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# **LOCAL ENFORCEMENT OF LAWS PROHIBITING DISCRIMINATION IN HOUSING: THE NEW YORK CITY HUMAN RIGHTS COMMISSION**

*Michael H. Schill\**

The year 1995 marks the fortieth anniversary of the New York City Human Rights Commission. Founded in 1955 by Mayor Fiorello LaGuardia, the Commission began its life primarily dedicated to promoting open housing for New York's racial and ethnic minorities. Two years after it was created, the Commission took on an important role in enforcing the nation's first law prohibiting discrimination in the private housing market. Although housing discrimination cases now constitute only a small proportion of the Commission's total workload, the battle against housing discrimination remains an important part of the Commission's mandate.

This article examines the problem of housing discrimination in New York City as well as the role of the Human Rights Commission in fighting illegally discriminatory practices. Part I describes the evidence demonstrating housing market discrimination and examines the harmful impact these practices have on many New Yorkers. Part II examines the New York City Human Rights Commission's battle against housing discrimination from its founding in 1955 to the present day. As part of this analysis, New York City's Human Rights Law is compared with analogous protections enacted by the State of New York and the federal government. Data on all housing discrimination complaints filed with the Commission in 1992 and 1993 is also studied. Finally, Part III of the article comments briefly on how the Commission can face the challenges of the future in seeking to break down barriers to residential mobility and integration.

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\* Professor of Law and Urban Planning, New York University; Director of the New York University School of Law Center For Real Estate and Urban Policy. I would like to thank Kammie Gormezano, Benjamin Scafidi and Simone Andrews for their research assistance. This article represents my own views and not necessarily the views of the members of the Center For Real Estate and Urban Policy's Board of Advisors.

## I. Racial and Ethnic Discrimination in the Housing Market

In enacting the pathbreaking Fair Housing Practices Law in 1957,<sup>1</sup> the New York City Council primarily sought to outlaw discrimination in housing based upon racial or ethnic characteristics.<sup>2</sup> Of particular concern were acts against black and Hispanic homebuyers and renters.<sup>3</sup> Although the scope of the City's human rights law has expanded greatly to encompass as protected groups, among others, women, families with children, people with mental and physical handicaps and gay persons,<sup>4</sup> the two largest categories of complaints continue to allege discrimination based upon race and national origin.<sup>5</sup> This part discusses recent evidence of discrimination in the housing market directed against black and Hispanic home buyers and renters, followed by an examination of some of the consequences of these discriminatory acts.<sup>6</sup>

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1. See *infra* notes 65-71 and accompanying text for a description of the Fair Housing Practices Law.

2. In addition to race, color, national origin and ancestry, the Act also proscribed discrimination based upon religion. In light of the leading role played by the American Jewish Congress and the American Jewish Committee in the passage of the Act, it is likely that the Council also was concerned with discrimination against Jewish households. At the time the Act was passed, however, discrimination against Jews in the housing market was considerably less frequent than discrimination against blacks and Hispanics. Nevertheless, several reports indicated that Jews faced considerable difficulty in purchasing apartments in several exclusive cooperative apartment buildings on Manhattan's upper east side. See NATHAN GLAZER & DANIEL PATRICK MOYHIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS AND IRISH OF NEW YORK CITY* 160 (1963); Joseph B. Robison, *Fair Housing Legislation in the City and State of New York*, in *THE POLITICS OF FAIR-HOUSING LEGISLATION: STATE AND LOCAL CASE STUDIES* 27, 32-33 (Lynn W. Eley & Thomas W. Casstevens eds., 1968); *Housing Discrimination Against Jews*, 2 *RIGHTS* 41, 41 (1959). During the first three years following the law's enactment in 1958, 81% of complainants were black, 8% were Puerto Rican and only 3% were Jewish. See Harold Goldblatt & Florence Cromien, *The Effective Social Reach of the Fair Housing Practices Law of the City of New York*, 9 *SOC. PROBS.* 365, 366-67 (1962).

3. New York, N.Y., Local Law 80 § X41-1.0 (Dec. 30, 1957) (noting that segregation in housing often results in racial segregation in public schools and other public facilities which is "condemned by the constitutions of our state and nation").

4. See *infra* text accompanying notes 86-99.

5. See *infra* text accompanying note 146.

6. My focus in this part on discrimination against blacks and Hispanics is not meant to suggest that discriminatory acts aimed at these two groups are the only or even the most important problems to be addressed by the Commission on Human Relations. Insufficient data prevents me from thoroughly examining the scope and consequences of other forms of housing discrimination. The absence of this data may nevertheless have certain normative implications.

### A. Evidence of Discrimination Against Black and Hispanic Households

The level of discrimination<sup>7</sup> practiced by participants in the housing market is often extremely difficult to identify and assess.<sup>8</sup> It is the unusual case in which an owner, real estate agent or lender will tell a prospective purchaser or renter that he or she is being rejected because of his or her race or ethnicity. It is even more rare for the discriminating party to make these reasons known publicly. Social scientists, therefore, must develop research methodologies to ferret out evidence of discriminatory actions.

One indirect method of learning about the likelihood of racial or ethnic discrimination in a particular housing market is to examine levels of race segregation. No matter what level of analysis one chooses, recent data show extremely high levels of racial and ethnic segregation in the United States. According to the 1990 Census of Population and Housing, 22% of the residents of American central cities are black compared with only 7% of the suburban population.<sup>9</sup> In the New York metropolitan area, 29% of the residents of New York City are black compared to 11% of the population in the rest of the metropolitan area.<sup>10</sup> Similar disparities exist for Hispanic households.<sup>11</sup>

Alternative indirect methods devised by social scientists to measure spatial concentrations of population within metropolitan areas also demonstrate high levels of segregation in American metropolitan areas in general, as well as in New York. The most commonly

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7. For purposes of this article, "discrimination" is defined as the refusal by an owner, landlord, lender or real estate agent to make available housing or housing-related services because of a characteristic of the prospective tenant or purchaser when the use of such characteristic by the owner, landlord, lender or real estate agent is proscribed by law.

8. Individual acts of discrimination can be identified from litigated cases or investigations by fair housing enforcement organizations. Nevertheless, given their anecdotal nature, these reports cannot furnish estimates of the overall level of discrimination in the housing market.

9. See UNITED STATES DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS UNITED STATES 7 (1992).

10. See UNITED STATES DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING: POPULATION AND HOUSING CHARACTERISTICS FOR CENSUS TRACTS AND BLOCK NUMBERING AREAS NEW YORK-NORTHERN NEW JERSEY-LONG ISLAND, NY-NJ-CT CMSA 1, 2, 391-92 (1993).

11. With respect to the United States, 14.8% of all residents of central cities are Hispanic compared to 7.6% of all suburban residents. See U.S. DEP'T OF COMMERCE, *supra* note 9, at 7. Similarly, 24% of all residents of New York City are Hispanic compared to 9.2% of the residents of the New York metropolitan area. See U.S. DEP'T OF COMMERCE, *supra* note 10, at 1, 2, 546-47.

used measure of segregation is the index of dissimilarity which represents the proportion of a metropolitan area's population that would have to move to achieve an even distribution of minority group members throughout the metropolitan area. A high level of segregation is generally indicated by an index value in excess of 60.

Among the twenty-three metropolitan areas in the United States with the largest black populations in 1990, the average index of dissimilarity was 74.5, down slightly from 78.8 in 1980.<sup>12</sup> In New York, the index value in 1990 was 78, unchanged from 1980.<sup>13</sup> For the twenty metropolitan areas with the largest Hispanic populations in the United States, the average index of dissimilarity was 48.9 in 1990.<sup>14</sup> In New York, the index took on the value of 54.<sup>15</sup> Thus among blacks, the level of segregation in the New York metropolitan area is high in absolute terms, although not terribly higher than the national average. Segregation among Hispanics, however, is considerably more moderate.

High levels of segregation, while suggestive, do not necessarily imply high rates of racial and ethnic discrimination in the housing market. In New York, as well as the nation, a correlation exists between income and race or ethnicity. Black families earn, on average, one-third the income of white families in New York City; the disparity between Hispanics and whites is even greater.<sup>16</sup> Therefore, because low cost housing is frequently located in certain geographic areas of the city, one might expect to find that lower incomes contribute to segregated housing patterns among black and Hispanic households. Nevertheless, much research suggests that the effect of income disparities among blacks, Hispanics and whites on housing segregation is likely to be relatively small. For example, one set of studies predicts the expected location of households in a city based upon family characteristics, housing prices and incomes and then compares these locations against actual residential patterns to determine whether racial discrepancies persist. In virtually all of these studies, income, housing and individual char-

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12. See JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 112 (1995).

13. *Id.*

14. *Id.* at 113.

15. *Id.* The 1980 dissimilarity indices for Hispanics in the U.S. and New York were 48 and 55, respectively. *Id.*

16. The median income of white families in New York City in 1989 was \$61,913. For black families the median was \$20,850 and for Hispanics \$18,378. See UNITED STATES DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING 2632, 2869, 3181 (1993).

acteristics predict only a small part of the geographic distribution of minority households.<sup>17</sup> Another set of studies computes separate indices of dissimilarity for different income groups as a means of investigating whether segregation declines as household income increases. These studies also find that income apparently has only a small impact on levels of segregation. Higher income blacks and Hispanics tend to be almost as segregated as their lower income counterparts.<sup>18</sup>

A more important cause of high levels of racial and ethnic segregation, and one which is certainly more difficult to assess, may be individual preferences. Empirical studies repeatedly show that blacks and whites have different preferences for the racial composition of their neighborhoods and that these different preferences may give rise to segregated residential patterns. Whites typically prefer neighborhoods which either have no black residents or only a few. Blacks, on the other hand, typically prefer integrated communities in which the number of black residents is roughly equal to the number of white residents.<sup>19</sup> These different preferences for neighborhood racial composition are likely to be one explanation for the rapid racial transformation experienced by many inner city communities since the end of World War II.<sup>20</sup> Although the preferences that give rise to neighborhood change and re-segregation might be based on racial prejudice or bigotry, segregation may occur without a single illegal act of discrimination.<sup>21</sup>

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17. See John E. Farley, *Race Still Matters: The Minimal Role of Income and Housing Cost as Causes of Housing Segregation in St. Louis, 1990*, 31 URB. AFF. REV. 244, 249-51 (1995) (presenting data for St. Louis); John F. Kain, *Housing Discrimination and Black Suburbanization in the 1980s*, in DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION 68, 78 (Gary A. Tobin ed., 1987) (describing simulations in Cleveland); Karl E. Taeuber, *The Effect of Income Redistribution on Racial Residential Segregation*, 4 URB. AFF. Q. 5, 7 (1968) (describing results in Cleveland).

18. See DOUGLAS S. MASSEY AND NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 84-88 (1993).

19. See Reynolds Farley et al., *Continued Racial Residential Segregation in Detroit: "Chocolate City, Vanilla Suburbs" Revisited*, 4 J. HOUSING RES. 1, 27 (1993).

20. The phenomenon described is typically called "tipping." See Thomas C. Schelling, *A Process of Residential Segregation: Neighborhood Tipping*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 157 (Anthony H. Pascal ed., 1972).

21. Of course, illegal acts might be part of this neighborhood transformation. In many well documented cases, real estate agents prey upon white prejudice and fear to accelerate the process of neighborhood racial change. In a process called "blockbusting," the agent typically sells one or two homes in an all white neighborhood to minority homebuyers. He or she then solicits other homeowners to sell their homes before the neighborhood "changes." For a discussion of blockbusting activities in

Discrimination in the housing market is not limited to home sellers and real estate agents. In recent years, several studies have examined and tried to measure the level of discrimination in the home loan mortgage market. Data released since 1989 pursuant to the Home Mortgage Disclosure Act (HMDA)<sup>22</sup> have repeatedly shown large disparities in loan rejection rates among white, black and Hispanic applicants. For example, in 1993, 17.4% of all black applicants were rejected in the New York metropolitan area compared to 10.7% of white prospective borrowers. Among Hispanic loan applicants, the rejection rate was 16.9%.<sup>23</sup> Nevertheless, differential rejection rates, like disparate segregation levels, only suggest the possibility of discrimination, but do not prove it. Financial institutions may reject minority loan applicants at higher rates than whites not because of discriminatory motives, but because factors contributing to the risk of default, such as lower assets or income, are correlated to race.

The challenge of identifying discrimination based upon loan acceptance and rejection data is great given the number of factors that might influence a bank's decision to extend credit. The most comprehensive study completed to date was conducted by the Federal Reserve Bank of Boston in 1990.<sup>24</sup> The authors of this study obtained data from member banks which permitted them to control a wide array of individual, property and neighborhood risk variables. They concluded from their analysis that, even after controlling for these factors, the probability of rejection among blacks and Hispanics was more than 50% higher than for white appli-

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New York and efforts by the Commission to fight the process, *see infra* text accompanying notes 102-110.

22. Pub. L. No. 94-200, Title III, 89 Stat. 1125 (1975) (codified as amended at 12 U.S.C. §§ 2801-2811 (1994)). Prior to 1990, lenders were required by HMDA to disclose the aggregate number and dollar value of loans originated by census tract for each of their market areas. Because these datum did not disclose characteristics of individual borrowers, their usefulness in assessing financial institution lending patterns was limited. HMDA was amended in 1989 to require financial institutions to make available information about individual applicants by census tract, including their income, sex, race, the loan amount requested and whether their applications were approved or rejected.

23. *See* Christine Dugas, *Lending Bias Is Greater Nationwide Than In NY*, NEWS-DAY, Oct. 28, 1994, at A-57.

24. *See* ALICIA H. MUNNELL ET AL., MORTGAGE LENDING IN BOSTON: INTERPRETING HMDA DATA (Federal Reserve Bank of Boston Working Paper No. 92-7, Oct. 1992).

cants.<sup>25</sup> To date, no comparable study of lending patterns has been completed for New York City.

The most direct method of estimating the incidence of discrimination is through the use of testers. Pairs of individuals—one minority and one majority—are sent separately to the offices of real estate agents or landlords, posing as home or apartment seekers. These testers are similarly matched with respect to characteristics other than race or ethnicity so that discrimination can be inferred from differential treatment.

In the mid-1980s, the New York City Human Rights Commission and the Corporation Counsel jointly conducted an investigation and prosecution of systemic discrimination in the New York City housing market. The project, funded by a grant from the United States Department of Housing and Urban Development (HUD), targeted real estate agents in each of the City's boroughs, with the exception of Manhattan. Matched pairs of testers were sent to 32 real estate brokers and managing agents between March 1986 and February 1988.<sup>26</sup> Discrimination was inferred if the minority tester was treated less favorably than the white tester at least three times. In 18 of the 32 separate investigations, the City determined that probable cause existed to ascertain that discrimination had occurred.<sup>27</sup> Only three agents or landlords were conclusively found not to discriminate; the remaining investigations were suspended because of broker suspicion, tester error or other administrative problems.<sup>28</sup>

Although the Human Rights Commission's systemic investigation suggests that discrimination based upon race and ethnicity was

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25. *Id.* at 34. The Boston Federal Reserve Bank study has been replicated by members of the Housing Research staff of the Federal National Mortgage Association. Their results substantially support the validity of the earlier study. See James H. Carr & Isaac F. Megbolugbe, *The Federal Reserve Bank of Boston Study on Mortgage Lending Revisited*, 4 J. HOUSING RES. 277, 311 (1993) ("Our study confirms these results and refutes recent reports that attempted to discredit the original Boston Fed Research."). Other commentators have been more critical of the methodology of the Boston Fed. See, e.g., Mitchell B. Rachlis & Anthony M.J. Yezer, *Serious Flaws in Statistical Tests for Discrimination in Mortgage Markets*, 4 J. HOUSING RES. 315, 326-30 (1993) (noting the econometric problems with studies such as the Boston Fed's); Stan Liebowitz, *A Study That Deserves No Credit*, WALL ST. J., Sept. 1, 1993, at A14; Mark Zandi, *Boston Fed's Bias Study Was Deeply Flawed*, AM. BANKER, Aug. 19, 1993, at 13.

26. See Karen Webber, Systemic Report: Fair Housing Assistance Program Type II, HA-14607 1 (undated and unpublished report prepared by the New York City Commission on Human Rights in 1988) (on file with the author).

27. See *id.* at 43.

28. *Id.*

a substantial problem in New York in the mid- to late-1980s, the evidence cannot be utilized to infer the overall incidence of discrimination in the housing market. Real estate agents were not selected randomly by investigators; instead, one of the criteria used to select agents for investigation was an allegation of discriminatory behavior. Therefore, it is likely that the results of the investigation over-estimate the level of discrimination in the New York City housing market.

More systematic data, however, can be obtained from the Housing Discrimination Study (HDS) conducted by the Urban Institute in 1989. The study involved 3,800 fair housing (matched tester) audits in 25 metropolitan areas.<sup>29</sup> The HDS authors used econometric techniques to obtain estimates of the likelihood that black or Hispanic persons would encounter discrimination in housing-related transactions. Based upon a national sample, they concluded that 53% of black renters and 59% of black homebuyers could be expected to encounter one or more incidents of discrimination.<sup>30</sup> Among Hispanics, the expected incidence of discrimination was 46% for renters and 56% for homebuyers.<sup>31</sup> The results of this study therefore demonstrate the persistence of discrimination in the housing market.

Relatively small sample sizes, however, make it difficult to draw conclusions about rates of housing discrimination in individual cities included in the HDS. Nevertheless, the authors oversampled a subset of cities, including New York. According to the authors, the proportion of blacks who encountered comparatively unfavorable treatment in the New York housing market ranged from 40% to 48%.<sup>32</sup> Between 53% and 61% of Hispanic home-seekers in the New York metropolitan area sample had similar experiences.<sup>33</sup>

The authors of the HDS further examined the extent to which living in a particular metropolitan area affected the probability that a minority household would encounter discrimination. Compared to New York, no metropolitan area in the sample had a statistically

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29. See MARGERY AUSTIN TURNER, RAYMOND J. STRUYK & JOHN YINGER, HOUSING DISCRIMINATION STUDY: SYNTHESIS 1 (1991). The study was funded by HUD.

30. See *id.* at 43.

31. *Id.*

32. See JOHN YINGER, HOUSING DISCRIMINATION STUDY: INCIDENCE OF DISCRIMINATION AND VARIATION IN DISCRIMINATORY BEHAVIOR 43-53 (1991). The overall rates of unfavorable treatment are not directly comparable to the probabilities of discrimination reported in the immediately preceding paragraph since the latter are estimated by econometric techniques.

33. *Id.*

greater impact on the probability of a household encountering discrimination.<sup>34</sup> Furthermore, the results of the regression analyses suggest that residents of New York had a significantly higher likelihood of experiencing discrimination as compared to the residents of several other cities.<sup>35</sup>

## **B. Consequences of Discrimination For Minority Households**

Existing research supports the proposition that substantial discrimination against racial and ethnic minorities exists in the New York City housing market. Discrimination by actors in the housing market limits the housing opportunities available to minority households and, in so doing, affects not only their housing conditions, but their health and welfare, as well as their social mobility.

There can be no doubt that the housing conditions of black and Hispanic residents of New York are much less advantageous than white households. Every three years, New York City contracts with the Census Bureau to conduct a survey of households in the City. Data from the 1993 New York City Housing and Vacancy Survey (NYCHVS) on the housing conditions of different racial and ethnic groups are contained in Table 1. White New York households have a significantly higher rate of homeownership (39.3%) than any other racial or ethnic group including blacks (22.2%), Puerto Ricans (12.0%), and Asians (30.8%). In terms of housing affordability, compared to whites, a significantly greater proportion of black, Hispanic, and Asian households pay over 35% of their incomes for rent. Similarly, higher proportions of racial and ethnic minorities live in crowded conditions and in buildings with three or more housing maintenance deficiencies. In terms of neighborhood quality, a much higher proportion of minority households live in neighborhoods they characterize as "poor" and on blocks with boarded up dwellings.

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34. *See id.* at 55-59.

35. For example among black-white testers in the sales market, significantly lower rates of discrimination were found in Austin, Chicago, Dayton, Lansing, Macon, and Philadelphia. In the rental market, no city had a significantly lower rate of discrimination with respect to black-white pairs. Similarly, among Hispanic homebuyers, Chicago, Denver, Houston, and Tuscon had lower rates of discrimination. For Hispanic renters, lower rates of discrimination were found in Austin, Denver, Houston, Los Angeles, Phoenix, and Tuscon. *See id.*

**Table 1: Housing Characteristics of New York City Households**

	All Races	White	Black	Puerto Rican	Non-Puerto Rican Hispanic	Asian
Paying more than 35% of income in rent	40.7%	34.7%	38.9%**	48.6%**	52.0%**	38.8%*
Paying more than 50% of income in rent	27.1%	22.6%	25.4%**	35.6%**	34.9%**	23.6%*
Living in Crowded Housing	23.6%	15.4%	24.9%**	29.1%**	42.1%**	43.7%**
Living in neighborhood with boarded up buildings	17.1%	12.3%	27.7%**	20.9%**	15.4%**	8.3%*
Living in "poor" neighborhood	6.4%	1.8%	11.7%**	11.4%**	11.2%**	2.5%
Living in Buildings with 3 or more deficiencies	16.4%	8.2%	24.8%**	25.9%**	24.7%**	14.1%*
Owner-Occupants	28.7%	39.5%	22.3%**	12.0%**	12.0%**	30.8%**

Source: 1993 New York City Housing and Vacancy Survey Longitudinal Microdata File

Note: Each observation in the New York City Housing and Vacancy Survey sample is weighted by household weights generated by the Census Bureau.

\* Significantly different from whites at the 5% level.

\*\* Significantly different from whites at the 1% level.

Given the income disparities between New York City's white households and its nonwhite and ethnic minority population,<sup>36</sup> one would expect differences to exist in rates of homeownership, affordability and housing and neighborhood quality. Therefore, Table 2 only includes data for households whose incomes are below the federally prescribed poverty level. Nevertheless, among poor households, the racial and ethnic disparities in homeownership rates still increase. Almost one-quarter of poor white households are owner-occupied compared to only 7.9% of blacks and 2.9% of Puerto Ricans. A greater proportion of poor white households—65.5%—pay more than half of their incomes for rent than any other racial or ethnic group except non-Puerto Rican Hispanics. Among black and Puerto Rican households, the proportions who pay over half of their incomes for rent are 54.5% and 61.9%, re-

36. See *supra* text accompanying note 16.

spectively. On virtually all of the other housing and neighborhood quality indicators, poor white households are in an advantageous position compared to blacks and Hispanics. One-third of poor black and Hispanic households live in buildings with three or more maintenance deficiencies compared to only one in ten poor white households. Approximately one-third of poor black and Puerto Rican households and almost one-half of non-Puerto Rican Hispanic and Asian poor households live in crowded conditions compared to only one-fifth of poor white households. Finally, roughly one-quarter and one-third of poor Puerto Rican and black families, respectively, live on blocks with boarded-up buildings as compared to fewer than one in ten whites.

**Table 2: Housing Characteristics of New York City Households with Incomes Below the Poverty Level**

	All Races	White	Black	Puerto Rican	Non-Puerto Rican Hispanic	Asian
Paying more than 35% of income in rent	72.6%	72.8%	66.9%*	73.5%	83.6%**	71.2%
Paying more than 50% of income in rent	62.0%	65.5%	54.5%**	61.9%*	73.1%*	60.6%*
Living in crowded housing	33.1%	20.4%	34.5%**	31.9%**	48.5%**	46.9%**
Living in neighborhood with boarded up buildings	21.9%	9.1%	32.6%**	24.6%**	20.8%**	7.9%
Living in "poor" neighborhood	13.4%	3.2%	18.5%**	16.8%**	16.3%**	4.8%
Living in buildings with 3 or more deficiencies	27.3%	10.0%	35.3%**	32.1%**	32.6%**	21.8%*
Owner-Occupants	10.6%	24.1%	7.9%**	2.9%**	4.3%**	16.4%*

Source: 1993 New York City Housing and Vacancy Survey Longitudinal Microdata File

Note: Each observation in the New York City Housing and Vacancy Survey sample is weighted by household weights generated by the Census Bureau.

\* Significantly different from whites at the 5% level.

\*\* Significantly different from whites at the 1% level.

Tables 1 and 2 suggest that the housing and neighborhood conditions of racial and ethnic minorities in New York City are substan-

tially less desirable than those of white families. Nevertheless, despite disaggregating poor families from the non-poor, it is still possible that factors other than race or ethnicity may be causing these disparate conditions. For example, one hypothesis that would be consistent with the data in Table 2 is that poor white households pay a greater proportion of their incomes for rent and thereby consume better housing and neighborhoods. Disentangling the separate effects of race on housing and neighborhood quality requires the use of multivariate techniques.

In her research, Emily Rosenbaum has used the NYCHVS to analyze the impact of race and ethnicity upon the housing and neighborhood attributes of recent movers in New York City. In one article,<sup>37</sup> she constructed a sample of housing units which had experienced a change of occupancy between 1978-1981, 1981-1984 or 1984-1987. Using logistic regression techniques as controls for a wide variety of building and household characteristics, she found that compared to white households, blacks and Hispanics were more likely to move to apartments with three or more housing maintenance deficiencies<sup>38</sup> and to neighborhoods characterized as fair or poor.<sup>39</sup> A separate study using data from 1991 determined that, compared to whites, housing disparities existed for a variety of Hispanic sub-groups such as Puerto Ricans, Dominicans and Central Americans.<sup>40</sup> Among Asians, however, no significant differences existed with respect to the likelihood of living in an apartment with three or more housing maintenance deficiencies.<sup>41</sup> Rosenbaum further concluded that, other than the Chinese, had a lower probability than whites of being a homeowner.

The NYCHVS data show clear racial and ethnic disparities in housing and neighborhood quality. Together with the HDS results

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37. See Emily Rosenbaum, *The Constraints on Minority Housing Choices, New York City 1978-1987*, 72 SOC. FORCES 725 (1994).

38. See *id.* at 739. Housing maintenance deficiencies include rodents, cracks/holes in walls/floors, missing plaster, insufficient heat and heating breakdowns in the last 90 days. See *id.* at 732.

39. See *id.* at 739. Non-Puerto Rican Hispanic households were not significantly more likely than white households to move to buildings with three or more housing maintenance deficiencies. *Id.*

40. See Emily Rosenbaum, *Racial/Ethnic Differences in Home Ownership and Housing Quality, 1991* (Paper presented at the 1995 Meeting of the Population Association of America in San Francisco) (Table 2) (copy on file with the author). The housing and neighborhood quality indicators included in this study were the existence of three or more housing maintenance deficiencies and the existence of abandoned buildings on the block.

41. *Id.* Among non-Chinese Asians, however, a greater probability of living on a block with abandoned housing existed. *Id.*

and New York's relatively high dissimilarity index score, these data suggest that race discrimination plays an important role in contributing to high levels of racial segregation in the City, as well as inferior neighborhoods and housing conditions for racial and ethnic minorities.

Regardless of its cause, high levels of racial and ethnic housing segregation are likely to have an enormous impact on the health, safety and welfare of city residents. Since the 1970s, cities throughout the nation have experienced a sharp increase in the geographic concentration of poverty. John D. Kasarda's analysis of census data for the largest one hundred cities in America indicates that the number of extreme poverty tracts—census tracts in which 40% or more of the residents earn incomes below the federal poverty level—jumped from 751 in 1970 to 1,954 in 1990.<sup>42</sup> The population living in these extreme poverty tracts doubled during the twenty-year period.<sup>43</sup> In New York City, the number of extreme poverty tracts increased at an even faster rate than the national average. From 1970 to 1990, the number of extreme poverty tracts jumped from 73 to 276; by 1990, 952,484 people or 13% of the City's population lived in these neighborhoods.<sup>44</sup>

As Massey and Denton have demonstrated, high levels of housing segregation among racial and ethnic minorities make them especially vulnerable to living in neighborhoods of concentrated poverty.<sup>45</sup> Given the disproportionately higher rates of poverty experienced by blacks and Hispanics as compared to whites, segregation acts to concentrate and intensify poverty.<sup>46</sup> This relationship is discernible between race and residence in New York City. In 1990, of the 952,484 people residing in extreme poverty tracts in the City, 409,271 were non-Hispanic black individuals and 459,099 were Hispanic.<sup>47</sup>

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42. See John D. Kasarda, *Inner-City Concentrated Poverty and Neighborhood Distress: 1970 to 1990*, 4 HOUSING POL'Y DEBATE 253, 258, 263 (1993). As a proportion of all census tracts in the 100 cities, extreme poverty tracts increased from 6% to 13.7%. See *id.* at 258.

43. In 1970, 2.7 million people lived in extreme poverty tracts. This number increased to 5.5 million in 1990. See *id.* at 263.

44. See John D. Kasarda, *Inner-City Poverty and Economic Access*, in REDISCOVERING URBAN AMERICA: PERSPECTIVES ON THE 1980s 4-1, 4-39 to 4-41 (Jack Sommer & Donald A. Hicks eds., 1993).

45. MASSEY & DENTON, *supra* note 18, at 118-25. For a review of Massey and Denton's book, see Michael H. Schill, *Race, the Underclass, and Public Policy*, 19 J. L. & SOC. INQUIRY 433 (1994).

46. See MASSEY & DENTON, *supra* note 18, at 140-45.

47. See Kasarda, *supra* note 44, at 4-41.

Living in communities of concentrated poverty has enormous social consequences for New York City's minority residents. Typically, these communities have high rates of infant mortality and crime.<sup>48</sup> Proximate employment opportunities typically diminish as do other forms of economic activity.<sup>49</sup> In addition, several sociologists have argued that living in communities of concentrated poverty can generate behavioral adaptations which impede social mobility. For example, William Julius Wilson has argued that children who grow up in environments with few working role models develop weak attachments to the labor force.<sup>50</sup> Lacking employment opportunities and the appropriate socialization to seek work, these youths will frequently engage in deviant or illegal activities to earn income and gain status, thereby further distancing themselves from middle-class norms.<sup>51</sup> These behaviors are reinforced by peer groups. Activities likely to assist them in obtaining employment and social mobility, such as graduating from high school, are stigmatized rather than valued.<sup>52</sup>

Since 1987, social scientists have repeatedly tested Wilson's hypothesis that growing up in a neighborhood of concentrated poverty will generate "concentration effects." Although the precise causal mechanism remains a matter of debate, studies testing the theory demonstrate a consistent relationship between social and spatial isolation on the one hand, and high rates of teenage childbearing, school dropouts and welfare dependency on the other.<sup>53</sup>

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48. See CITIZENS COMMITTEE FOR CHILDREN OF NEW YORK, KEEPING TRACK OF NEW YORK'S CHILDREN 55-63 (1995).

49. For a discussion of how some impoverished neighborhoods are seeking to spark economic development, see Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE \_\_\_ (forthcoming 1997).

50. See WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY 56-57 (1987).

51. *Id.* at 57-58. See also William J. Wilson, *Studying Inner-City Social Dislocations: The Challenge of Public Agenda Research*, 56 AM. SOC. REV. 1, 12 (1991) ("The issue is not simply that the underclass or ghetto poor have a marginal position in the labor market . . . it is also that their economic position is uniquely reinforced by their social milieu.").

52. See MASSEY & DENTON, *supra* note 18, at 167-76 (describing "oppositional cultures" developed by young people to protect their self esteem).

53. See Elijah Anderson, *Neighborhood Effects on Teenage Pregnancy*, in THE URBAN UNDERCLASS 375, 382-90 (Christopher Jencks & Paul E. Peterson eds., 1991) (describing cultural explanations for teenage pregnancy in ghetto communities); Jeanne Brooks-Gunn *et al.*, *Do Neighborhoods Influence Child and Adolescent Development?*, 99 AM. J. SOC. 353 (1993) (the presence of affluent neighbors decreases the likelihood that teenagers will have children and drop out of school); Rebecca L.

## II. The New York City Human Rights Commission and the Battle Against Housing Discrimination

Although the problems posed by housing discrimination appear especially intense today, they have existed in one form or another for almost a century. Nathan Glazer and Daniel P. Moynihan observed that in 1910, although blacks constituted only a small proportion of the City's total population, segregation was "universal."<sup>54</sup> By 1920, according to Harold Connolly, Brooklyn residents were already banding together to prevent black families from moving into their neighborhoods.<sup>55</sup>

New York City was at the forefront of efforts to combat housing discrimination. In 1955, Mayor LaGuardia and the City Council created the Commission on Intergroup Relations (COIR) to investigate claims of discrimination. Three years later, New York became the first city in the nation to outlaw discrimination in the private housing market. COIR and later its successor, the New York City Human Rights Commission, were vested with the authority to administer and enforce this law. This part discusses, from an historical perspective, New York City's pathbreaking Fair Housing Practices Law and the efforts by COIR and the Human Rights Commission to fight discrimination in the housing market. It then examines the law more carefully, drawing parallels to similar state and federal statutes. Finally, it examines current enforcement of the law by the Human Rights Commission.

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Clark, NEIGHBORHOOD EFFECTS ON DROPPING OUT OF SCHOOL AMONG TEENAGE BOYS 16-21 (Urban Institute Discussion Paper PSC-DSC-UI-13, Dec. 1992) (rates of school drop-outs among boys increase as the proportion of poor households in a community increases and as the proportion of households employed in middle-class occupations declines, although the results do not support a contagion theory); Jonathan Crane, *The Epidemic Theory of Ghettos and Neighborhood Effects on Dropping Out and Teenage Childbearing*, 96 AM. J. SOC. 1226, 1236 (1991) (as the proportion of high status job-holders in a community declines, teenage pregnancy and the rate of school drop-outs increases exponentially, thereby supporting the contagion model); Paul Osterman, *Welfare Participation in a Full Employment Economy: The Impact of Neighborhood*, 38 SOC. PROB. 475, 486 (1991) (as the proportion of employed persons in a community decreases, the likelihood that an individual resident will receive public assistance increases.).

54. See GLAZER & MOYNIHAN, *supra* note 2, at 26.

55. See HAROLD X. CONNOLLY, *A GHETTO GROWS IN BROOKLYN* 58-60 (1977) (describing the Gates Avenue Association in Brooklyn's Bedford-Stuyvesant neighborhood).

## A. The New York City Human Rights Commission's Battle Against Housing Discrimination: An Historical Perspective

### 1. *The Early Years (1939-1965)*

Legislative efforts to combat housing discrimination in New York City began, in earnest, during and after World War II.<sup>56</sup> In 1939, the State of New York banned discrimination in publicly owned housing based upon a tenant's "race, creed, color or national origin."<sup>57</sup> In 1943, partly in response to the restrictive rental practices of the Metropolitan Life Insurance Company in its newly constructed Stuyvesant Town development,<sup>58</sup> the City Council further outlawed discrimination in any housing which benefited from tax exemptions.<sup>59</sup>

Responding to the Harlem Race Riots, Mayor LaGuardia established an interracial Unity Committee in 1943. The Committee, supported largely by private donations, was charged with investigating and conciliating claims of racial discrimination. One of the main achievements of the Committee was a statement approved by the Mayor in 1950 decrying racial discrimination as being a "moral travesty," violating democratic and Christian traditions.<sup>60</sup> The Unity Committee was superceded in 1955 by the Commission on Intergroup Relations (COIR).<sup>61</sup> COIR, whose fifteen members were appointed by the Mayor, was charged with investigating complaints and initiating its own investigations of discrimination based upon race, creed, color, national origin and ancestry. Unlike the Unity Committee, COIR was empowered to issue subpoenas and take testimony under oath.<sup>62</sup>

Meanwhile, the State of New York and New York City were gearing up to expand the scope of existing anti-discrimination laws. By 1951, both the City Council and the New York State Legislature

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56. Some have argued that New York's legislation to combat housing discrimination was a response to the racial and ethnic genocide practiced by Nazi Germany. See Robison, *supra* note 2, at 34-35.

57. *Id.* at 35.

58. A legal challenge was mounted to Metropolitan Life's exclusionary admissions practice in *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950). In the end, the New York Court of Appeals held that the development did not involve state action and therefore did not violate the Fourteenth Amendment to the United States Constitution.

59. See Robison, *supra* note 2, at 36.

60. See GERALD BENJAMIN, RACE RELATIONS AND THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS 67-68 (1974).

61. See New York, N.Y., Local Law No. 55 (June 3, 1955).

62. *Id.* at § B1-5.0(4)-(5).

had passed laws outlawing discrimination in housing which received substantial public assistance.<sup>63</sup> In 1955, the Governor also signed legislation extending anti-discrimination coverage to housing built with federal mortgage insurance.<sup>64</sup>

In 1957, two years after it had established COIR, the New York City Council passed the first law in the nation prohibiting discrimination in privately-owned housing that did not receive public subsidies or tax abatements. Following defeat of a similar measure in the New York State Legislature, Councilmembers Sharkey, Brown and Isaacs introduced a bill which provided for criminal penalties against people who were found to discriminate. The legislation attracted the intense opposition of the real estate industry.<sup>65</sup> In an effort to achieve a consensus behind the bill, the criminal penalty provisions were dropped and, in their place, the sponsors substituted enforcement by civil suits as well as administrative enforcement by COIR.<sup>66</sup> Before finally passing the City Council on December 5, 1957, the enforcement provisions were weakened once more when they were amended to provide that only COIR would have the authority to seek conciliation. If this were not possible, the complaint would be forwarded to the newly created Fair Housing Practices Board for investigation. If the Fair Housing Practices Board made a determination that proscribed discrimination had likely taken place, the complaint would be sent to the Corporation Counsel for legal action.<sup>67</sup> Four years later, the New York State Legislature passed a similar law.<sup>68</sup> Despite challenges, New York courts held that the new state anti-discrimination law did not preempt New York City's Fair Housing Practices law.<sup>69</sup>

In 1960, the constitutionality of New York City's Fair Housing Practices Law was challenged in state court. In *Martin v. City of New York*,<sup>70</sup> the plaintiff was a landlord who claimed that the local

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63. See Robison, *supra* note 2, at 46-49.

64. See *id.* at 52.

65. See *id.* at 54.

66. See *id.* at 55.

67. See New York, N.Y., Local Law No. 80 (Dec. 30, 1957).

68. See Robison, *supra* note 2, at 62. The state legislation had broader coverage than the law passed by the New York City Council in 1957. Instead of being limited to multi-family dwellings, the state statute applied to all housing except rentals in two family owner-occupied homes and rooms to boarders. See *id.* New York City would broaden its coverage to mirror the state statute the same year. See *infra* text accompanying note 80.

69. See *City of New York v. Clafington, Inc.*, 40 Misc. 2d 547, 243 N.Y.S.2d 437 (Sup. Ct. 1963).

70. 22 Misc. 2d 389, 201 N.Y.S.2d 111 (1960).

law interfered with his property rights. According to the complaint, the landlord alleged that the existence of black tenants would reduce his rental income. Observing that the state had broad powers to regulate the housing market, the court rejected the constitutional challenge and upheld the law.<sup>71</sup>

With its new responsibilities, COIR grew faster between 1958 and 1960 than during any other point in its history or the history of its successors. In 1956-1957, prior to the passage of the Fair Housing Practices Act, COIR employed 12 people and had a budget of \$120,000. Three years later, its budget had jumped to \$370,525 and its staff to 53.<sup>72</sup> Importantly, the Fair Housing Practices Law also changed the orientation of COIR. In 1956, prior to its enactment, the Commission launched the Open Cities Program, an attempt to promote desegregation by systematic action. Under the program, COIR promoted the development of centralized listings of housing vacancies and negotiated with apartment building owners to make units available to racial and ethnic minority households.<sup>73</sup> The Sharlley-Brown-Isaacs Act effectively redirected the attention of the Commission away from systemic efforts to fight segregation and towards the processing of individual complaints.<sup>74</sup>

In the four years immediately following the adoption of the Fair Housing Practices Law, COIR received 939 sworn complaints alleging housing discrimination.<sup>75</sup> Just over half of these complaints were settled by COIR; the remainder were dismissed for administrative reasons or because discrimination was unsubstantiated. Of those cases settled by COIR, the complainant was offered the apartment at issue 29.1% of the time and an alternative dwelling in an additional 24% of the cases.<sup>76</sup> Eighty-one percent of all complainants were black and 8% were Puerto Rican.<sup>77</sup> A majority of these people were characterized by members of the Commission's research staff as middle class.<sup>78</sup>

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71. *Id.* at 391, 201 N.Y.S.2d at 112-13.

72. *See* BENJAMIN, *supra* note 60, at 86.

73. *See id.* at 101.

74. *Id.* at 103.

75. *See* Florence M. Cromien, Four Years of the Fair Housing Practices Law of the City of New York: Status of Complaints of Discrimination in Housing April 1, 1958 - March 31, 1962 (NYCCHR Research Report No. 11, June 1962) (on file with the author).

76. *Id.* at 3.

77. *See* Goldblatt and Cromien, *supra* note 2, at 366-67.

78. *Id.* Thirty-seven percent of the black complainants were college graduates and an additional 22% had some college education. *Id.*

Over the next several years, the City Council made several changes affecting enforcement of the City's laws prohibiting housing discrimination. In 1961, the Fair Housing Practices Law was amended to make discriminatory lending practices and advertising illegal.<sup>79</sup> In addition, the exemptions under the original law were narrowed. Only two-family dwellings, in which the owner occupied one housing unit, and rooms in apartments or homes were exempted from coverage.<sup>80</sup>

In 1962, COIR was re-constituted as the New York City Commission on Human Rights, although its powers did not substantially change. Local Law 97, passed by the City Council in 1965, however, gave the Commission additional broad enforcement powers with respect to claims of housing discrimination.<sup>81</sup> The Commission, rather than the Fair Housing Practices Board, investigated discrimination claims and had the power to issue subpoenas, take proof and administer oaths. The Commission also had the power to post notices on buildings under investigation warning prospective tenants or purchasers that occupancy of the dwellings was contested. In addition, the Human Rights Commission was authorized to obtain temporary injunctive relief to preserve housing opportunities for complaints. Finally, after hearing evidence, the Commission was empowered to issue cease and desist orders and require the respondent to take affirmative measures to remedy discriminatory actions.<sup>82</sup>

One section of Local Law 97 that had nothing to do with housing nonetheless had a profound affect on the New York City Human Rights Commission and its efforts to fight residential discrimination. For virtually all of its young life, the battle against housing discrimination and segregation was the central activity of COIR.<sup>83</sup> Nevertheless, in 1965 the Human Rights Commission's jurisdiction expanded to include claims involving employment discrimination.<sup>84</sup> Within a short period of time, employment discrimination claims outnumbered those concerning housing.<sup>85</sup>

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79. See New York, N.Y., Local Law No. 48 § X41-3.0(b)-(c) (1961).

80. *Id.* at § 41-3.0(a).

81. See New York, N.Y., Local Law No. 97 (Dec. 13, 1965).

82. *Id.* Unsuccessful complainants or respondents could appeal the findings of the Human Rights Commission to state supreme court. Nevertheless, the Commission's findings of fact are conclusive if supported by substantial evidence. *Id.*

83. See BENJAMIN, *supra* note 60, at 101.

84. See New York, N.Y., Local Law No. 97, § B1-7.0.

85. See *infra* text accompanying notes 140-41.

## 2. *Expansion and Change: 1966-1989*

In 1968, the City Council began gradually expanding the classes of people protected under the New York City Human Rights Law. Passage of Local Law 95 provided protections for people with physical handicaps.<sup>86</sup> Five years later, the Council passed and the Mayor signed Local Law 7, which forbade discrimination on the basis of sex or marital status.<sup>87</sup> In a hearing preceding the signing of the ordinance, the Mayor and members of the Council noted that some building owners would not rent to single people, particularly single women. One speaker observed that landlords sometimes used sex or marital status as a pretext for rejecting prospective minority tenants.<sup>88</sup>

In 1977, discrimination against tenants or homebuyers on the basis of age was outlawed in New York<sup>89</sup> and, in 1981, the Council passed a bill broadening the definition of handicap to include mental impairments.<sup>90</sup> Alcoholics, substance abusers and drug addicts were protected from discrimination provided they were recovering and, at the time of the application for housing, free from abuse.<sup>91</sup>

Further enlargement of the scope of the Human Rights Law occurred in 1986. Observing that "throughout the history of the city, many New Yorkers have encountered prejudice on account of their sexual orientation,"<sup>92</sup> the City Council passed Local Law 2 outlawing discrimination based on sexual orientation.<sup>93</sup> That same year the Council proscribed discrimination based upon a person's lawful occupation.<sup>94</sup> Finally, families with children were brought within the scope of the Human Rights Law. In signing the applicable legislation, the Mayor observed: "Because housing is in such short supply, rental restrictions placed on families add an untenable burden to low-, moderate-, and middle- income people . . ."<sup>95</sup> The Mayor pointed to testimony given at a 1983 hearing demonstrating

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86. See New York, N.Y., Local Law No. 95 (1968).

87. See New York, N.Y., Local Law No. 7 (Feb. 7, 1973). The law exempts from coverage single sex rooming houses, dormitories and residential hotels. *Id.*

88. Public Hearing on Local Laws, June 25, 1973 (statement of Mayor Edward I. Koch) (transcript on file with the author).

89. See New York, N.Y., Local Law No. 61 (Sept. 6, 1977).

90. See New York, N.Y., Local Law No. 49 (June 16, 1981).

91. *Id.* at §§ 2-3.

92. New York, N.Y., Local Law No. 2 § 1 (Apr. 2, 1986).

93. *Id.* at § 2.

94. New York, N.Y., Local Law No. 59 § 1 (Nov. 25, 1986).

95. Public Hearing on Local Laws, June 25, 1973 (statement of Mayor Edward I. Koch) (transcript on file with the author).

that restrictions against children in rental buildings were common and "profoundly" affected minority and female-headed households.<sup>96</sup>

The last major expansion of the groups protected under the Human Rights Law took place in 1989. In that year, the City Council passed a law making it illegal to discriminate against a person based upon his or her alienage or citizenship status.<sup>97</sup> According to the statement of policy contained in the legislation, the passage of federal immigration laws designed to restrict illegal aliens had made immigrants to the City vulnerable to exploitation. Discrimination was practiced not just with respect to illegal immigrants, but also against people perceived to be there in violation of the law.<sup>98</sup> Sometimes citizenship status was used as a pretext for already proscribed discrimination based upon national origin.<sup>99</sup>

In addition to responding to individual complaints, during the period between 1966 and 1989, the Commission sporadically engaged in proactive efforts to investigate discrimination in the housing market and promote integration. In 1968, for example, the Commission began an investigation of Metropolitan Life Insurance Company's "deliberate, intentional and systematic" exclusion of blacks and Puerto Ricans from the Stuyvesant Town, Peter Cooper Village and Parkchester housing developments. Following publicity of the investigation, Metropolitan Life entered into an agreement with the Commission in which it promised to stop its practice of giving preferences to relatives of existing tenants, consider blacks and Puerto Ricans concurrently with people already on waiting lists for the developments, and issue orders to its staff not to discriminate.<sup>100</sup> Within five months from the date the agreement was reached, just under one-fifth of all new tenants selected for Parkchester and Stuyvesant Town were nonwhite.<sup>101</sup>

Integration in the 1960s and 1970s was threatened not solely by the refusal of landlords, sellers and real estate agents to deal with nonwhite homebuyers and tenants; in addition, neighborhoods throughout the City were rapidly transforming from white to black through a combination of blockbusting and white flight. Hearings

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96. *Id.*

97. *See* New York, N.Y., Local Law No. 52 § 3 (July 18, 1989).

98. *Id.* at § 1.

99. Memorandum on "Protecting Immigrants from Discrimination" from Dr. John E. Brandon, Commissioner, to Mayor Edward I. Koch 3 (October 26, 1988) (on file with the author).

100. *See* BENJAMIN, *supra* note 60, at 234.

101. *Id.*

revealed that in several neighborhoods real estate agents spread rumors that black people would soon be moving into the communities and that property values would plummet. The fear of falling property values and racial prejudice caused white owners to move away, selling their homes for less than market value. Entire neighborhoods were transformed from white to black in a matter of years.<sup>102</sup>

Under the leadership of its chairperson, Eleanor Holmes Norton, the New York City Human Rights Commission launched an ambitious program to shore up neighborhoods and promote integration. The central element of this policy was the federally-funded Neighborhood Stabilization Program, which sought to prevent neighborhood transition by enforcing the law against blockbusting and organizing residents to preserve their neighborhoods.<sup>103</sup> Outreach offices were opened in several neighborhoods. Clean-up campaigns, street repairs and community meetings were also part of this multi-pronged effort.<sup>104</sup> In addition, the Commission promoted efforts to affirmatively market neighborhoods so as to attract and retain a diverse population.<sup>105</sup>

The Commission also sought to prevent blockbusting and redlining of New York City neighborhoods. Using its power to issue "non-solicitation orders,"<sup>106</sup> the Commission forbade real estate agents from soliciting clients in several neighborhoods in Queens and the Bronx.<sup>107</sup> In addition, the Commission was instrumental in getting the Secretary of State to issue non-solicitation orders for the entire boroughs of Brooklyn and Queens.<sup>108</sup> Efforts were also made to uncover practices of financial institutions that effectively

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102. *Id.* at 165-66.

103. See Eleanor Holmes Norton, *The Challenge of Equality: The Work of the New York City Commission on Human Rights 1970-1977* 52-53 (May 1977) (unpublished report on file with the author).

104. *Id.* at 52-54.

105. *Id.* at 52.

106. See NEW YORK, N.Y., ADMIN. CODE § 8-204 (1996).

107. See Holmes Norton, *supra* note 103, at 62-63.

108. *Id.* at 64. In 1989, the New York State Court of Appeals ruled that the Secretary of State exceeded her authority in ordering non-solicitation orders. See *Campagna v. Shaffer*, 73 N.Y.2d 237, 243, 536 N.E.2d 368, 370-71, 538 N.Y.S.2d 933, 935-36. The New York State Legislature responded to *Campagna* by granting the Secretary broad powers to enter nonsolicitation orders. See N.Y. REAL PROP. LAW § 442-h (McKinney 1994). This legislation was struck down by a federal appellate court in 1994 as violating the First Amendment to the United States Constitution. See *New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 845 (2d Cir.), *cert. denied*, 115 S.Ct. 511 (1994).

denied credit to inner city communities.<sup>109</sup> Studies of purported "redlining" were undertaken for several neighborhoods including those in Southeast Queens and Rockaway.<sup>110</sup>

As described in more detail in Part I, in the mid-1980s, the Human Rights Commission also launched a systemic investigation of discrimination by real estate agents in four New York boroughs.<sup>111</sup> A total of 32 investigations were conducted and 12 complaints were filed in federal court by the Corporation Counsel. The Commission obtained settlements in every case. Typically, the consent decree required the defendant to agree to not discriminate against protected groups, to require its brokers and salespeople to attend training sessions on anti-discrimination law, and to adequately supervise employees to ensure that no discrimination occurred in the future. Defendants also paid civil fines to the City, promised to advertise in newspapers with predominantly minority readership and agreed to maintain adequate records for inspection of housing opportunities and people served.<sup>112</sup>

### 3. *The Human Rights Commission in the 1990s*

The 1990s have, thus far, been a turbulent period for the New York City Human Rights Commission. The decade began with a major reorganization of the Commission in response to a report prepared by a mayoral task force. The task force made sixty-two separate recommendations, several of which were implemented administratively.<sup>113</sup> Perhaps most important with respect to housing, the Fair Housing Division was subsumed under a newly constituted Law Enforcement Division.<sup>114</sup> Therefore, beginning in the early 1990s, housing discrimination complaints would be investigated by the same staff that handled cases involving AIDS, government employment and private employment.

The City Council implemented several other Task Force recommendations and added several of its own ideas in its 1991 compre-

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109. See Holmes Norton, *supra* note 103, at 65.

110. See, e.g., New York City Commission on Human Rights, *Redlining in Southeast Queens* (December 1977) (unpublished report on file with the author); New York City Commission on Human Rights, *Redlining in Rockaway* (June 1978) (unpublished report on file with the author).

111. See *supra* text accompanying notes 26-28.

112. See, e.g., *City of New York v. Fillmore Real Estate, Ltd.*, 85 Civ. 1769 (ERK) (E.D.N.Y. Sept. 18, 1989) (consent judgment).

113. TASK FORCE ON THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS, TASK FORCE REPORT 107 (1988) [hereinafter TASK FORCE REPORT].

114. *Id.* at 17-18.

hensive overhaul of the Human Rights Law.<sup>115</sup> Local Law 39 narrowed the exemption for single family homes to include only homes that were sold or rented without public advertisement.<sup>116</sup> The ordinance also allowed owners of housing built for senior citizens to discriminate against families with children.<sup>117</sup> Furthermore, the law explicitly prohibited the practice of blockbusting.<sup>118</sup>

In addition to expanding coverage, Local Law 39 made several changes to the Human Rights Commission's enforcement mechanisms. The ordinance spelled out in detail the powers and procedures of the Commission both regarding the investigation of individual complaints and systemic discriminatory practices. With respect to the latter, the City Council expressly authorized the use of a disparate impact theory of liability.<sup>119</sup> Civil penalties of up to \$50,000 were authorized for violation of the law.

In light of the persistent backlog of complaints facing the Commission, Local Law 39 additionally provided for a private right of action in state court for violation of the Human Rights Act. Successful complainants would be entitled to an award of attorneys fees. Because other provisions of the Human Rights Law prohibited litigation while the Commission had jurisdiction over a complaint, the ordinance also empowered persons who had filed a complaint with the Commission which had not been resolved in 180 days to gain a dismissal of the claim without prejudice.

## **B. A Comparison of New York City's Human Rights Law with State and Federal Laws Prohibiting Housing Discrimination**

New York City's Fair Housing Practices Law, later known as the Human Rights Law, preceded similar state and federal enactments

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115. See New York, N.Y., Local Law No. 39 (June 18, 1991).

116. *Id.* at § 8-107(5)(a)(4)(a)(1). In addition, the ordinance deleted the exemption permitting discrimination by sex in single sex rooming houses. *Id.* at § 8-107(5)(a)(4)(a)(3).

117. For a more detailed description of this exemption, see *infra* note 132.

118. New York, N.Y., Local Law No. 39 § 8-107(a)(4)(a)(3)(c)(3). In addition, discrimination based upon the perceived characteristics of prospective tenants and homebuyers was made illegal. Local Law 39 also made several changes to the terminology used to describe protected classes. References to "handicapped" were replaced with the word "disabled;" the term "sex" was changed to "gender." *Id.*

119. Under this disparate impact test, an unlawful discriminatory practice is established when it is proved that a practice or policy of a defendant results in a disparate impact on a protected group and the defendant fails to prove that such policy or practice bears a significant relationship to a significant business objective. See NEW YORK, N.Y., ADMIN. CODE § 8-107(17)(a)(2) (1996).

by several years. Since the 1960s, with the enactment by the New York State Legislature of its own Human Rights Law<sup>120</sup> in 1961 and the Fair Housing Act<sup>121</sup> by Congress in 1968, New York City residents who encounter discrimination in the housing market have been able to seek redress under more than one body of law.<sup>122</sup>

All three anti-discrimination laws are similarly structured. Each law designates a set of protected classes. Acts which discriminate against persons in these classes, such as refusing to rent or sell, refusing to make loans or advertising in a manner that shows a preference not to deal with these individuals, are illegal. Each statute also establishes an administrative mechanism to investigate alleged acts of discrimination and, if illegal discrimination is found to occur, provides remedies to the aggrieved party or parties.

Although there is considerable overlap among the three statutes, each differs from the other in terms of both its substantive coverage and enforcement procedures. Perhaps the most important difference among the three laws is the designation of protected classes. As Table 3 indicates, all three sources of law protect against discrimination based upon the race, religion (creed), color, national origin, sex, disabilities or familial status of a homebuyer or renter.<sup>123</sup> Each law defines disabilities as including both mental and physical disabilities.<sup>124</sup> Familial status is defined under the Fair Housing Act and the New York State Human Rights Law as including parents with children, persons having legal custody, or parental designees who have custody of children under the age of 18.<sup>125</sup> The New York City Human Rights Law, however, does not explicitly define the term "children."

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120. See N.Y. EXEC. LAW §§ 290-301 (McKinney 1993 & Supp. 1996).

121. 42 U.S.C. §§ 3601 *et seq.*

122. In addition, other sources of law exist for claims of housing discrimination. See, e.g., The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (1994); N.Y. CIV. RIGHTS LAW § 18-c (McKinney 1992 & Supp. 1996); N.Y. REAL PROP. LAW §§ 236-37 (McKinney 1989); N.Y. GEN. OBLIG. LAW § 5-331 (McKinney 1989).

123. New York, N.Y., Local Law No. 80 (Dec. 30, 1957); N.Y. EXEC. LAW §§ 290-301; 42 U.S.C. §§ 3601 *et seq.*

124. 42 U.S.C. § 3602(h); N.Y. EXEC. LAW § 292(21); NEW YORK, N.Y., ADMIN. CODE § 8-102(16)(a).

125. 42 U.S.C. § 3602(k)(2); N.Y. EXEC. LAW § 292(26).

**Table 3: A Comparison of Three Laws Prohibiting Housing Discrimination**

Year Enacted	New York City Human Rights Law 1958	New York State Executive Law 1961	United States Fair Housing Act 1968
Protected Groups	race creed color nat'l origin gender age disability marital status children alienage/citizenship sexual orientation occupation	race creed color nat'l origin sex age disability marital status family status	race religion color nat'l origin sex handicap family status
Exempt Housing (Generally Applicable)	1-2 Family Owner Occupied Housing*	1-2 Family Owner Occupied Housing**	4 or Fewer Units in Building & Occupied by Owner
	Housing units in which alleged discriminating party resides	Housing units in which alleged discriminating party resides	Single Family Homes***
Exempt Housing (Applicable to Protections for Family Status only)	Subsidized elderly housing Certain other elderly housing	None****	Subsidized elderly housing Certain other elderly housing
Private Right of Action	Yes	Yes	Yes
Enforcement Agency	N.Y.C. Commission on Human Rights	N.Y.S. Division of Human Rights	U.S. Dep't of HUD or substantially equivalent state agencies
Public Representation in Court	No	No	Yes (by Justice Department)
Punitive Damages in Administrative Action	None	Up to \$10,000	None
Punitive Damages in Court Proceeding	Yes	Yes	Yes
Civil Penalties	Up to \$50,000	Restitution of Profits	Up to \$50,000

\* Provided that the housing unit has not been publicly advertised. Exemption not applicable to housing financed with government guaranteed loans.

\*\* Exemption not applicable to housing financed with government guaranteed loans.

\*\*\* Subject to extensive limitations. See 42 U.S.C. § 3603(b)(1).

\*\*\*\* Law exempts housing exclusively for people aged 55 and over from protections based upon age.

New York State's Human Rights Law also prohibits discrimination in housing based upon the home seeker's marital status or

age.<sup>126</sup> In addition to including protections against discrimination for these two classes, the New York City ordinance includes protections that go beyond the other two statutes: protecting people against discrimination based upon their alienage or citizenship status, sexual orientation and lawful occupation.<sup>127</sup>

Not all housing is covered by each law. The scope of the Fair Housing Act is the narrowest; it exempts all buildings with fewer than five housing units provided that the owner lives in the building.<sup>128</sup> In addition, single family homes sold or rented by the owner are typically not covered under the Act.<sup>129</sup> Like the Fair Housing Act, both the New York State and City Human Rights Laws provide exemptions for owner-occupied housing, but limit the exempt buildings to one and two family homes.<sup>130</sup> In addition, the laws permit a person who wishes to rent a room in his or her dwelling unit to discriminate against otherwise protected parties.<sup>131</sup>

The Fair Housing Act and the New York City Human Rights Law provide additional exemptions permitting owners of housing built for the elderly to refuse to rent or sell to families with children.<sup>132</sup> The New York State Human Rights Act does not include an exemption for elderly housing, but does provide that sellers, landlords and agents can discriminate based upon age if the housing is exclusively limited to persons 55 years of age or older.<sup>133</sup>

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126. N.Y. EXEC. LAW § 291(2).

127. NEW YORK, N.Y., ADMIN. CODE § 8-107(5)(2).

128. 42 U.S.C. § 3603(b)(2).

129. In order for the single family home to be exempt from coverage, its owner must own no more than two other homes. If the owner does not reside in the home at the time of sale or was not the last resident prior to sale then the exemption applies only to one sale within any 24 month period. In addition, the owner may not use any sales or rental facilities or the services of a real estate agent in connection with the sale or rental. See 42 U.S.C. § 3603(b)(1).

130. See N.Y. EXEC. LAW § 296(5)(a)(3); NEW YORK, N.Y., ADMIN. CODE § 8-107(5)(a)(4).

131. *Id.*

132. Owners of housing built for the elderly and financed with public subsidies may discriminate against families with children. See 42 U.S.C. § 3607(b)(1); NEW YORK, N.Y., ADMIN. CODE § 8-107(5)(h). In addition, owners of housing developments that are intended for and solely occupied by persons aged 62 or older may restrict occupancy to the elderly. Finally, housing that is intended and operated for occupancy by people over the age of 54 and has significant facilities and services to meet the needs of people in this age group is also exempt from the prohibition on discrimination against families with children. 42 U.S.C. § 3607(b)(2)(C)(i). At least 80% of the housing units must be occupied by persons 55 years of age or older. 42 U.S.C. § 3607(b)(2)(C)(ii).

133. N.Y. EXEC. LAW § 296(5)(a)(3).

The enforcement mechanism set up under the New York City Human Rights Law is similar to the New York State scheme, but quite different from the Fair Housing Act. Under the Fair Housing Act, HUD is designated the primary administrative enforcement agency for complaints alleging housing discrimination. If the complaint originates from a state or locality with a substantially equivalent anti-discrimination law and enforcement mechanism, HUD must refer the complaint to the state or local human rights agency.<sup>134</sup> Otherwise HUD investigates the complaint and determines whether probable cause exists to believe that the law has been violated. Whereas a probable cause finding by the New York City Human Rights Commission automatically leads to an administrative hearing by the Commission's administrative law judge, a similar finding by HUD presents the complainant with a choice of forums. The complaint may be argued before a HUD administrative law judge. Alternatively, either the complainant or the respondent may elect to proceed in federal district court. If an election to proceed in court is made, the United States Justice Department is required to represent the complainant at no cost.

The forum in which a housing discrimination complaint is heard affects the types of remedies that might be awarded if the seller, landlord, real estate agent or financial institution is found to have violated the law. Neither the Human Rights Commission nor HUD are empowered to award punitive damages. The New York State Division of Human Rights, however, may grant a prevailing complainant up to \$10,000 in punitive damages.<sup>135</sup> Nevertheless, if the complainant brings a private cause of action under any of the three laws or elects to bypass the HUD administrative law judge, a state or federal court is empowered to grant full punitive damages.<sup>136</sup> Although the Human Rights Commission and HUD are not permitted to award punitive damages to successful complainants, they may order respondents to pay civil penalties to the government of up to \$50,000.<sup>137</sup>

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134. 42 U.S.C. § 3610(f)(1).

135. N.Y. EXEC. LAW § 297(4)(c).

136. See 42 U.S.C. § 3613(c)(1); NEW YORK, N.Y., ADMIN. CODE § 8-502(a); N.Y. EXEC. LAW § 297(9).

137. 42 U.S.C. § 3612(g)(3); NEW YORK, N.Y., ADMIN. CODE § 8-124.

### C. An Examination of Housing Discrimination Complaints Filed with the New York City Commission on Human Rights

In 1993, the very existence of the Human Rights Commission was in doubt. As a mayoral candidate, Rudolph Giuliani proposed eliminating the Commission and turning over its powers to the state or other city agencies.<sup>138</sup> Upon taking office in 1994, however, Mayor Giuliani decided to retain the Commission, reorienting its mission toward more efficient law enforcement. Nevertheless, fiscal pressures to cut the City's budget have taken their toll on the Commission. As Table 4 indicates, after steadily growing throughout the 1980s and 1990s, the Commission's expenditures fell by one-fifth between 1994 and 1995. In addition, the number of full time employees working for the Commission declined by twenty-three percent from 1990 to 1995. Part of this decline in budget and personnel is attributable to the effects of the Mayor's offer of severance packages to city employees. According to one account, one-third of the Commission's legal staff took advantage of the offer and left the agency.<sup>139</sup>

**Table 4: Budget and Personnel (1980-1994)**

	1980	1985	1990	1994
Commission Full Time Personnel	110	133	205	159
Commission Expenditures (000)	2.1	2.8	8.1	9.5
Total City Expenditures & Debt Service	13,493	18,796	25,932	31,348
Commission Expenditures as a Percentage of Total City Expenditures & Debt Service	.02	.01	.03	.03

Source: CITY OF NEW YORK, COMPREHENSIVE ANNUAL FINANCIAL REPORT OF THE COMPTROLLER FOR THE FISCAL YEAR ENDED JUNE 30, 1994 (1994).

Budgetary cutbacks have made it difficult for the Human Rights Commission to reduce its backlog of complaints and expedite the processing of claims. Data obtained from the Commission on 266 housing complaints filed in 1992 and 1993 indicate that obtaining a final resolution of a housing discrimination claim can take years. As of September 1995, 227 of these complaints were either closed by the Commission or under investigation for more than two years. Of these 227 complaints, 22.5% closed in less than six months. An

138. Michael Powell, *Rights Commission Set To Attack Rudy?*, NEWSDAY, Feb. 23, 1994, at 18.

139. See Michael Powell, *Party Pooped Career; Resigns Over GOP Query*, NEWSDAY, Aug. 11, 1994, at 4.

additional 19.4% closed after six months but within one year. However, it took between one and two years for the Commission to close 18.1% of all housing complaints and for over 40% of the complaints filed, a final resolution took more than two years.

Statistics on complaints filed also demonstrate the declining role of housing discrimination in the Commission's total workload. In 1968, just over half of all complaints filed with the Human Rights Commission pertained to housing.<sup>140</sup> By contrast, in 1994, only 169 of the 1,355 cases in which complaints were filed or 12.5% of the total caseload were housing-related.<sup>141</sup> The decline in housing relative to other categories of discrimination claims is likely caused by several factors. Since the mid-1960s, the Commission has increasingly focused its efforts on fighting discriminatory employment practices.<sup>142</sup> In addition, under the Fair Housing Act,<sup>143</sup> all complaints filed with HUD must be referred to state and local human rights agencies as long as the agencies operate under laws that are substantially equivalent to the Fair Housing Act.<sup>144</sup> Prior to 1988, the Commission was the forum for most complaints alleging violations of federal law. However, in 1988, Congress amended the Fair Housing Act to increase its coverage and institute a new enforcement regime. Although the City Council took several steps to conform the City's law to the federal statute, differing enforcement mechanisms caused the City to lose its substantial equivalence certification.<sup>145</sup> Thus, many claims that in earlier years would have been investigated by the City Human Relations Commission are now handled by HUD.

In addition to changing its emphasis from housing to employment cases, the Human Rights Commission has seen a gradual shift in the nature of its housing caseload. In the late 1960s and early 1970s, virtually all complainants who filed housing claims with the Commission alleged having been discriminated against because of their race or national origin. This pattern shifted substantially as the scope of the Human Rights Law broadened. As Table 5 indicates, from January 1992 through December 1993, of the 266 complaints filed with the Commission alleging discrimination in

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140. See BENJAMIN, *supra* note 60, at 231.

141. Interview with Randolph Wills, Managing Attorney, Law Enforcement Division, New York City Human Rights Commission (July 25, 1995).

142. See BENJAMIN, *supra* note 60, at 190-91.

143. See discussion of the Fair Housing Act, *supra* text accompanying note 134.

144. See *infra* text accompanying notes 162-63.

145. For a discussion of the reasons for this lack of substantial equivalence, see *infra* text accompanying note 163.

housing, just over one-third included allegations of race discrimination; an additional one-fifth stated a claim based upon national origin.<sup>146</sup> Among the types of discrimination outlawed after the Fair Housing Practices Act became law, discrimination based upon disability and sexual orientation constitute the two largest categories. More than one-fifth of all complaints filed in 1992-1993 alleged discrimination on the basis of disability; 10.9% alleged denial of housing because of sexual orientation.

**Table 5: Bases of Complaints Alleging Housing Discrimination Filed With the New York City Human Rights Commission (1992-1993)**

Basis of Complaint	Proportion of Total Complaints Filed Alleging Basis
Race or Color	33.5% (89)
National Origin	18.1% (48)
Disability	20.3% (54)
Religion or Creed	1.5% (4)
Family With Children	3.8% (10)
Marital Status	6.0% (16)
Sex or Gender	10.5% (28)
Age or Retirement	6.4% (17)
Sexual Orientation	10.9% (29)
AIDS	3.4% (9)
Occupation	0.8% (2)
Other	5.3% (14)

Source: New York City Human Rights Commission

Note: Column percentages do not sum to one hundred percent because some complaints allege more than one basis of discrimination.

146. Twelve complaints asserted both racial discrimination and discrimination based upon national origin. When this overlap among categories is taken into account, 125 of the 266 cases, or 46.9% of the total number of housing complaints filed in 1992-1993, alleged one of these two forms of discrimination.

Of the housing discrimination complaints filed with the Commission in 1992-1993, less than one-third were resolved on the merits by September 1995. As Table 6 shows, with respect to 11.3% of these complaints, the Commission found for the complainant; in 23.5% of the cases it found no probable cause to believe that discrimination had occurred. Just over seven percent of the 1992-1993 complaints were settled, 18.3% were administratively closed and 39.4% were still under investigation.<sup>147</sup>

**Table 6: Status of Cases Filed With the New York City Human Rights Commission Alleging Housing Discrimination (1992-1993)**

Status	Proportion of Cases
Probable Cause	11.3% (30)
No Probable Cause	23.5% (63)
Settlement	7.5% (20)
Administrative Closure	18.3% (48)
Still Under Investigation	39.4% (104)

Source: New York City Human Rights Commission  
Note: Status of cases is as of October 1, 1995.

### III. The New York City Human Rights Commission and Housing Discrimination: Facing the Future

Throughout its forty year history, the New York City Human Rights Commission has been a lightning rod for criticism. For example, an article appearing in the November 19, 1961 issue of the *New York Times* complained about the time it took the Commission (three to four months) to process housing discrimination complaints.<sup>148</sup> A 1974 book by Gerald Benjamin concluded that the Commission should be abolished.<sup>149</sup> The 1988 mayoral task force report on the Commission criticized the Commission's "enormous

147. Administrative closures occur for a wide variety of reasons. For example, the complainant may request that the case be closed after 180 days, may not be willing or able to cooperate with the Commission or may not accept a reasonable settlement offer. See NEW YORK, N.Y., ADMIN. CODE §§ 8-112 to 8-113.

148. Thomas W. Ennis, *Firmer Bias Law in Housing Sought*, N.Y. TIMES, Nov. 19, 1961, § 8, at 1.

149. See BENJAMIN, *supra* note 60, at 259.

backlog” and “systemic inefficiency.”<sup>150</sup> More recently, a leading figure in New York’s civil liberties community complained that the Commission was “invisible.”<sup>151</sup>

Complaints about the functioning of the Human Rights Commission are not unique to New York City. Most states and scores of municipalities have created human rights commissions to investigate and resolve housing and employment discrimination complaints.<sup>152</sup> A 1986 survey of several of these agencies by the American Jewish Congress criticized their lack of funding, long delays in resolution of complaints, and structural inefficiencies.<sup>153</sup> More recently, newspaper accounts have documented lengthy backlogs in complaint processing and insufficient budgetary resources for scores of human rights agencies including those in Kansas,<sup>154</sup> Utah,<sup>155</sup> Illinois,<sup>156</sup> Rhode Island<sup>157</sup> and Long Island.<sup>158</sup>

Much of the criticism of the New York City Human Rights Commission revolves around the time it takes to resolve individual complaints. On average, it took the Commission seventeen months to close housing discrimination cases filed in 1992 and 1993. Particularly with respect to housing, justice delayed may very well be justice denied. A person who brings a housing discrimination complaint to the Commission usually needs a place to live. Given the high transaction costs inherent in moving, when a remedy is not provided within weeks, it is likely that the complainant will no longer be interested in injunctive relief several months or, in some

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150. See TASK FORCE REPORT, *supra* note 113, at iv, 3.

151. See Powell, *supra* note 139, at 4 (quoting Norman Siegal, President of the New York Civil Liberties Union).

152. For a description of state and local human rights agencies, see NATIONAL NEIGHBORS, FAIR HOUSING RESOURCE DIRECTORY (1994).

153. See RONALD A. KRAUSS, STATE CIVIL RIGHTS AGENCIES: THE UNFULFILLED PROMISE 26-38 (1986).

154. See, e.g., Brian Kaberline, *Bill Would Cut Human Rights Agency's Budget*, Kan. City Bus. J., Mar. 10, 1995, at 1 (describing backlog of cases estimated to top 2,700 in 1995 and delays of 24 months before investigations begin).

155. See, e.g., Judy Fahys, *Criticism Haunts 2 Utah Agencies*, SALT LAKE TRIB., May 7, 1995, at E-1 (describing criticisms that the Utah Anti-Discrimination Division “takes too long”).

156. See, e.g., David Heckelman, *Speedier Rights Process Seen Boosting Backlog*, CHI. DAILY L. BULL., Aug. 22, 1995, at 1 (stating that it takes 18 months for complaints to come to human rights commission in Cook County due to investigatory delays).

157. See, e.g., Karen Davis, *Agency Struggles With Bias Caseload*, PROVIDENCE J.-BULL., June 27, 1994, at 1-D (characterizing backlog of Rhode Island Commission For Human Rights as “horrendous”).

158. See, e.g., Rick Brand, *New Life For Rights Agency?*, NEWSDAY, Apr. 9, 1993 (describing impact of budget cuts on the Suffolk County Human Rights Commission).

cases, years later. Furthermore, even in cases where the complainant has the ability to wait for a resolution, unless the Commission acts quickly, the landlord or seller, by renting the apartment or selling the house to someone else, may make it impossible for relief to be granted.

The causes of delay include inefficient case processing, increased workload and budget cutbacks. Over the years, allegations have frequently been made that the Commission's procedures are cumbersome and inefficient.<sup>159</sup> In 1995, the Commission took a number of steps to increase its productivity. Intensive case management and increased use of conciliation have been credited with doubling the number of completed investigations in fiscal year 1995. The average number of investigations closed per investigator also increased from 3.7 in 1994 to 4.4 in 1995. According to the Mayor's 1995 Management Report, the Commission's backlog was reduced by 8%, from 3,737 cases in 1994 to 3,425 cases in 1995.

The introduction of a computerized case management system designed by the Fund For The City of New York promises to further streamline the Commission's procedures. The system permits Commission personnel to enter information about complainants into computers as part of their intake interviews. Complaints are then automatically prepared and sent out with minimal delay. The system should permit the Commission to track cases more carefully and thereby manage its caseload better.

Inefficiency is certainly not the only reason for long delays in case processing and lengthening administrative backlogs. Since it was created forty years ago, the Human Rights Commission's mandate has steadily expanded. Over the years, discrimination based upon disability, marital status, sex, sexual orientation, family status, marital status, HIV status, age and occupation have been added to the original protected groups of race, color, creed and national origin. As the City Council adds protected groups to the Commission's agenda, it frequently does not increase funding or manpower. In addition, at no point in this progression of protection has the Council, the Mayor or the Commission identified priorities. Instead, each case is treated equally regardless of whether it involves discrimination against a tenant because he is black or because he is a lawyer.<sup>160</sup>

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159. See, e.g., TASK FORCE REPORT, *supra* note 113, at iv.

160. One group of complainants, HIV positive individuals, ordinarily receives expedited treatment.

In the face of this increased workload, the Commission has suffered as its manpower has decreased and its funding has declined. Although the City budgeted additional funds for the Commission in fiscal year 1996,<sup>161</sup> the overall level of funding is still substantially below spending levels for 1994. In the present era of fiscal austerity, it appears unlikely that the Human Rights Commission will receive major new commitments from the City budget.

Even so, additional resources are potentially available to fund administrative resolution of housing discrimination complaints. Under the Fair Housing Act, HUD must refer cases of housing discrimination to state and local human rights agencies if their substantive and procedural laws are substantially equivalent to the Fair Housing Act.<sup>162</sup> When HUD refers the cases to state and local agencies under the Fair Housing Assistance Program (FHAP) it typically also provides financial assistance at the rate of \$1,200 per case resolved. At present, the New York City Human Rights Commission is not eligible to participate in FHAP and receive federal contract funds because its law has not been deemed to be substantially equivalent.

The primary reason for the failure of the Human Rights Law to meet HUD's standards is procedural. Under the Fair Housing Act, once HUD determines probable cause exists to believe discrimination occurred, the complainant is given the choice of proceeding to an administrative hearing or, instead, opting for judicial review of the claims whereby he or she may receive punitive damages in addition to injunctive relief. If he or she chooses judicial review, the government must represent the complainant at no cost. Under the City's Human Rights Law, the complainant has no similar choice. Once the Commission makes a probable cause ruling, the case proceeds to an administrative hearing in which the Commission's legal staff represents the "public interest" rather than the injured party.

For the City to become eligible for FHAP funding, it must amend its law to conform to these federal standards. As of November 1994, 26 states and 32 localities have done so.<sup>163</sup> In New York, this could probably be achieved by allowing the complainant to choose to be represented by attorneys from the Corporation

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161. The authorized Fiscal Year 1996 budget for the Human Rights Commission is 8.2 million dollars. See CITY OF NEW YORK, ADOPTED BUDGET-FISCAL YEAR 1996 4E (1995).

162. See *supra* text accompanying note 134.

163. See 59 FED. REG. 56086 (Nov. 10, 1994).

Counsel's office or, alternatively, the Commission's enforcement bureau.

In addition to complaints about delays and backlogs, human rights commissions are also prime targets for criticism because the problems they seek to redress are so deeply ingrained in American society. Case by case adjudication of housing discrimination complaints, while important, is unlikely to have the impact of a more targeted and systemic approach to the problem. Indeed, throughout the history of the Commission on Human Rights a tension has existed between those who favored a system based upon resolving individual complaints and one which is based upon systemic investigations by the Commission followed by prosecution. In 1965, a former head of the Commission likened the case-by-case approach to "trying to empty the ocean with a spoon."<sup>164</sup> Although the Commission has had some success with systemic investigations, particularly the consent decrees obtained in the mid-1980s against real estate brokers,<sup>165</sup> since 1990, its role in initiating pattern and practice investigations and litigation has been extremely limited.

The Commission's ability to conduct systemic investigations and prosecutions is inhibited by several factors. In the early 1990s, the Housing Bureau was subsumed into the Law Enforcement Bureau. Therefore, given the overwhelming ratio of employment to housing cases filed with the Commission, investigators have had little time to develop expertise in investigating discriminatory housing practices. In addition, potential employees committed to open housing issues may be dissuaded from accepting jobs at the Commission because of their inability to specialize in fair housing enforcement. A separate reason for the limited role of the Commission in systemic investigations is that the Commission cannot, as a matter of right, bring lawsuits in its own name in state and federal court.<sup>166</sup> The commissioners must instead rely upon the cooperation of the Corporation Counsel's office to litigate pattern or practice cases.

Perhaps the greatest factor inhibiting the Human Rights Commission from engaging in systemic investigations of discriminatory housing practices is the crushing pressure of individual complaints.

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164. See *New Law Increases Powers of City Rights Board*, N.Y. TIMES, Dec. 16, 1965, at 40.

165. See *supra* text accompanying notes 26-28 and 111-12.

166. Attorneys for the Human Rights Commission may file civil actions only if they have been designated to do so by the Corporation Counsel. See NEW YORK, N.Y., ADMIN. CODE § 8-402(c).

In a world of static or declining budgets,<sup>167</sup> a decision to allocate resources to pattern or practice litigation implies diverting funds from individual claim processing and resolution with the resultant lengthening of delays and backlogs.

One possible justification for such a shift in resources is grounded in examining the comparative advantage of the Human Rights Commission. For most complainants, alternative avenues of individual redress exist. Any aggrieved individual can file a private claim in federal or state court, provided that he or she can afford the services of an attorney or can locate an attorney who will take the case on a contingency basis. In addition, most complainants who cannot file their own lawsuits have the option of filing their claims with HUD or the New York State Division of Human Rights. While it is true that each of these agencies have their own problems with delays and backlogs, limited evidence suggests that their case processing is at least as timely as the City's.<sup>168</sup>

A local, as opposed to a state or federal, human rights agency, however, is likely to have a comparative advantage in investigating patterns or practices of housing discrimination. The first advantage is informational. Close proximity to the sites where discriminatory

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167. One simple or, perhaps simplistic, approach to this problem would be to argue that the City should allocate additional resources to the Commission to enable it to do both functions well. Although such a recommendation may fit my personal policy preferences, I do not have sufficient information about other City programs to analyze adequately the trade-offs such a shift in resources would necessitate. Furthermore, additional resources would probably not eliminate the problem of backlogs in individual case processing and the trade-off between individual and systemic enforcement activities. If the Commission were to receive additional resources and improved its record in handling individual complaints, it would likely attract an increased proportion of new cases that would otherwise be filed with the Division of Human Rights or HUD. This, in turn, would likely lead again to increased delays and backlogs and the reemergence of trade-offs borne by scarcity.

168. According to the most recent annual report of the New York State Division of Human Rights, the median case processing time in 1991-1993 was 20 months. From 1991-1993, the Division reduced the number of cases over two years old by 11.3%. *See* NEW YORK STATE DIVISION OF HUMAN RIGHTS, ANNUAL REPORT 1991-1993 1-2 (1993). Furthermore, from March 1990 to October 1995, the total caseload of the Division has fallen from 17,348 to 13,701. *See* New York State Division of Human Rights, Total Caseload as of 31 March (1990-1995) (mimeograph dated October 1995, on file with the author). According to a recent report by the United States Commission on Civil Rights, the average number of days for cases filed with HUD to be closed varied by type of closing. In 1993, cases which were administratively closed took the shortest time—94 days on average. Cases for which HUD determined no probable cause to exist took an average of 203 days to close and probable cause determinations took an average of 592 days. *See* U.S. COMMISSION ON CIVIL RIGHTS, THE FAIR HOUSING AMENDMENTS ACT OF 1988: THE ENFORCEMENT REPORT 48 (Sept. 1994).

practices exist is likely to increase the flow of information from the neighborhoods involved to the investigative agency.<sup>169</sup> In addition, to the extent that the investigators live in nearby areas, they can be expected to have a greater understanding of local customs and practices than outsiders.<sup>170</sup> Close proximity also enhances opportunities for the human rights agency to develop partnerships with indigenous community groups and fair housing advocacy organizations. Finally, and perhaps most importantly, a state or federal agency would be unlikely to commit substantial resources to a sustained, targeted investigation dedicated to rooting out discriminatory practices in just one jurisdiction. Instead, investigatory resources are likely to be spread throughout the broader geographic boundaries of the state or nation so as to maintain a deterrent effect.<sup>171</sup>

Reorienting the New York City Human Rights Commission from individual complaint processing to systemic investigations and prosecutions would certainly not be costless. Complainants in certain protected groups, such as those discriminated against because of their sexual orientation, alienage status or occupation, have no administrative alternative to the Commission. For those unable to obtain a lawyer, increased delays and case backlogs could well create hardships.<sup>172</sup> One possible way to deal with this problem would

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169. This informational advantage may be diluted if the Commission, as would be expected, received a smaller share of individual complaints as a result of increased case processing times. Nevertheless, the Commission would likely continue to receive a substantial number of individual complaints, even if it shifted resources to systemic investigations and prosecutions. In addition, cooperation between the Commission and the New York State Division of Human Rights and HUD could provide similar information about sources of discriminatory practices.

170. This advantage may imply a corresponding disadvantage. An investigator who shares a similar culture with the discriminating parties may be less sensitive to, or energetic in, uncovering illegal activities.

171. One comparative disadvantage of locating the responsibility of investigating discriminatory housing practices in a local as compared to a state or federal agency is the possibility of political interference. It is likely that mayors would be more sensitive to pressure from neighborhoods opposed to public efforts to break down discriminatory barriers than governors or presidents. This greater sensitivity to public pressure might, in turn, weaken local enforcement efforts. To avoid this problem of political interference, the Commission might choose to "contract out" systemic investigations to private, nonprofit organizations such as the Open Housing Center. For a description of the Open Housing Center, see OPEN HOUSING CENTER, *The Open Housing Center* (undated pamphlet on file with the author).

172. Fewer resources devoted to individual case resolution would not, in the long run, necessarily lead to increased delays and case backlogs. As information about increased processing time became disseminated, many people who would otherwise file complaints with the City Commission could be expected to file private lawsuits or complaints with HUD or the New York State Division of Human Rights. The result-

be to grant complainants in these groups a priority in the Commission's case processing. Although such a procedure may cure the problem of hardship among members of these protected classes, it may nevertheless raise serious problems of equity.

In the end, a decision to shift the Commission's focus from individual complaint resolution to systemic investigations and prosecutions, at least with respect to housing discrimination, must rest with an evaluation of whether the benefits obtained outweigh the costs. There are several reasons to believe that compared to the current case-by-case approach, a strategy based on systemic investigations and prosecutions would be more effective in fighting discrimination in New York City. Fighting housing discrimination primarily through resolving individual complaints effectively places the agenda of the Human Rights Commission in the hands of individual complainants. A substantial number of these complaints will be found to have no merit.<sup>173</sup> Furthermore, because discrimination is usually difficult or impossible for an individual tenant or home buyer to identify, a large number of discriminatory actions will never find their way onto the Commission's docket. Indeed, a reactive system that relies upon individual complainants may make it possible for the worst offenders to elude detection as minority homeseekers, themselves, steer clear of neighborhoods or landlords that have a reputation for discrimination.<sup>174</sup>

In contrast, systemic investigations and prosecutions can target scarce enforcement dollars on neighborhoods or landlords that the Commission identifies as posing the greatest probability of discrimination and the greatest threat to integration. The City's experience with systemic investigations in the mid-1980s suggests that this type of focused law enforcement effort can effectively change practices and benefit substantial numbers of New Yorkers.

### Conclusion

In New York City, as well as in most major metropolitan areas of the nation, the issues of housing discrimination and segregation

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ing drop in caseload with the Human Rights Commission might then lead to shorter administrative delays.

173. Of the 93 complaints filed between January 1992 and 1993 for which determinations on the merits were made, the Commission found that no probable cause existed to believe that discrimination had occurred in 63 cases or 68% of the total.

174. Cf. Joseph P. Witherspoon, *Civil Rights Policy In The Federal System: Proposals For A Better Use Of Administrative Process*, 74 *YALE L.J.* 1171, 1191 (1965) (stating that minority group members will usually restrict their employment applications to businesses that already hire members of their group).

have taken on tremendous importance. Studies have repeatedly shown that the incidence of racial and ethnic discrimination is high, contributing to residential segregation and the growth of concentrated poverty. Barriers to mobility based upon race or ethnicity threaten to grow in importance over the next decade, primarily among low income households, as government increasingly relies upon housing vouchers and the private housing market.

New York City has led the nation in fighting housing discrimination. Its Fair Housing Practices Law, enacted in 1957, was the first law in the nation to make discrimination in the private housing market illegal. With varying levels of success, the New York City Human Rights Commission has fought for equal opportunities in housing for forty years. There is much to be proud of, but still much more to accomplish.