EQUITABLE HOUSING INSTITUTE

Promoting housing affordability by removing regulatory barriers

P.O. Box 1402
Vienna, VA 22183
(O) (703) 938-2930
(E-mail) info@equitablehousing.org
(Website) https://www.equitablehousing.org

June 2019

Making challenges to exclusionary housing practices feasible—the role of attorney's fees awards

Introduction

Stronger protections are needed for low- and moderate-income Americans from the major problems created by economically exclusionary housing practices. Those practices (exclusionary zoning and other regulatory barriers to housing affordability) are prime culprits in Americans' mounting problems with housing cost inflation and residential segregation into "rich" and "poor" neighborhoods. Those practices also interfere with the nation's economic growth.

All those problems have increased dramatically in the last 50 years. In fact, even though residential isolation by race has declined substantially during that period (especially isolation of blacks from whites), residential isolation by income level has increased markedly during the same period.

One apparent reason for those divergent trends is that legal protections against racial discrimination in housing are much stronger than those against exclusionary housing practices generally. Under civil rights statutes such as the federal Fair Housing Act, for example, discrimination based on race and other specific categories subjects those responsible to strong enforcement action.

A key enforcement provision in those statutes is the courts' authority to award, to those who show they have suffered illegal discrimination, reimbursement of their necessary litigation expenses, including attorney's fees. The expenses awarded under such "fee-shifting" statutes are payable by the person(s) or organization(s) responsible for the violation—which may include a unit of government.

Litigation fees and costs often amount to hundreds of thousands—or even millions—of dollars. "Fee-shifting" statutes enable more Americans to defend their rights effectively, regardless of their level of income or wealth. Indications are that the problems addressed by those statutes are diminishing.

By contrast, low- and moderate-income Americans who suffer from the effects of economically exclusionary housing practices generally have no such remedy—unless the practice involved also violates one of those civil rights laws. That is true even though those economically discriminatory practices are widely considered illegal, and that certain of them are specifically prohibited by statute in a number of states.

Serious reform of land use regulations seems necessary, in order to stem the mounting proportion of Americans who are victims of economically exclusionary housing practices. In fact, a virtual consensus has emerged to that effect—among housing policy experts, economists, and even Presidents of the United States, across the political spectrum.

As part of that legal reform, serious consideration should be given to authorizing courts to award *bona fide* victims of illegal economic discrimination reimbursement of their necessary litigation costs—payable by those responsible for the discrimination.

Below, we will summarize:

1. The increasing housing affordability problems of low- and moderate-income Americans;
2. The mounting interference of economically exclusionary housing practices with American economic growth;
3. The increasing residential isolation of Americans by income level in recent decades, while residential isolation by race has been diminishing;
4. The much stronger legal protections against racial and certain other forms of discrimination, than against economically exclusionary housing practices generally;
5. The fee-shifting provisions of major civil rights laws and related statutes; and
6. The financial barriers faced by low- and moderate-income victims of economically exclusionary housing practices, due to the courts' general lack of fee-shifting authority for even proven victims of those unlawful practices.

1. Housing is much less affordable than 50 years ago

Between the 1960's and 2016, the share of American rental households that paid more than 30 percent of their household income for housing doubled, from 23.8 percent to 47.5 percent. [1] About half of those cost-burdened households (11.0 million) have "severe" burdens—that is, they pay more than 50 percent of their household income for housing.[2]

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[1] Joint Center for Housing Studies, Harvard Univ., *The State of the Nation's Housing 2018 ("SONH 2018"),* p. 5 (2016 is the latest year for which comprehensive data is available). "[S]ince 2001, the fastest growth in cost burden shares has been among moderate-income renters. For example, the share of cost-burdened renters making $30,000-$45,000 (in constant dollars) rose from 37 percent in 2001 to 50 percent in 2016. During the same time frame, the share of cost-burdened renters making $45,000-$75,000 nearly doubled from 12 percent to 23 percent." Harvard JCHS, *Housing Perspectives Blog*, July 5, 2018.

[2] *SONH 2018,* pp. 5, 30.

Most of those severely cost-burdened households are in the bottom quartile of income. Between 2001 and 2016, funds that households in that quartile had to pay for other basic needs declined from $730 to just $590 per month, in inflation-adjusted dollars. Families with children need several times that amount to cover essential non-housing expenses, even in the most affordable metropolitan areas.[3]

The median rent payment in the United States rose 61 percent between 1960 and 2016, while the median income among renters grew only 5 percent (adjusted for inflation). Most low- and moderate-income American households rent their housing, and about 36 percent of U.S. households are renters.[4]

American homeowners also experienced housing price increases far greater than typical income increases, between 1960 and 2016. The median home value increased 112 percent during that period, while median income for owners rose only 50 percent.[5]

2. Residential isolation by income has increased dramatically, while residential isolation by race has been declining

Residential isolation by income has increased markedly since 1970. A rigorous study by the Stanford University Center for Education Policy Analysis found that the percentage of families in America's large metropolitan areas who lived in predominantly "rich" or "poor" neighborhoods more than doubled between 1970 and 2012.

The increase was fairly steady, from 15% to 34% of the overall population of those metros, during that period. [6] There also was a significant, and fairly steady, increase in

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[3] *SONH 2018*, p. 31 citing Economic Policy Institute's estimate that families with children need at least $2,700 per month *in the most affordable metros*. "In sharp contrast, households in the highest quartile saw their incomes climb significantly in 2001–2016 while their monthly housing costs increased only $20, leaving $10,600 each month for all other expenses." *Id.*

[4] *See* Pew Research Center, *More U.S. households are renting than at any point in 50 years*, July 19, 2017 (as of 2016, there were about 43.3 million rental households and 75 million owner-occupied households); *SONH 2018*, p. 25 (there was a net increase of about 1.1 million owner-occupied units in 2017, and a net reduction of 180,000 rental households).

[5] *SONH 2018*, p. 5. The divergence of housing costs and household incomes was fairly steady during that period, with the most dramatic changes occurring in the 2000s. Further: "Cost-burdened shares continue much higher among black (45 percent) and Hispanic households (43 percent) than among Asian and other minority households (36 percent) or white households (27 percent)." *SONH 2018*, p. 31. Even among households within the same income groups, larger shares of minorities than whites are cost burdened. *Id.*

[6] K. Bischoff & S. Reardon, *The Continuing Increase in Income Segregation, 2007–2012*, Stanford Center for Education Policy Analysis, p. 5 (2016); K. Bischoff & S. Reardon, *Residential Segregation by Income, 1970-2009* (2014). In J. Logan (Ed.), *Diversity and Disparities: America Enters a New Century* (New York: The Russell Sage Foundation). The percentage who lived in predominantly "middle-income" neighborhoods declined about a 24%

income isolation in housing in smaller metropolitan areas during that period, according to that study.[7]

Another major, recent study, done for the Pew Research Center using a somewhat different methodology, found: "In 2010, 28% of lower-income households lived in majority lower-income tracts, an increase from 23% in 1980."[8] The increase amounted to approximately 22 percent in the proportion of such households..

In contrast, residential isolation by race (especially of blacks from whites) generally has been diminishing for several decades. The Pew Research Center study found. "In 1980, the typical black American lived in a census tract that was 58% black; by 2010, that share dropped to 45%."[9] Another rigorous study also found a downward trend in residential isolation of blacks from whites, "though modest" (about 4.5 percent per decade), which continued steadily from the 1970's across the ensuing decades, dropping from a value of 78% in 1970 to 60% in 2010.[10]

Racial isolation in housing (especially of blacks and whites) still is considered more prevalent than isolation by income level.[11] However, the sharp increase in residential isolation by income cuts against attempts to reduce residential isolation of minority

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between 1970 and 2012 (from 85% to 66% of the residents of those metros). Bischoff & Reardon, 2016. Those large metros are home to roughly 65 percent of the total U.S. population. Bischoff & Reardon, 2014, p. 7.

[7] Bischoff and Reardon, pp. 5, 17 & Table A1. In those smaller metros, according to the study, the percentage of families who lived in predominantly "rich" or "poor" neighborhoods (as opposed to middle-income neighborhoods), rose from 9.6% in 1970 to 21.6% in 2012.

[8] Richard Fry and Paul Taylor, *The Rise of Residential Segregation by Income*, p. 12 (Pew Research Center, August 1, 2012), posted at: http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/.

[9] Fry and Taylor, p. 14. In 2010: "African Americans comprised only 12% of the population. The typical white person (63% of the population) lived in a tract that was 77% white; the typical Hispanic (17% of the population) resided in a tract that was 45% Hispanic; and the typical Asian or Pacific Islander (5% of the population) resided in a tract that was 21% Asian or Pacific Islander."

[10] Douglas S. Massey, *The Legacy of the 1968 Fair Housing Ac*t, p. 8 (HHS Public Access, June 1, 2016) (author manuscript *Sociol Forum* (Randolph N J), 2015), citing Massey, Douglas S. and Denton, Nancy A. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge, MA: Harvard University Press; 1993.

[11] According to the Pew Center study: "In 2010, 42% of blacks lived in a census tract that was majority black, compared with 28% of low-income households living in a majority low-income tract and 18% of upper-income households living in a majority upper-income tract." Fry and Taylor, p. 14.

groups, because most members of those groups are on the lower end of the income spectrum.[12]

3. Economically exclusionary housing practices interfere increasingly with American economic growth

One major study indicates that a century-long trend of convergence in the average per-capita incomes of different States of the Union has slowed considerably since about 1980. Peter Ganong and Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* National Bureau of Economic Research (NBER), Working Paper 23609 (July 2017). Evidence presented in that study includes:

a. The tremendous housing price inflation in wealthier states since the 1970's is responsible for slowing that migration and convergence;
b. The greater restrictions on housing growth in wealthier states since that time are strongly associated with that inflation; and
c. Almost a third of the rise in economic inequality among American states since 1970 (when American incomes were, by historical standards, most equally distributed) may be accounted for by those trends.

Another major, recent study also indicates that land-use restrictions are a significant drag on economic growth in the United States. Chang-Tai Hsieh and Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 American Economic Journal: Macroeconomics, pp. 1–39 (2019).

> The creeping web of these regulations has smothered wage and gross domestic product growth in American cities by a stunning 50 percent over the past 50 years. Without these regulations, our research shows, the United States economy today would be 9 percent bigger — which would mean, for the average American worker, an additional $6,775 in annual income.[13]

EHI recently has reviewed other findings that are consistent with that study. For more, please click on EHI's website article: INTERSTATE EFFECTS OF REG. BARRIERS (2017).

[12] "Minorities made up half of the nation's low-wealth households in 2016, up from 39 percent in 1995. They also accounted for more than three-quarters of the growth in low-wealth households between 1995 and 2016." *SOHN 2018*, p. 16.

[13] Chang-Tai Hsieh and Enrico Moretti, *How Local Housing Regulations Smother the U.S. Economy*, New York Times, Sept. 6, 2017.

4. Much stronger legal protections exist against racial and certain other forms of discrimination, than against economically exclusionary housing practices generally

Various federal civil rights statutes, including the Fair Housing Act, carry heavy penalties for discrimination based on race or other protected categories (even criminal penalties where appropriate). Such statutes may be enforced by the U.S. Department of Justice, as well as by federal administrative agencies.[14]

Many of those statutes also give private individuals a right to challenge prohibited discrimination against them personally, through legal action. Private enforcement is a crucial means of combating housing discrimination. According to the National Fair Housing Alliance:

- In 2016, private fair housing organizations investigated 70 percent of the complaints filed nationwide—almost twice as much as all federal, state, and local government agencies combined;[15] and
- More than 70 percent of the cases brought before the U.S. Dep't of Housing and Urban Development (HUD), in which a fair housing organization is a complainant or co-complainant, result in conciliation or a finding of reasonable cause to believe that unlawful discrimination occurred. [16]

There is no similar federal statute attempting to regulate economically discriminatory housing practices. Certain states have enacted statutes that attempt to control exclusionary housing practices (the first being Massachusetts' Comprehensive Permit Law, enacted in 1969). [17] Also, landmark judicial decisions by the highest courts of numerous states also declare exclusionary zoning to be unlawful.[18]

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[14] *See, e.g.,* U.S. Department of Justice Civil Rights Division, *Statutes Enforced*, posted at: https://www.justice.gov/crt/page/file/962196/download (accessed June 25, 2019).

[15] National Fair Housing Alliance (NFHA), *2017 Fair Housing Trends Report: The Case for Fair Housing*, p. 50 (2018).

[16] *Id.*, citing DB Consulting Group, Inc., *Study of the Fair Housing Initiatives Program* (May 2011).

[17] Examples of those state statutes are:

- Massachusetts—*Comprehensive Permit Law*, Mass. Gen. Laws Ann., Ch. 40B, §§ 20-23 (enacted 1969)
- California—*Housing Element Law*, Cal. Gov't Code §§ 65580, 65583.1 et seq (enacted 1971)
- Oregon—*Comprehensive Land Use Planning*, Or. Rev. Stat. 197.312 (enacted 1973)
- New Jersey—*New Jersey Fair Housing Act*, N. J. Rev. Stat. §§ 52:27D 301-29 (enacted 1985)
- Connecticut—*Affordable Housing Land Use Appeals Procedure*, Conn. Gen. Stat. § 8-30g (enacted 1989)

However, the effects of those statutes and judicial decisions have been limited. A 2017 analysis of the results of state and local affordable housing programs to date, co-authored by the Principal Economist of the Federal Reserve Board and a Professor of Planning at Columbia University, concluded:

> Unfortunately, most state and local programs have produced relatively small numbers of affordable units, and so are unlikely to substantially meet the demand for below-market-rate housing. Moreover, low-cost housing tends to be built where land is cheap and political opposition is muted, which in practice limits the ability of low-income families to move into neighborhoods with more employment opportunities, better schools, lower crime, and higher-quality public and private services.[19]

Similarly, leading housing economists Edward Glaeser and Joseph Gyourko recently observed: "There have been some attempts at the state level to soften severe local land use restrictions, but they have not been successful."[20]

A virtual consensus has emerged recently—among housing policy experts, economists, and even Presidents of the United States, across the political spectrum—that land use regulations often include such serious barriers to housing affordability for low- and moderate-income Americans that broad-based reforms of those regulations are needed. [21]

There is a recent proposal to create "a new Economic Fair Housing Act," at either the state or federal levels, to assist the high percentage of Americans of all races who are excluded from resource-rich neighborhoods by exclusionary zoning and other exclusionary government regulations. [22] But as yet, such discrimination generally is not under strong legal constraints.

- Rhode Island—*Low and Moderate Income Housing Act*, R.I. Gen. Laws § 45-53-1 (enacted 1991)
- Illinois—*Affordable Housing Planning and Appeal Act*, 310 Ill. Comp. Stat. 67/1-60, Sec. 67/30(b) (enacted 2004)
- New Hampshire—*Workforce Housing*, N.H. Rev. Stat. § 674:58-61 (enacted 2008).

[18] For more on those judicial decisions, please click on EHI's Home Page, https://www.equitablehousing.org/, and access the Background article on Exclusionary Housing Policies.

[19] Lance Freeman & Jenny Schuetz, *Producing Affordable Housing in Rising Markets: What Works?*, 19 Cityscape 217, 228 (2017).

[20] Ed Glaeser and Joe Gyourko, *The Economic Implications of Housing Supply* (NBER Working Paper 23833 (Sept. 2017), posted at http://www.nber.org/papers/w23833.

[21] For more on that emerging consensus, please click on EHI's website article: EMERGING CONSENSUS ON REGULATORY BARRIERS TO HOUSING AFFORDABILITY.

[22] One new legislative approach has been suggested recently by Century Foundation Senior Fellow Richard D. Kahlenberg:

5. A key feature of anti-discrimination statutes is the courts' discretionary authority to order reimbursement, by the party responsible for unlawful discrimination, of the legal expenses of proven victims

The individual right of low- and moderate-income people to challenge unlawful discrimination depends heavily on the prospect of having their necessary legal expenses reimbursed by the party(ies) responsible for the violation. Therefore, many anti-discrimination statutes authorize courts to order that persons found in violation reimburse the legal fees incurred by the people whose rights have been violated.

Here, we focus on those "fee shifting" provisions of anti-discrimination statutes. Those provisions are exceptions to the "American rule," under which people who take legal action in the United States generally must bear the entire legal expense (other than minor "court costs") of vindicating their rights, even if they are poor and overcome well-funded opponents in protracted litigation.[23] Our nation "stands in a small minority among the industrialized democracies" in that regard.[24]

The American Rule poses a barrier to the enforcement of legal rights of low- and moderate-income people regarding exclusionary housing practices cases generally. Often, those rights effectively are denied through the exclusionary zoning and housing-related actions of well-funded local governments that have experienced litigators on staff to defend those actions. Low- and moderate-income people whose rights are violated in that way cannot be expected to bear the often enormous costs of litigation to have those actions overturned.

> To complete the unfinished business of the civil rights movement—and to address rising segregation by income—we need a new set of policies to update the 1968 [federal Fair Housing Act]. Such a new Economic Fair Housing Act would help the vast majority of Americans—of all races—who are excluded from resource-rich neighborhoods not merely by market forces, but also by government regulation.

Richard D. Kahlenberg, *An Economic Fair Housing Act* (Century Foundation, August 3, 2017), posted at: https://tcf.org/content/report/economic-fair-housing-act/.

[23] *E.g.*, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *see generally, e.g.,* Martin A. Schwartz & John J. Kirlin, *Section 1983 Litigation: Statutory Attorney's Fees,* § 1.02[B](1) (June 2018 update) ("under the 'American Rule,' the prevailing party in litigation cannot collect attorney's fees from the losing party absent statutory or contractual authority, the existence of a common fund, or the losing party's contemptuous or bad faith conduct").

[24] Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651 (1982) ("The English routinely include an assessment for a reasonable attorney's fee in the costs to be borne by a losing party; the usual rule on the Continent is similarly to assess the loser for at least part of the winner's attorney fees.") (citing authorities).

However, there is a recent trend in American statutes toward authorizing fee-shifting—notably in civil rights cases, including housing discrimination cases.[25] A "dramatic increase in the number of U.S. fee-shifting statutes occurred" during the 1970's.[26] Most of those statutes were enacted after the Supreme Court's 1975 decision limiting non-statutory fee-shifting. *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).[27]

The number of fee-shifting statutes at the federal level had grown to at least 153 by the early 1980's,[28] and there were roughly 200 such statutes by 2008.[29] On the state level, a 1983 survey identified 1,974 laws providing for some type of fee shifting.[30] Ten years later, a survey estimated that the number of such laws had almost doubled—"a remarkable increase in a decade."[31]

Among the fee-shifting provisions in statutes relevant to housing discrimination are the federal Fair Housing Act, the Civil Rights Attorney's Fees Act of 1976, the Equal Access to Justice Acts at the federal and state levels; and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). A summary of those provisions, and indications of their real-world effects, follows.

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[25] Rowe, 1982 Duke L.J. 651, 663-64.

> Awards of attorneys' fees are often designed to help to equalize contests between private individual plaintiffs and corporate or governmental defendants. Thus, attorneys' fees provisions are most often found in civil rights, environmental protection, and consumer protection statutes.

Congressional Research Service (CRS), *Awards of Attorneys' Fees by Federal Courts and Federal Agencies*, Summary, p. i (updated June 20, 2008).

[26] Susan M. Olson, *Symposium on Fee Shifting: Article: How Much Access to Justice from State "Equal Access To Justice Acts*"? 71 Chi.-Kent L. Rev. 547, 551 & n. 13 (citing "articles that emphasize one-way shifts and thus are especially relevant to EAJAs," including Bruce Fein, *Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government-"Subdsidized" Litigation*, 47 Law & Contemp. Probs. 211 (1984); Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 Law & Contemp. Probs. 233 (1984).") *Id.* Olson also cited Frances K. Zemans, *Fee Shifting and The Implementation of Public Policy*, 47 Law & Contemp. Probs. 187 (1984).

[27] Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 Law & Contemp. Probs. 233 (1984).") However, many such statutes already existed. *Id.*, citing *Alyeska*, 421 U.S. at 260, n.33.

[28] *See generally* Olson, 71 Chi.-Kent L. Rev. at 552 (citing Alba Conte, 2 *Attorney Fee Awards* 321-30 (2d ed. 1993)).

[29] Congressional Research Service (CRS), *Awards of Attorneys' Fees by Federal Courts and Federal Agencies*, Summary & pp. 64-114 (updated June 20, 2008).

[30] Olson, 71 Chi.-Kent L. Rev. at 552 , citing Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?* 47 Law & Contemp. Probs. 321, 323 (1984).

[31] Olson, 71 Chi.-Kent L. Rev.at 552 (her survey estimated a total of 3,918 such laws as of May, 1993).

a. Fair Housing Act [32]

That statute is a major federal civil rights law[33] that prohibits housing discrimination based on race, color, religion, sex, handicap, familial status, and/or national origin. Its provisions apply to housing discrimination claims brought in state court as well as federal court.[34]

The Fair Housing Act, enacted in 1968, included an attorney's fees provision to enable low- and moderate-income victims of violations to afford the expenses of proving unlawful discrimination in litigation. Originally, the court's authority to award attorney's fees was limited to victims who were "not financially able to assume" the cost of attorney's fees. [35] However, that restriction came to be seen by many in Congress as a "severe limit . . . upon the availability of attorney's fees for victims of discrimination."[36]

The restriction was eliminated in the 1988 Fair Housing Act Amendments,[37] in order to remove one of the "barriers to the use of court enforcement by private litigants."[38] The

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[32] 42 U.S.C. § 3601 *et seq*. (Title VIII of P.L. 90-284, 82 Stat. 81 (April 11, 1968), as amended).

[33] *See generally, e.g.,* Mark D. Boveri, *Note, Surveying the Law of Fee Awards under the Attorney's Fees Awards Act of 1976,* 59 Notre Dame L. Rev. 1293, 1294 (1984).

[34] *See* 42 U.S.C.A. § 3613(a)(1)(A).

[35] That provision (Public Law 90-284, Sec. 812(c) (1968)) stated that in civil suits by private persons for redress of violations, the court may grant as relief:

> court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

That provision also stated that "the court . . . may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security."

[36] Robert G. Schwemm, *Housing Discrimination Law and Litigation*, § 25:17 (July 2018 Update) (quoting remarks of Sen. Cranston, 134 Cong. Rec. S10556 (1988)).

[37] That provision now states that in such actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person." P.L. 100-430, § 8(2),102 Stat. 1633 (1988).

The 1988 Fair Housing Act Amendments changed the appointment of counsel provision of the staute to authorize the court to appoint an attorney for *either party* in the case, as well as to waive fees, costs, or security for any party who is financially unable to bear those costs. P.L. 100-430, § 8(2), 42 U.S.C.A. § 3613(b)

[38] House Comm. on the Judiciary, *Fair Housing Amendments Act of 1988*, H.R. Doc. No. 711, 100th Cong., 2d Sess., p. 13). *See generally,* Schwemm, *Housing Discrimination Law and Litigation*, § 25:17. "[I]n their analysis of segregation trends through 1980, Massey and Denton (1993) detected little movement toward integration between 1970 and 1980. Owing to the technical limitations of the time, however, they only studied segregation trends in the 50 largest metropolitan areas. In subsequent decades, moreover, metropolitan America was radically

1988 amendments also eliminated most of the statute's restrictions on federal enforcement efforts, and creation of a number of new powers for the enforcement agencies (HUD and the Justice Department).[39]

The Fair Housing Act actually may be used by victims of economically exclusionary housing practices that have a demonstrable, "disparate impact" on a minority group or individual in a protected category.[40] The protected categories are race, color, religion, sex, handicap, familial status, and national origin.

However, the Fair Housing Act is not designed to solve the general problem of economically exclusionary housing practices. The major increase in residential segregation by income level, discussed above, while residential segregation by race has declined substantially, indicates the statute's limitations.[41]

b. Civil Rights Attorney's Fees Awards Act of 1976 (CRAFA) [42]

That statute authorizes a court, in its discretion, to award a reasonable attorney's fee to the "prevailing party" in an action brought under numerous, major civil rights laws.[43] The

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transformed by mass immigration and rising inequality to produce a dramatically different urban context." Douglas S. Massey, *The Legacy of the 1968 Fair Housing Ac*t, p. 8 (HHS Public Access, June 1, 2016) (author manuscript *Sociol Forum* (Randolph N J), 2015).

[39] Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. Marshall L. Rev. 745, (1993)

[40] The U.S. Supreme Court recently resolved differing judicial interpretations of the Fair Housing Act, by holding that it prohibits housing practices that have a disproportionately adverse effect ("disparate impact") on members of protected minority groups—regardless of the intent behind those practices. There is no violation, however, if those practices have a legally justifiable purpose and are properly limited in scope. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project (ICP),* 135 S.Ct. 2507 (2015).

[41] Although the FHA aims to help "level the playing field" for minority group members, but the housing shortages that are caused by exclusionary housing practices would cause the "playing field" to remain very deficient, even if it were "level." Also, in many situations it will be difficult to prove that an exclusionary housing policy that is neutral on its face has a disparate impact on a minority-group member. Proving a disparate impact on minority-group members often may require a sophisticated analysis of statistics that would not be necessary to establish an economically exclusionary housing practice.

[42] 42 U.S.C. § 1988(b).

[43] The key language of that provision, for present purposes, is that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee" as part of the costs that routinely are payable by the party in violation. 42 U.S.C. § 1988(b). (The provision does not apply to actions against a judicial officer, unless that officer's action (or inaction) "was clearly in excess of such officer's jurisdiction.")

Expert fees may be included in the attorney's fee allowed to the prevailing party, under 42 U.S.C. § 1988(c), for violations of 42 USC § 1981 (racial discrimination in the making and enforcing of contracts) and § 1981a (intentional discrimination in employment).

statute's terms are substantially identical to those of the of the Fair Housing Act's current attorney's fee provision.[44]

In enacting CRAFA, Congress intended to achieve consistency in the fee-shifting approach of federal civil rights statutes, in the wake of *Alyeska.* Certain civil rights statutes (including the Fair Housing Act) expressly authorized awards of attorney's fees, but other civil rights statutes did not. [45]

> The Senate Judiciary Committee, which reported favorably on the bill, recognized that the congressional policies contained in civil rights laws depend heavily on enforcement by private citizens. The committee noted that since many private citizens are without sufficient funds to finance a lawsuit, especially where merely prospective relief is sought, to preclude the award of fees effectively frustrates the purpose of civil rights laws. [46]

The goal of opening the federal judiciary's doors to more civil rights plaintiffs was fulfilled. Within five years of enactment of CRAFA, the number of civil rights cases brought against state and local governments for deprivation of civil rights, under 42 U.S.C. § 1983,[47] increased by two-thirds.[48]

The United States Supreme Court has affirmed the role of CRAFA in allowing low-income Americans to defend their civil rights. *See, e.g., Perdue v. Kenny A.,* 559 U.S. 542, 558 (2010) ("Section 1988 serves an important public purpose by making it possible

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[44] Robert G. Schwemm, *Housing Discrimination Law and Litigation*, § 25:17 (July 2018 Update). Schwemm notes three differences between the fee award provisions of the Fair Housing Act and § 1988(b). Unlike § 1988(b), the Fair Housing Act's fee provision: (1) contains a specific waiver of the federal government's immunity to fee awards; (2) contains no explicit authorization for recovery of expert fees as part of the attorney's fee; and (3) explicitly includes "fee and costs," whereas the last part of § 1988 reads "fee as part of the costs." *Id.*, n. 4.

[45] *See generally, e.g.,* Mark D. Boveri, *Note, Surveying the Law of Fee Awards under the Attorney's Fees Awards Act of 1976,* 59 Notre Dame L. Rev. 1293 (1984), citing S. REP. No. 94-1011, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908-09.

[46] Boveri, 59 Notre Dame L. Rev. at 1294, and n. 10 & 11, citing S. REP. No. 94-1011, at 2-3, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5910-11.

[47] 42 U.S.C.A. § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[48] Boveri, 59 Notre Dame L. Rev. at 1295, citing Diamond, *The Firestorm Over Attorney Fee Awards,* 69 A.B.A. J. 1420 (1983). According to the Administrative Office of the U.S. Courts, the number of lawsuits filed against state and local governments rose from 17,543 in 1976 to 29,173 in 1981. Diamond at 1420.

for persons without means to bring suit to vindicate their rights"). A plurality of the Court explained in another case:

> Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.[49]

City of Riverside v. Rivera, 477 U.S. 561, 578 (1986) (plurality opinion):

c. Equal Access to Justice Acts (EAJAs)—federal and state

Certain housing-related issues not addressed by the Fair Housing Act or other federal civil rights laws could be subject to fee shifting under the federal Equal Access to Justice Act (EAJA) [50] (or even under some of the state EAJAs). The federal EAJA originally was enacted in 1980,[51] and it was made permanent in 1985.[52] It allows a successful claimant in proceedings against federal agencies (including HUD, for example), to be awarded its reasonable attorney's fees by the opposing party in appropriate circumstances. The EAJA:

> expanded the federal government's liability for awards of attorney's fees beyond the traditional realms of civil rights laws and open government laws, and broadly waived the sovereign immunity of the United States with respect to payment of attorney's fees in any civil action in which the position of the federal government is found to be without substantial justification.[53]

"The EAJA was enacted in response to congressional concern that the economic disparity between the government and individual litigants would discourage parties with limited resources from challenging or defending against unreasonable government action."[54]

Most states enacted somewhat similar laws following enactment of the federal EAJA. By 1995, 30 states had such a law ("state EAJA").[55] "What evidence is available on the state EAJAs' legislative histories suggests that they were passed for much the same purposes

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[49] 477 U.S.at 578.

[50] 5 U.S.C. § 504, 28 U.S.C. § 2412.

[51] Pub. L. No. 96-481, 94 Stat. 2325 (1980).

[52] 5 U.S.C. § 504, 28 U.S.C. § 2412.

[53] Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act*, 55 La. L. Rev. 217, 220 (1994) (citations omitted).

[54] Alba Conte, 4 *Attorney Fee Awards*, Ch. 26, p. 4 (3d ed., 2004). "Congress also wanted to provide a disincentive to careless or irresponsible exercises of governmental authority." *Id.*

[55] Olson, 71 Chi.-Kent L. Rev. at 554-555 & Table 1 (1995).

as the federal EAJA."[56] The federal EAJA has proven to be widely popular with private groups across the political spectrum,[57]

d. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[58]

RLUIPA generally prohibits a "land use regulation" that substantially burdens religious exercise, or that treats a religious assembly or institution on less than equal terms with a non-religious assembly or institution.[59] The statute defines "land use regulation" generally as a "zoning or landmarking law" (or the application of such a law), that restricts the use or development of land, or of a building on it, for religious purposes.[60] A lawsuit for violation may be brought either in state or federal court, by a party that has a present property interest regarding the land or a right to acquire such an interest.[61]

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[56] Olson, 71 Chi.-Kent L. Rev. at 555.

> Several states' legislative findings are taken almost verbatim from their federal counterpart, to the effect that certain parties (they vary on who this is) "may be deterred from seeking review of or defending against unreasonable [or "substantially unjustified"] governmental action because of the expense involved in securing the vindication of their rights."

Olson, 71 Chi.-Kent L. Rev. at 556 and n.44 (citing six such states' legislative findings).

[57] *See generally, e.g.,* Olson, 71 Chi.-Kent L. Rev. at 555:

> research on the legislative history of the federal EAJA found that it was a product of the deregulatory climate of the early 1980s, passed largely at the instigation of small businesses to help them defend themselves against allegedly unreasonable government regulation. . . . By the time the law was permanently reauthorized in 1985, however, liberal groups joined the small business lobbyists in support because they had learned it could be useful for them, too.

However, regarding the state EAJA's, Olson's 1995 article concluded.: "As measured by actual use rather than the features of the statutes, at best only half of EAJA claimants in any state receive a fee award, and the national average is merely 27%." Olson, 71 Chi.-Kent L. Rev. at 580.

[58] 42 U.S.C. § 2000cc.

[59] 42 U.S.C. § 2000cc(a) & (b).

[60] 42 U.S.C. § 2000cc-5(5) (that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.)

[61] 42 U.S.C. §§ 2000cc-2, -5. To contest an alleged exclusionary land use regulation under RLUIPA, a claimant must have a property interest in the regulated land, or a contract or option to acquire such an interest. 42 U.S.C. § 2000cc-5(5)

The fee-shifting provision applicable to RLUIPA is in CRAFA, discussed above.[62] Commentators who view RLUIPA favorably, as well as those who view it unfavorably, generally conclude that:

- The statute has substantially increased the leverage of people who claim that exclusionary zoning has interfered with their religiously-motivated land use projects; and
- Reimbursement of the full costs unavoidably incurred by proven victims of exclusionary zoning is a key to increasing their leverage.

There have been many multi-million dollar reimbursement awards under RLUIPA. For example:

- Bridgewater Township, New Jersey, settled protracted litigation with leaders of a proposed mosque in 2014, by agreeing to pay a total of $7.75 million—consisting of $5 million for alleged damages, costs and attorney's fees, plus $2.75 million to pay for a site for the mosque.[63]
- The Village of Mamaroneck, New York, was ordered to pay the claimants $4.75 million in damages, including over $3 million in attorney's fees, by the Second Circuit U.S. Court of Appeals (2008). [64]
- In *Rocky Mountain Christian Church v. Comm'rs of Boulder County, Colorado*, The U.S. Supreme Court's denial of Boulder's petition for certiorari left the County "to pay $1.5 million in legal fees for the Church, not to mention their own costs of seven years of litigation in this matter." [65]

For further information about fee-shifting under RLUIPA, please click on EHI's website article: MAKING CHALLENGES TO EXCLUSIONARY HOUSING PRACTICES FEASIBLE: THE RLUIPA EXPERIENCE.

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[62] The key part of that provision regarding RLUIPA is that:

> In any action or proceeding to enforce a provision of . . . *the Religious Land Use and Institutionalized Persons Act of 2000*, . . . the court, in its discretion, may allow the *prevailing party, other than the United States, a reasonable attorney's fee as part of the costs*, ...

[63] Mike Deak, Bridgewater, mosque settlement reaches $7.75 million, MyCentralNJ, Dec. 2, 2014.

[64] *See generally* New York Zoning and Municipal Law Blog, Jan. 15, 2008. The underlying case was *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007) (noting the "arbitrary blindness to the facts" exhibited by village officials).

[65] Patricia Salkin, *US Supreme Court Denies Cert in Colorado RLUIPA Case*, Law of the Land blog, posted at: https://lawoftheland.wordpress.com/2011/01/10/us-supreme-court-denies-cert-in-colorado-rluipa-case/.

6. Financial barriers to low- and moderate-income Americans overcoming exclusionary housing practices generally

The cases just mentioned show how enormous the litigation costs can be, in order to defend one's rights against exclusionary zoning.[66] We are not aware of any statute, state or federal, that authorizes substantial cost reimbursement to successful claimants in cases involving exclusionary housing practices, except where they violate a civil rights statute, such as the federal Fair Housing Act.

As discussed, the Fair Housing Act authorizes fee-shifting where an exclusionary housing practice has a demonstrable, "disparate impact" on members of a racial minority, or on a group or individual in another protected category. Maximum use should be made of that statute when it is available.

However, the Fair Housing Act is not designed to solve the general problem of economically exclusionary housing practices, and it has not had that effect—as the major increase in residential segregation by income level, discussed above, illustrates. The emerging consensus on exclusionary housing practices recognizes that the adverse effects of those barriers on low- and moderate-income Americans are so serious that broad-based reforms of zoning and land use regulations are needed.

Unless low- and moderate-income Americans have effective access to the courts to reverse denials of reasonable housing opportunities by those practices generally, the problems they cause likely will continue to increase. Clearly, effective access to the courts for those people includes the prospect of recovering the often enormous expenses required to overcome those exclusionary practices.

Effective access to the courts, for low- and moderate-income victims of exclusionary, governmental housing practices depends on other laws, too, such as those regarding standing to sue. Those issues are beyond the scope of this article.[67]

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[66] *See generally, e.g.,* Larry J. Smith, ed., *How to Litigate a Land Use Case*, American Bar Assoc., Section of State and Local Government Law (2000). As Smith explains, exclusionary zoning litigation, and other cases involving exclusionary housing practices, can be quite protracted. Extensive proceedings before local officials may be followed by the filing and trial of complex lawsuits—usually with the losing party seeking reversal in an appellate court.

[67]Traditionally, legal standing to sue over a zoning issue has been restricted to current residents and owners of nearby land. *See generally, e.g.*, Eric D. Kelly, gen'l ed., 1 Zoning and Land Use Controls § 3.02[3][a] (June 2019). However, where exclusionary zoning has a "disparate impact" on members of protected minority groups, they have standing to sue under the federal Fair Housing Act. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project (ICP)*, 135 S.Ct. 2507 (2015).

Also "Increasingly, the state courts have recognized the right of racial minorities and the economically disadvantaged, including those not residing within the subject municipality, to contest allegedly exclusionary zoning ordinances as being violative of their constitutional and statutory rights." 1 Zoning and Land Use Controls § 3.02[3][d][i], citing, *inter alia, Stocks v. City of Irvine*, 170 Cal. Rptr. 724 (1981); *Urban League of Greater New Brunswick v. Mayor of*

7. Conclusions

Given the virtual consensus that has emerged about the need for reform of land use laws in order to solve the major and growing problem of economically exclusionary housing practices, the question becomes how to go about reform.

Recent studies document the major increase in residential isolation of Americans by income level during the past several decades, while residential isolation by race has decreased in a fairly steady, substantial way. Those contrasting trends suggest that reform should include applying the much stronger legal protections against racial and certain other forms of discrimination, to economically exclusionary housing practices.

Whatever shape legal reform ultimately takes, a key ingredient should be an individual right by persons suffering the adverse effects of those discriminatory, exclusionary practices, to have them corrected through litigation, if necessary. Such a personal right is included in the Fair Housing Act and numerous other, major civil rights laws.

To enable low- and moderate-income people to protect their legal rights against economically exclusionary housing practices, it appears that courts should be authorized to order those responsible for violative practices to reimburse the necessary legal expenses of proven victims. Again, such provisions are included in the Fair Housing Act and many other civil rights laws.

The federal Fair Housing Act applies to economically exclusionary housing practices that have a demonstrable, "disparate impact" on members of a racial minority or other protected group. However, the Fair Housing Act is not designed to solve the general problem of economically exclusionary housing practices. The major increase in residential segregation by income level in the 50 years since that statute took effect suggests its limitations.

Perhaps that statute should be amended to expressly cover *all* economically exclusionary housing practices, as has been proposed recently. Whatever legal reforms are adopted, a provision for reimbursement of the necessary legal expenses of proven victims of those practices appears crucial.

Carteret, 406 A.2d 1322, 1325 (N.J. App. Div. 1979); *Suffolk Housing Services v. Town of Brookhaven*, 397 N.Y.S.2d 302 (N.Y. S.Ct. 1977), *aff'd as modified*, 405 N.Y.S.2d 302 (N.Y. App. 1978),