman."²⁹ As a result, "99 1/2% of the units proposed for sites in white areas which had been initially selected as suitable for public housing by CHA" were rejected.³⁰ The CHA also imposed quotas on the number of African-American families allowed to reside

24. *Id.* at 51-52.

25. *Id.* at 52.

26. *See id.* at 53 ("Before [FHA], mortgages generally were granted for no more than two-thirds of the appraised value of a home, so buyers needed to acquire at least 33% of the value of a property in order to make a down payment; frequently banks required half the assessed value of a home before making a loan. The FHA program, in contrast, guaranteed over 90% of the value of collateral so that down payments of 10% became the norm. The FHA also extended the repayment period to twenty-five or thirty years, resulting in low monthly payments, and insisted that all loans be fully amortized. The greater security afforded by FHA guarantees virtually eliminated the risk to banks, which lowered the interest rate charged borrowers. When the VA program was established, it followed practices established by the earlier FHA program.").

27. *See id.* at 52-57.

28. *Hills v. Gautreaux*, 425 U.S. 284, 286 (1976).

29. *Id.* at 287 n.4 (citing lower court opinion at 296 F. Supp. 907, 910, 913).

30. *Id.* at 287.

in predominantly white areas in Chicago.³¹ Although about 90% of the tenants in CHA were African-American, none of the four housing projects built in predominantly white areas had an African-American population greater than 10%.³² In short, the CHA segregated public housing in Chicago, practically limiting it to African-American neighborhoods. Where public housing existed in a predominantly white neighborhood, only whites had a realistic chance of living there.

These policies were not unique to Chicago. The New York City Housing Authority (NYCHA) engaged in practices that also promoted residential segregation. Even in this decade, the NYCHA allegedly engaged in a number of practices, *inter alia*, restricting applications for a housing project to families already living in that neighborhood and using codes to indicate to NYCHA personnel that certain housing projects were reserved for white families.³³

Other state and local governmental entities promoted residential segregation under the guise of economic segregation. The New Jersey Supreme Court denounced the activities of Mount Laurel, New Jersey in seeking to exclude low- and middle-income housing.³⁴ Communities in New York City have also sought to exclude African-Americans, invoking class rather than race as the basis for exclusion.³⁵ Yonkers, New York experienced this type of racial exclusion in the 1980s.³⁶ In Yonkers, the dual realities of segregated schools and housing patterns reinforced each other. The City of Yonkers was found to "have played a significant role in the preser-

31. *Id.*

32. *Id.*

33. *Davis v. New York City Hous. Auth.*, 839 F. Supp. 215, 217 (S.D.N.Y. 1993).

34. *See Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713, 724-25 (N.J.) (holding that a municipality "cannot foreclose the opportunity of the classes of people mentioned for low- and moderate-income housing and in its regulations must affirmatively afford that opportunity at least to the extent of a municipality's fair share of the present and prospective regional need therefore. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances that dictate that it should not be required so to do."), *cert. denied*, 423 U.S. 808 (1975); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir.) (holding that a local government may not block integrated housing developments where this action will have a racially discriminatory effect and is not supported by a substantial justification), *aff'd per curiam*, 488 U.S. 15 (1988).

35. *See generally MARIO CUOMO, FOREST HILLS DIARIES* (1974) (detailing the struggle of African-Americans moving into scatter-site low- and middle-income housing in the Forest Hills section of Queens, New York, one of New York City's five boroughs).

36. *See United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1526 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

vation of East and Northwest Yonkers as overwhelmingly white communities."³⁷ Indeed, as the Court held in that case:

The evidence of the City's intentional perpetuation of residential segregation . . . demonstrates that the City not only was aware of the overall impact of its subsidized housing practices on Yonkers public schools but also intended to preserve the racially segregative impact of these practices on the schools.³⁸

The institutional acts of discrimination committed by governmental entities reinforced the policies and practices of private institutions, such as banks, insurance companies and real estate agencies.³⁹ If the FHA would not guarantee loans made in predominantly African-American neighborhoods, then banks had little choice but to factor FHA's decision-making process into their own. This racially motivated decision had and still has economic consequences. Whether public or private, these institutional acts of discrimination served and serve as a barrier to "community."

When defining the impact of institutional acts of discrimination, the historical effects of institutional policies and practices must be identified. Professor Schill treats each incident of racial discrimination without sufficient regard to the historical pattern of discrimination.⁴⁰ He does not discuss how practices of the past still affect residential segregation today. Mortgage "redlining" is a clear example of this problem. If, at one time, the FHA placed a lower value on homes in predominantly African-American neighborhoods, then housing values in these neighborhoods will be lowered over time, resulting in more mortgage "redlining." In short, yesterday's mortgage "redlining" contributes to today's mortgage "redlining." In order to remedy current mortgage and insurance "redlining," any legal action must stop the current racially discriminatory practices and also address the impact of past racially discriminatory practices.

Individual acts of discrimination also serve as a barrier to "community." Individual acts of discrimination include the decision of a landlord to withhold an apartment on the basis of race, or that of a real estate agent not to show an apartment in a particular neighborhood for the same reason. In an individual act of discrimination, the action is undertaken by individual(s) acting on personal beliefs, rather than pursuant to a company policy or practice, as in

37. *Id.* at 1364 (footnote omitted).

38. *Id.* at 1501.

39. See, e.g., KING, *supra* note 1, at 51-52.

40. See Schill, *supra* note 10, at 992-95.

an institutional act of discrimination. Less than ten years ago, New York City received a poignant reminder of how individual acts of discrimination create a barrier to "community" in the Howard Beach section of Queens, New York.

On December 19, 1986, an African-American man was killed and two others injured by a white gang from Howard Beach who were protecting "their" community.⁴¹ The assumptions motivating this act of discrimination have been aptly described by Professor Patricia Williams.⁴² She divided them into the following six categories: (1) Everyone who lives here is white; (2) No black could live here; (3) No one here has a black friend; (4) No white would employ a black here; (5) No black is permitted to shop here; and (6) No black is ever up to any good.⁴³

These six presuppositions rely on "certain lethal philosophies of life."⁴⁴ First, the attackers were "better safe than sorry."⁴⁵ Knowingly or unwittingly, there is a view of life which equates white neighborhoods as "safe" and blacks as being a threat to this safety.⁴⁶ Second, "a prejudiced society is better than a violent society."⁴⁷ There is a tendency to distinguish between bias and violence and to relegate bias to a lower status in terms of societal concern.⁴⁸ As a result, "[w]ith the imperviously divided symmetry of the marketplace, gains for whites are not felt as gains for blacks, and social costs to blacks are simply not seen as costs to whites."⁴⁹

A third "lethal philosophy of life" involves justifying "turf wars."⁵⁰ The Howard Beach incident and the type of defense mounted on behalf of the defendants in that case are the products of a belief that: "black people . . . need documented reasons for excursioning into neighborhoods where they do not live, for venturing beyond the bounds of the zones to which they are supposedly confined."⁵¹ Finally, there is a "lethal philosophy of life" that Williams refers to as "privatized innocence and publicized guilt."⁵²

41. See CHARLES J. HYNES, INCIDENT AT HOWARD BEACH: THE CASE FOR MURDER 17-25 (1990).

42. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

43. *Id.* at 59.

44. *Id.*

45. *Id.*

46. See *id.* at 59-60.

47. *Id.* at 61.

48. See WILLIAMS, *supra* note 42, at 61.

49. *Id.* at 62.

50. *Id.* at 67.

51. *Id.* at 68.

52. *Id.* at 69.

Here, she discusses the actions of then New York City Mayor Edward I. Koch. After the Howard Beach incident, citizens who were outraged by the incident organized and conducted a march through the streets of Howard Beach.⁵³ The mostly white residents of Howard Beach reacted angrily to the march.⁵⁴ Mayor Koch tried to explain the anger of the Howard Beach residents to the members of a black church in Jamaica, Queens.⁵⁵ As Williams explains the incident:

He asked them how they would feel if fourteen hundred white people took to the streets of Jamaica (a mostly black neighborhood) in such a march. This question, from the chief executive of New York City's laws, accepts a remarkable degree of possessiveness about public streets — possessiveness, furthermore, that is racially and not geographically bounded. Koch was, in effect, pleading for acceptance of the privatization of public space. *This is the de facto equivalent of segregation; it is exclusion in the guise of deep-moated property "interests" and "values."* Lost is the fact that the object of discussion, the street, is public.⁵⁶

Obviously, there are a number of more recent incidents around the country and in New York City which indicate the challenge to developing a singular vision of "community." However, Williams' presuppositions and the underlying "lethal philosophies of life" have to be a part of any meaningful discussion of residential segregation in New York City or in this country. Her analysis sheds light on the set of assumptions behind the individual acts of discrimination committed by a landlord or a real estate agent.⁵⁷ As long as this set of assumptions remains unchallenged and unchanged, neighborhoods in New York City and any racially segregated American city will remain that way. The conditions under which housing discrimination operate may change, but the structure of residential segregation will remain firmly in place.

Thus, racial bias initiates an ongoing cycle of discrimination manifested in both institutional and individual acts. Institutional acts of discrimination are merely a more sophisticated form of racism. The decision by the HOLC and then the FHA to "redline"

53. *Id.* at 69.

54. WILLIAMS, *supra* note 42, at 69. See also HYNES, *supra* note 39, at 3-5.

55. WILLIAMS, *supra* note 42, at 69.

56. *Id.* (citations omitted) (emphasis supplied).

57. On another level, this analysis helps explain the differences between whites and blacks, in terms of their respective levels of tolerance for integrated communities. See Schill, *supra* note 10, at 993-99.

African-American neighborhoods reflects a "lethal philosophy of life" as dangerous as the decision of a group of white youths from Howard Beach to attack three African-American men for being in their neighborhood. Unchallenged individual acts of discrimination become institutional acts of discrimination, and these institutional acts contribute to more individual acts of discrimination.

III. Dismantling The Barriers To "Community"

A housing discrimination litigation strategy to dismantle the barriers to "community" must focus on systemic and individual litigation. Neither systemic nor individual litigation alone addresses the two barriers to "community." A coordinated campaign of systemic and individual litigation, seeking far-reaching remedies, is more likely to lead to the dismantling of the barriers of "community." Two cases in the area of mortgage and homeowner insurance "red-lining" demonstrate the effectiveness of this type of strategy: *Buycks-Roberson v. Citibank Fed. Sav. Bank*⁵⁸ and *NAACP v. American Family Mutual Ins. Co.*⁵⁹ In addressing residential segregation in New York City, the Commission should adopt the type of litigation strategy utilized in these cases.

By some measures, Chicago, Illinois is the most segregated city in the United States.⁶⁰ It is one of sixteen large American cities considered to be "hypersegregated."⁶¹ This level of segregation is not surprising, given the extent of segregation in both the public and the private housing markets.⁶² In this segregated environment, opportunities for further segregation abound.

In *Buycks-Roberson*, a class of African-Americans are claiming that a major lending institution in the area exploited just such an opportunity. The plaintiffs allege that home loan applications of

58. *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322 (N.D. Ill. June 29, 1995).

59. *NAACP v. American Family Mut. Ins. Co.*, Civil Action No. 90-C-0759 (E.D. Wis. consent decree filed July 13, 1995) (on file with the author).

60. See MASSEY & DENTON, *supra* note 23, at 72.

61. See *id.* at 75-76. There are five empirical measures used by sociologists to measure segregation: (1) racial unevenness (blacks are overrepresented in some areas and underrepresented in other areas); (2) racial isolation (blacks rarely share a neighborhood with whites); (3) racial clustering (black neighborhoods are tightly packed to form "one large continuous enclave"); (4) racially concentrated (blacks contained in a very small area); and (5) racially centralized (blacks are spatially located in the urban core). When a city is segregated on four of these five measures, it is considered to be in a state of "hypersegregation."

62. See *supra* notes 28-32 and accompanying text (describing the activities of the Chicago Housing Authority (CHA)).

African-Americans from the Chicago metropolitan area were rejected because of the race or racial composition of the neighborhood in which their properties are located.⁶³ While the case is still far from resolved, the litigation has already made headway in the struggle against residential segregation. The court certified a class of African-American homeowners "who were denied home mortgage loans by Citibank on the basis of improper racial considerations."⁶⁴ The court dismissed the arguments raised by the defendant bank regarding the uniqueness of the financial situations of any two home mortgage loan applicants, recognizing the possibility that a systemic injury could occur.⁶⁵ As the court held: "Certainly, where the subjective decisions of Citibank employees allow Citibank to systematically discriminate on the basis of race or the racial composition of the applicant's neighborhood when choosing among minimally qualified applicants, common issues of law and fact exist regardless of individual differences."⁶⁶

The *Buycks-Roberson* case supports the notion that African-American homeowners can challenge a set of lending policies and practices, not just their own individual outcomes. This type of challenge will force financial institutions to examine all of their institutional policies and practices which result in the denial of housing opportunities to African-Americans.

Like Chicago, Milwaukee is also one of the sixteen American cities considered to be hypersegregated.⁶⁷ In 1990, Milwaukee was considered the most segregated city in America on a number of measures.⁶⁸ Where African-Americans live in the City of Milwaukee is easy to determine:

According to the 1990 Census, the overwhelming majority (78.2%) of African Americans in Wisconsin reside in the City of Milwaukee, in a discrete, well-defined geographic area. Further,

63. Second Amended Complaint at 1, *Buycks-Roberson* (No. 94-C-4094) (on file with the author).

64. *Buycks-Roberson*, 162 F.R.D. at 388.

65. *Id.* at 329 (quoting Pls. Mem. at 6; Pls. Reply at 5). The Court found that two common issues of law and fact had been identified: (1) whether Citibank employed policies or engaged in practices or procedures which resulted in the denial of African-Americans' home loan applications on the basis of the applicant's race; and (2) whether Citibank personnel practiced redlining by applying its underwriting criteria in a subjective manner which resulted in the denial of home loans to African-Americans in predominately African-American communities.

66. *Id.* at 330.

67. See MASSEY & DENTON, *supra* note 23, at 75-76.

68. See Complaint at 1-2, *American Family* (No. 90-C-0759) (on file with the author).

the census indicates that as of 1990, almost ninety percent of the city's African American population resided within the area bounded by the following streets: the Stadium Freeway from Interstate 94 to North Avenue, North Avenue to 51st Street, 51st Street to Hampton Boulevard, Hampton Boulevard east to the Milwaukee River, and south along the Milwaukee River to Interstate 94, and west on Interstate 94 to the intersection with the Stadium Freeway.⁶⁹

In 1990, a group of African-American homeowners from Milwaukee filed suit against the American Family Mutual Insurance Company, alleging racial discrimination in the company's provision of homeowners' insurance. Plaintiffs alleged that American Family refused to do business in the predominantly African-American community of Milwaukee or did so on less favorable terms, violating their rights under the fair housing laws.⁷⁰ This litigation also resulted in important case law for the purpose of determining what types of activity can be addressed by fair housing laws.

Defendant American Family argued that even if homeowner insurance was denied or provided on the basis of race, this activity did not necessarily result in the denial of a housing opportunity. The Court of Appeals for the Seventh Circuit held otherwise.⁷¹ As the Seventh Circuit stated, "[L]enders require their borrowers to secure property insurance. No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable."⁷² The ruling in the *American Family* case marked the first time a federal circuit court recognized that insurance "redlining" was an actionable practice of housing discrimination.

Obviously, systemic litigation must do more than just clarify the right to redress institutional acts of discrimination. It must provide meaningful remedies. With systemic litigation, the goal should be to ensure that the defendant or defendants in the case alter their behavior and do so in such a way as to undermine the structure currently supporting residential segregation. A prime example of this type of fair housing litigation is the settlement reached in *American Family*.

In *American Family*, the plaintiffs, who at the time of the settlement included private plaintiffs and the United States Government, reached a settlement that makes the case a model for

69. Consent Decree at 2 n.1, *American Family* (No. 90-C-0759).

70. Complaint at 1, *American Family* (No. 90-C-0759).

71. NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 293 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993).

72. *Id.* at 297.

systemic litigation. On every level, from injunctive relief to monetary relief, the settlement not only stopped the economically damaging practices of a financial institution, but also ushered in a new era for predominately black neighborhoods in Milwaukee, one likely to lead to economic investment rather than disinvestment. As the agreement states:

This consent decree is the product of negotiations among the parties designed to achieve several remedial objectives shared by the parties, including: (1) compensating for past disparities in the availability of American Family insurance in the predominantly African-American community in Milwaukee; (2) enhancing the availability of American Family homeowners insurance in that area in the years to come; (3) offering such insurance to qualified applicants in all segments of the Milwaukee metropolitan area; and (4) investing in the future of that community through these steps.⁷³

As this description suggests, the agreement provides for substantial relief in numerous forms.

First, the settlement includes substantial injunctive relief. American Family has agreed to intensify their marketing efforts to capture a larger percentage of the African-American homeowners' insurance market. Advertisements will be placed in African-American publications and other media.⁷⁴ In addition, "American Family will devise sales strategies to assist agents in originating more [insurance] policies in the predominantly African American community."⁷⁵ Efforts are to be made to hire sales agents for an office in this community.⁷⁶ Sales agents will maintain logs detailing their contacts with consumers to ensure that African-Americans who call in will not be discriminated against.⁷⁷ The most dramatic change in marketing will be the introduction of new policy offerings and changes in the procedures for determining eligibility for American Family policies. American Family has agreed to create a new homeowners insurance product, designed to provide African-American homeowners with access to replacement-cost coverage, as opposed to the inferior repair-cost coverage.⁷⁸ American Family's underwriting practices—the standards for determining eligibil-

73. Consent Decree at 3, *American Family* (No. 90-C-0759).

74. *Id.* at 7-11.

75. *Id.* at 11.

76. *Id.* at 10-11.

77. *Id.* at 11-12.

78. *See id.* at 12-14. Replacement cost insurance coverage ensures that, if damage to the house occurs, the house will be fixed using the original construction materials.

ity for insurance coverage—have been revised to reduce, if not eliminate, the likelihood that race or the racial composition of a neighborhood will affect eligibility for American Family insurance.⁷⁹ For five years following the entry of the consent decree, American Family will be subject to evaluation to ensure that racial discrimination in the provision of homeowners' insurance is no longer a problem.⁸⁰

Second, the settlement provided for \$5 million in monetary compensation for African-Americans affected by American Family's policies.⁸¹ Four categories of individuals were eligible for monetary relief: (1) named plaintiffs;⁸² (2) persons denied insurance;⁸³ (3) persons receiving repair cost policies;⁸⁴ and (4) persons deterred from seeking insurance.⁸⁵ The named plaintiffs, who included seven African-American homeowners and the Milwaukee Branch of the NAACP, received \$10,000 each from the claim fund.⁸⁶ \$3 million or 60% of the funds allocated for monetary compensation of individuals was provided for those persons denied insurance.⁸⁷ \$1.5 million was allocated to those who applied to American Family and received a repair-cost policy, rather than the replacement-cost policy, which provides more comprehensive coverage.⁸⁸ The remainder, or \$420,000, was allocated to those individuals deterred from seeking American Family coverage.⁸⁹

Repair cost insurance coverage provides for only the use of similar, but not original, construction materials.

79. Consent Decree at 23-28, *American Family* (No. 90-C-0759).

80. *Id.* at 33-34. The Consent Decree calls for "a minimum of fifty (50) paired tests per year. . . . American Family will review the testing results with the relevant individual employees and sales agents and will use the results to determine how to address any concerns with them and whether changes in training are necessary." *Id.* at 34.

81. *Id.* at 35.

82. *Id.* at 49.

83. *Id.* at 49-51.

84. Consent Decree at 51-52, *American Family* (No. 90-C-0759).

85. *Id.* at 52-54.

86. *Id.* at 49.

87. *Id.* at 51.

88. *Id.* at 52. The first distribution for this category of injury was for those who received a repair-cost policy and suffered a loss, which was treated less generously than it would have been if the loss had occurred while the homeowner had a replacement-cost coverage policy. The remainder will be distributed in equal amounts to all those persons who had repair-cost policies. *Id.*

89. Consent Decree at 53-54, *American Family* (No. 90-C-0759). The category of deterred applicants have to demonstrate that they had reason to believe that American Family would not offer insurance coverage for some reason other than the existence of the NAACP litigation. *Id.* at 53.

Third, the settlement provides for \$9.5 million in community-based relief.⁹⁰ These "provisions are designed to alleviate the impact of the lack of quality homeowners insurance in the predominantly African American community."⁹¹ There are four components to the community-based relief: (1) interest-rate subsidies;⁹² (2) financing-cost assistance;⁹³ (3) homeownership counseling;⁹⁴ and (4) emergency home-repair programs.⁹⁵ Each of these programs was made available through the cooperation of and consultation with state and local governmental entities and the private sector.⁹⁶

The interest-rate subsidies are available for home-mortgage and repair loans and home-improvement loans.⁹⁷ \$4 million in loans for purchase and repair are available to "homes in the predominantly African-American community that have experienced deterioration or are otherwise in need of rehabilitation or repair."⁹⁸ These loans, offered through the WHEDA program, will be provided at a maximum of four percentage points below the currently used interest rate.⁹⁹ American Family will be subsidizing the difference between a market-rate loan and the subsidized loans.¹⁰⁰ \$1.5 million in loans are "designed for the improvement and rehabilitation of homes in the predominantly African-American community which are already owned by the borrower."¹⁰¹ These loans will also be provided at a maximum of four percentage points below the current interest rate and the cost of the buy-down would be subsidized by American Family.¹⁰²

Financing-cost assistance in the amount of \$1.5 million will be set up in conjunction with the City of Milwaukee.¹⁰³ These funds "will be used by the City of Milwaukee through its Department of City Development [DCD] to supplement its existing programs as ap-

90. *Id.* at 35.

91. *Id.*

92. *Id.* at 35-40.

93. *Id.* at 40-41.

94. Consent Decree at 41-42, *American Family* (No. 90-C-0759).

95. *Id.* at 42-44.

96. *Id.* at 35-36. The state agency was the Wisconsin Housing and Economic Development Authority (WHEDA). The local governmental entity was the City of Milwaukee's special lending programs. *Id.* at 35.

97. *Id.* at 36-38.

98. *Id.* at 36.

99. Consent Decree at 36, *American Family* (No. 90-C-0759).

100. *Id.*

101. *Id.* at 38.

102. *Id.* at 38-39.

103. *Id.* at 40.

plied in the predominantly African-American community in order to provide grants for financing cost assistance, including down payments, closing costs, mortgage insurance premiums, and appraisal fees."¹⁰⁴ In addition to the City of Milwaukee, non-profit community groups serving Milwaukee's African-American community will receive some portion of the funds.¹⁰⁵ The eligibility criteria for these programs will be the existing ones used by the City in its programs, whether administered by the City or a non-profit community group.¹⁰⁶

The third component of the community-based relief obtained in the *American Family* consent decree is homeownership counseling. "American Family, through the City of Milwaukee, will help provide homeownership counseling for low- and moderate-income, first-time home buyers seeking to purchase single family owner-occupied homes in need of repair or rehabilitation in the predominantly African-American community."¹⁰⁷ \$500,000 will be allocated for this purpose.¹⁰⁸ The funds will be provided to the City of Milwaukee's Department of City Development for use in its existing programs and for distribution to non-profit community groups.¹⁰⁹

The final component of community-based relief is an emergency home-repair program. "American Family will make available funds . . . to help cover a portion of the costs needed to make emergency repairs in homes in the predominantly African-American community that have experienced deterioration or are otherwise in need of rehabilitation or repair."¹¹⁰ American Family will underwrite the costs of grants and loans for repair and improvement.¹¹¹ \$2 million will be allocated for this program.¹¹²

The predominantly African-American community in Milwaukee has the chance to be compensated fairly for the lack of availability of homeowner insurance. Individuals harmed directly by discriminatory policies are to be compensated. More importantly, though, economic incentives are created for the entire African-American

104. *Id.*

105. Consent Decree at 40, *American Family* (No. 90-C-0759).

106. *Id.* at 40-41.

107. *Id.* at 41.

108. *Id.* at 41-42.

109. *Id.* at 42.

110. *Id.* at 42.

111. Consent Decree at 42-43, *American Family* (No. 90-C-0759) ("The loans will have below-market interest rates and favorable repayment terms.").

112. *Id.* at 43.

community in the form of innovative community relief. The community relief addresses every conceivable barrier to homeownership in inner-city Milwaukee and every possible reason for not providing insurance to homes in that area. If there are solid market values in homes, then there is a better atmosphere for providing insurance. If insurance is more readily available, then this will stabilize and eventually improve the market values. The cycle of disinvestment can be slowed. A cycle of investment and economic growth can begin.

A stronger economic environment in African-American communities will attack the infrastructure of residential segregation in two ways. First, African-Americans will have homes of appreciating value, making it possible, if they desire, to sell and move elsewhere or to stay and not fear losing economic ground. Second, the homes of value will be attractive to whites, who will have an economic incentive to live in predominantly African-American communities. In essence, legal strategies focused at creating these types of remedies will strengthen the economic base of predominately black communities and therefore, provide opportunities for closing the economic gap between blacks and whites.

While systemic litigation is important to attacking the structure of residential segregation, a meaningful litigation strategy must also address individual acts of discrimination. Cases where landlords allegedly refuse to rent to people on the basis of race still exist and are important to litigate.¹¹³ Cases where real estate agents allegedly limit the type of housing shown to prospective buyers or renters on the basis of race still exist and must be addressed as well.¹¹⁴ Even cases involving individual complaints of lending discrimination are worthwhile.¹¹⁵ These individual cases must not be ignored. These cases send a strong message about the

113. See, e.g., *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992) (alleging that landlord refused to rent and harrassed applicant on the basis of race); *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991) (landlord claimed that her husband would not allow her to rent to "Negro men").

114. See, e.g., *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086 (7th Cir. 1992) (involving allegations of racial steering by real estate broker), *cert. denied sub nom. Ernst v. Leadership Council For Metro. Open Communities*, 508 U.S. 972 (1993); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990) (involving allegations of racial steering by a real estate agent).

115. See *Price v. Gadsden Corp.*, CV93-PT-1784-M (N.D. Ala.). This case involved allegations of discrimination against two lenders. One institution would not close the loan unless a second lender agreed to underwrite the loan. While the second lender made the decision to refuse to underwrite the loan, the first lender was listed on the Adverse Action notice required by the Equal Credit Opportunity Act as the only lender involved in the decision-making process. Thus, both lenders were sued. The

inappropriateness of individual acts of discrimination, and help to capture the public imagination about the problem of residential segregation.¹¹⁶ Landlords, real estate agents and others are put on notice that they must comply with the law, and that failing to do so will have severe consequences. This type of litigation has the potential to reform behavior. If the facts in an individual case of discrimination are sufficiently egregious, substantial injunctive relief could be ordered beyond instructing the defendant to "go and sin no more."¹¹⁷

A strategy of pursuing individual acts of discrimination also assists the prosecution of institutional acts of discrimination. While institutional acts of discrimination may be distinguished from individual acts of discrimination, there may be no such meaningful distinction at first glance. Pursuing an individual act of discrimination may lead to the development of an institutional claim. Further, the critical proof in a case involving an individual act of discrimination is evidence obtained by testers, indicating that other acts of discrimination have occurred, essentially uncovering an institutional act of discrimination.¹¹⁸ For example, the *American Family* case itself stemmed not simply from a systemic analysis of the insurance industry and its impact on the predominantly African-American community in Milwaukee but from the case of a white American Family insurance agent, who was told in no uncertain terms: "Quit writing all those blacks."¹¹⁹ In addition, the case would have been difficult, if not impossible, to understand and put together without the individual, but common, experiences of seven African-American homeowners seeking homeowner insurance.¹²⁰

Certainly, the above legal strategy would be appropriate for the Human Rights Commission. The Human Rights Commission must be prepared to engage in dismantling the barriers to "community" presented by both institutional and individual acts of discrimination. Just as the Howard Beach "incident" indicates the existence of individual acts of discrimination, the existing patterns of residen-

jury ruled in favor of both defendants, and plaintiffs appealed. The appeal was subsequently withdrawn pursuant to an agreement reached by the parties.

116. See generally Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797 (1990).

117. See, e.g., *Rogers v. 66-36 Yellowstone Blvd. Co-op Owners, Inc.*, 599 F. Supp. 79 (E.D.N.Y. 1984).

118. See ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 32.2 (1995).

119. Second Amended Complaint at Exhibit A, *American Family* (No. 90-C-0759).

120. See generally Second Amended Complaint, *American Family* (No. 90-C-0759).

tial segregation suggest the prevalence of institutional acts of discrimination. New York City, like Chicago and Milwaukee, is "hypersegregated."¹²¹ The Human Rights Commission must respond to these challenges. It must develop an institutional framework for attacking the structure of residential segregation created and maintained by institutional and individual actions.

The Human Rights Commission then must have a staff knowledgeable about the past and present manifestations of residential segregation. Ideally, this would include a substantial number of well-trained attorneys and an even larger number of investigators and policy analysts, who could spend time doing the necessary preparation for casework. The Human Rights Commission must rely on testers to ferret out individual bias in housing by landlords and real estate agents. The Human Rights Commission must have the capacity to conduct and produce the type of empirical data necessary to investigate institutional claims of housing discrimination. From their work with testers and social scientists, the Human Rights Commission must strategically undertake both individual and systemic litigation.

Obviously, as Professor Schill's article points out, the critical issue may be how to fund a legal strategy for combatting residential segregation.¹²² Therefore, a legal strategy for the Human Rights Commission must also include a means to investigate and prosecute claims of housing discrimination with limited resources. In the absence of significant funding for attorneys and investigators, the Human Rights Commission should consider developing a host of private-public partnerships which will allow the Commission to be effective.

If funding limits its ability to hire a large number of lawyers, the Human Rights Commission should consider hiring a small number of well-trained and experienced lawyers capable of providing training and publishing educational materials for members of the private bar interested in prosecuting housing discrimination cases. A partnership between the Human Rights Commission and large private law firms in New York City should be developed to serve as a means to locate attorneys capable of assisting in the litigation of housing discrimination cases. Large law firms should train young associates to litigate housing discrimination cases for the Human Rights Commission in satisfaction of *pro bono* obligations and in order to provide training. The more complex cases could be han-

121. See MASSEY & DENTON, *supra* note 23, at 75-77.

122. Schill, *supra* note 10, at 1019.

dled by the small Human Rights Commission fair housing staff alone or in conjunction with the volunteers from the private bar.

If hiring policy analysts capable of conducting preliminary empirical analyses is cost-prohibitive, then the Human Rights Commission should consider creating a policy network with local colleges and universities. The Commission could develop and maintain ties with professors and graduate students in the City University of New York system or any of the numerous schools in New York City where there is the technical capacity to conduct empirical analyses, like logistical regression analysis. The policy network could even be geographically based, with schools like Queens College and St. John's University maintaining databases on the borough of Queens; City College, Columbia University, and New York University maintaining databases on Manhattan; and Fordham University maintaining databases in the Bronx. The policy network, if geographically based, could serve two purposes. First, the policy network could provide a ready supply of social scientists willing and able to respond to specific requests for empirical analysis. Second, the policy network could provide an additional database on the Commission's activities in a given geographic location.¹²³

With this type of institutional structure, the Commission could launch a serious attack on residential segregation in New York City. With a focus on addressing institutional and individual acts of discrimination, the Commission will be pursuing cases at the root of the problem. These cases will have the chance of establishing meaningful precedents and, if successful, these cases will lead, if sought, to creative and far-reaching remedies.

Conclusion

Where does New York City go from here: chaos or community? To the extent that New York City is hypersegregated, "chaos" may already be here. The case for "community" is clear and compelling. There is no other choice. The barriers to "community," created by both institutional and individual acts of discrimination, are daunting. Nevertheless, strategic litigation, like the *American Family* case, suggests that not all of these barriers are insurmountable.

123. The Commission already has database information on complaints of discrimination. Members of the proposed policy network would agree to monitor a given area and conduct additional analyses. For example, St. John's University may create a database from which a map, identifying problem landlords/owners with numerous complaints of discrimination, could be generated.

Furthermore, public institutions, like the Human Rights Commission, have an obligation and the capacity to play a role in dismantling these barriers by engaging in strategic litigation. Time is of the essence, though, in the struggle against residential segregation. This may well be New York City's "last chance to choose between chaos and community."¹²⁴

124. See KING, *supra* note 1, at 191.