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Abstract

This article examines US fair housing policy from a critical perspective. We describe the impact of the expansion of neoliberal ideology on the fair housing assistance program (FHAP), the fair housing initiatives program (FHIP), and the scope of US Department of Justice activities. Prior findings from the US Department of Housing and Urban Development (HUD) and IRS Form 990 are summarized. We argue that neoliberalism has contributed to the underdevelopment, underfunding, and poor implementation of US fair housing policy. We offer three recommendations for fair housing reform. The first focuses on the need to remove fair housing activities from HUD and place them in an independent fair housing agency. The second focuses on the need for the federal government to mandate fair housing enforcement across all governmental programs and agencies. The third focuses on the need for increased lobbying, litigation, and activism by community-based advocacy organizations for reform.

Keywords

discrimination, fair housing, neoliberalism, prejudice, social justice, urban policy

Introduction

Revelations of US Fair Housing Policy

I watched a snail crawl along the edge of a straight razor. That's my dream; that's my nightmare. Crawling, slithering, along the edge of a straight razor ... and surviving. Colonel Walter E. Kurtz (Coppola, 1979)

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In the beginning of the film *Apocalypse Now*, the tape-recorded voice of Colonel Walter E. Kurtz is played in the background while military intelligence officers sit in a trailer, eat lunch, and plan his assassination. The words above encapsulate Colonel Kurtz's frustration with the Vietnam War. Just as Colonel Kurtz applied those words to Vietnam, we apply them to US fair housing policy. In 1968, the US adopted fair housing policy with good intentions, to fight racism and discrimination. The concept was simple: if racism could be stopped in housing markets, it would be less likely to spread to other parts of society. An open housing market would be a firewall to stop racism's domino effect in society. However, the USA never committed adequate resources to the war for fair housing and there was little public support for it. After four decades of skirmishes, the country has become mired in a fair housing quagmire. Like the snail in Colonel Kurtz's dream, fair housing policy barely survives as it crawls and slithers along the edge of a straight razor. We contend that the cumulative effects of underfunding and inconsistent implementation have undermined fair housing policy and rendered it impotent. Without stepped up advocacy and fundamental reform, fair housing policy will become increasingly vulnerable as the federal, state, and local government search for areas to reduce spending in an era of fiscal constraint.

The current state of fair housing policy is the product of decades of impediments, false starts, and neglect. In this article, we argue that fair housing policy has reached an apocalyptic state. We review the state of fair housing policy in the context of existing policy and political culture. This discussion is framed using the metaphor of the four horsemen of the fair housing apocalypse: the historic underfunding and inconsistent implementation of the fair housing assistance program (FHAP), the historic underfunding and inconsistent implementation of the fair housing initiative program (FHIP), the lack of continuity in US Department of Justice (DOJ) fair housing enforcement, and the expansion of neoliberal ideology which serves as fair housing's harbinger of death. Each horseman represents a paradox in fair housing policy. On the surface, fair housing policy offers the promise of significant reform. Yet, in practice, it becomes punitive due to the underdevelopment of policy, chronic underfunding, inconsistent implementation, growing neoliberal sentiment in contemporary society, and wavering support from policymakers and the general public. We introduce the metaphor of the four horsemen as a rhetorical device which highlights the underlying problems with US fair housing policy.¹ We then offer a post-apocalyptic view of fair housing policy.

Over 40 Years of Challenges

Housing discrimination is alive and well in the USA. It is estimated that minorities, the disabled, and families experience more than 4 million instances of discrimination annually when renting and purchasing housing (National Fair Housing Alliance, 2007, 2008, 2009, 2010). Housing discrimination is a reflection of historic residential segregation patterns in American society, and its continued occurrence functions to perpetuate these patterns (Ellen, 2008; Massey, 2008; Roscigno et al., 2009). Policy makers and scholars have offered a variety of explanations for the persistence of housing discrimination. These explanations have prompted the enactment of fair housing laws at the federal, state and local levels.

Fair housing legislation is a relatively recent phenomenon in the USA. The main thrust of anti-discrimination efforts related to housing was the Fair Housing Act of 1968. For the first time in US history, the Act prohibited discrimination at any point in the sale or rental of housing on the basis of race, color, religion, sex, and national origin. The Act designated the US Department of Housing and Urban Development (HUD) as the federal agency to administer programs related to fair housing. HUD was authorized to *affirmatively* further fair housing in all of its programs and funded activities.

As a political statement, the Act represented a monumental shift in US housing policy. Prior to its passage, there was virtually no legal recourse for individuals facing discrimination in housing markets. After the Act's passage, individuals could file complaints with HUD and had standing to sue when they felt they were discriminated against in their search for housing. However, this legislative milestone was narrowly constructed and focused exclusively on providing remedies to individuals who experienced discrimination. The Act did not provide remedies for structural forms of discrimination faced by ascribed groups or classes in society. Moreover, the burden of proving that acts of discrimination had occurred was firmly placed on those who had been victimized.

The Act was narrowly constructed in a number of other ways (Landis and McClure, 2010; Yinger, 1999). For instance, it did not apply to a substantial proportion of properties. The Act did not apply to rental properties with four or fewer units, and it did not apply to home sales unless real estate agents were used. Consequently, many renters and homebuyers remained unprotected from housing discrimination. When the Act did apply, mechanisms for fair housing enforcement were extraordinarily weak. HUD had no enforcement powers when fair housing violations were identified. Instead, the agency filled a conciliation role and in extreme cases of discrimination could notify the US Department of Justice (DOJ) about suspected violations. Typically, the DOJ would take action on a small number of highly egregious instances of housing discrimination. Enforcement was further hampered since individuals only had 180 days to file a lawsuit related to fair housing, they were responsible for all court costs and attorneys' fees (unless a court waived them due to economic hardship), and punitive damages were capped at \$1000.

It took two decades for significant reforms in fair housing legislation to occur. These reforms came in the wake of the savings and loan crisis of the late 1980s, which ultimately resulted in the passage of the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA). The growing momentum of the savings and loan crisis created an opening for fair housing advocates to lobby for legislative reform that would address some of the weaknesses in the enforcement structure of the Fair Housing Act. Sensing the imminence of FIRREA legislation, housing advocates pressed for a number of legislative reforms which had been blocked by Congress for decades. In 1988, several amendments to the Fair Housing Act were adopted.

The amendments expanded fair housing protections to those facing housing discrimination based on disability and family status (e.g. pregnant women and households with children under the age of 18). The amendments empowered HUD to hold administrative hearings and impose fines and damages for violations. HUD was required to address complaints within four months, and the time limit for individuals to file civil suits was extended from 180 days to two years. In addition, caps on damages were significantly increased. The 1988 amendments augmented other programs designed to address shortcomings in fair housing enforcement. These included the fair housing assistance program (FHAP) which was created in 1979 and the fair housing initiatives program (FHIP) which was created in 1986.

Since the 1988 amendments, federal fair housing policy has remained relatively static. It has been over 20 years since fair housing protections were extended to additional groups or classes. Under current federal law, there is still no fair housing protection based on marital status, sources of income, sexual orientation, gender identification, political affiliation, Housing Choice Voucher (HCV) status, or other characteristics. The Act also remains focused on individual complaints and lacks remedies for structural forms of discrimination. Moreover, rental properties with four or fewer units and home sales where real estate agents are not used remain exempt from the Act.

To date, federal fair housing policy has remained relatively isolated from other legislative efforts to address affordable housing needs in the USA. Fair and affordable housing policies remain

highly fragmented and underfunded. Sidney (2003, 2004) has argued that the lack of coordination between the Fair Housing Act, the Home Mortgage Disclosure Act (HMDA), and the Community Reinvestment Act (CRA) has resulted in divergent and incompatible strategies to address discrimination in housing markets. Other federal policies aimed at promoting affordable housing have been criticized for contributing to the geographic isolation of minorities and the poor. For example, it has been argued that the Low-Income Housing Tax Credit program has been implemented in a manner that re-concentrates poverty (Landis and McClure, 2010; McClure, 2010; National Fair Housing Alliance, 2008; National Neighborhood Coalition, 2001; UN Committee on the Elimination of Racial Discrimination, 2008).

Policy fragmentation is also systemic, since federal fair housing policy is implemented through a patchwork of state and local agencies, as well as nonprofit organizations. Although Connerly (2006) argues that US fair housing policy has benefited from strengthened enforcement mechanisms in the contemporary period, this system remains direly underfunded and hampered by a lack of coordination across agencies responsible for its implementation. Underfunding and fragmentation has contributed to the underreporting of instances of housing discrimination. This problem has been compounded by those responsible for implementing fair housing laws in local government and the nonprofit sector. In some cases the very individuals responsible for policy implementation lack an understanding of fair housing laws or are resistant to them (Patterson and Silverman, 2011).²

In addition, participation in federal fair housing programs is inconsistent across many municipalities and absent in some states. For instance, we examined FHAP and FHIP records between 2004 and 2009 and found that three states (Alaska, South Dakota, and Wyoming) had not participated in either program. The same records also indicated that in any given year a maximum of 40 states participated in both programs. Although federal fair housing policy is supposed to protect minorities, the disabled, families, and other groups from discrimination, the level of protection afforded to individuals varies across the states. Despite an unequivocal federal mandate to *affirmatively* further fair housing, many states and localities consistently fall short of this legal obligation. The outcome of acute underfunding and the inconsistent implementation of fair housing policy are clear when one considers that of the estimated 4 million instances of housing discrimination annually, the combined case load of all agencies and organizations across the country involved a record high 30,758 complaints in 2008 (National Fair Housing Alliance, 2010).³ That case load accounted for less than 1 percent (0.76%) of the estimated instances of discrimination annually. Of those complaints, approximately 1/3 resulted in some form of settlement or conciliation. In essence, less than 1 percent (0.76%) of all instances of discrimination result in a complaint being filed with an FHAP agency, an FHIP organization, or the DOJ, and only 1/3 of those complaints result in a legal remedy. These outcomes suggest that the odds are stacked against victims of housing discrimination.

Fragmentation in US housing policy is symptomatic of the processes of devolution and non-profitization in affordable housing policies described by Swanstrom (1999) and Bockmeyer (2003). More specifically, such fragmentation has been attributed to the devolution of fair housing policy (Lamb and Wilk, 2009). Policy fragmentation is also an outgrowth of the general ethos of 'privatism' that has driven housing policy historically (Hayes, 1995). Since the 1980s, these processes have accelerated as broader neoliberal policies have taken hold at the national and global levels (Purcell, 2008; Thibault, 2007). These policies and trends constitute the parameters in which fair housing has been debated in the USA. As an outgrowth of this environment, fair housing policy has remained underdeveloped, underfunded, and poorly implemented.

The Four Horsemen of the Fair Housing Apocalypse

The consensus among scholars is that fair housing policy has failed to address housing discrimination in the USA (Connerly, 2006; Goering, 2007; Landis and McClure, 2010; Patterson and Silverman, 2011; Sidney, 2003; Squires, 2008; Tisdale, 1999; Yinger, 1999). Goering (2007) has suggested that the level of responsibility for enforcement that victims must assume, coupled with chronically underfunded fair housing programs, has a punitive impact. The very policies designed to eradicate housing discrimination and provide remedies to those impacted by discrimination have not just failed to achieve their goals; they have inflicted additional damage on victims of discrimination.

The shortcomings of contemporary efforts to address housing discrimination in the USA are examined in the context of the four horsemen of the fair housing apocalypse. Each horseman represents a paradox in fair housing policy. On the surface, fair housing policy offers the promise of significant reform. Yet, in practice, it becomes punitive due to the underdevelopment of policy, underfunding, inconsistent implementation, growing neoliberal sentiment, and wavering support from policymakers and the general public. The four horsemen presented include historic underfunding and inconsistent implementation of the two programs administered by HUD's Office of Fair Housing and Equal Opportunity (FHAP and FHIP), the lack of continuity in DOJ activities related to fair housing, and the degree to which growing neoliberal sentiment has weakened support for fair housing policy in society. Combined, the four horsemen define the state of fair housing policy in the contemporary period.⁴

The Fair Housing Assistance Program, Underfunding and Inconsistent Implementation

I looked, and there before me was a white horse! Its rider held a bow, and he was given a crown, and he rode out as a conqueror bent on conquest. *Revelations* 6: 1–8.

The FHAP was established in 1979. Under the program, grants are awarded annually on a noncompetitive basis to state and local fair housing agencies. FHAP agencies are referred complaints from HUD and other organizations and charged with the task of investigating instances of housing discrimination in their jurisdiction. Based on those investigations, complaints can be dismissed, conciliated/settled, or referred to the DOJ or the courts for litigation. FHAP funding is provided by HUD in steps. Initially, HUD awards a flat amount of funding for agency capacity building. These funds are augmented over time to enhance complaint processing, special enforcement, training and other fair housing efforts. In principle, the FHAP is designed to decentralize the process of investigating and enforcing fair housing policy. In practice, the program has suffered from chronic underfunding, uneven administration across states and agencies, and inconsistent reporting of case outcomes (US General Accounting Office, 2004).

Schill (2007) examined trends in FHAP complaint filings from 1989 to 2003. He found that over time FHAP agencies assumed a growing and inordinate proportion of the total fair housing complaint case load. Between 1989 and 2003, the percentage of fair housing complaints investigated by FHAP agencies grew from 45.8 percent to 68.5 percent. In 2008 and 2009, the percent of complaints investigated by FHAP agencies reached 79.9 percent and 79.6 percent respectively (National Fair Housing Alliance, 2010). This represented a steady shift from a model where HUD conducted internal investigations of fair housing complaints to one based on referring cases to local agencies for investigation. In essence, the devolution of fair housing policy had taken hold in this aspect of policy implementation.

Table 1. Congressional appropriations for FHAP, 2004–8 (in 2008 dollars)

Fiscal Year	Total FHAP Funding	Average FHAP Agency Funding
2004	\$30,276,500	\$582,240
2005	\$24,165,980	\$464,730
2006	\$23,265,416	\$447,412
2007	\$22,606,454	\$434,740
2008	\$22,398,831	\$430,747

Source: HUD Office of Fair Housing and Equal Opportunity (TEAPOTS)

While an increasing percentage of investigations were being handled by FHAP agencies, the percentage of cases with a result favorable to complainants steadily declined. Between 1997 and 2003 the percent of all fair housing complaints conciliated/settled fell from 38.6 percent to 27.4 percent. In 2008, the percent of all fair housing complaints conciliated/settled experienced a slight rebound to 30.2 percent (National Fair Housing Alliance, 2009).⁵ In terms of monetary compensation, Schill (2007) reported that between 1989 and 2003 average settlement amounts were less than \$2000. We collected FHAP data from HUD⁶ for 2004 to 2008. After adjusting for inflation using the Bureau of Labor Statistics CPI inflation calculator, the average settlement amount was \$2337. This figure was inflated by an outlier, representing average settlement amounts of \$4361 in 2004. When 2005–8 data was examined alone, the average FHAP settlement amount was \$1599. In terms of outcomes, this data indicates that despite fluctuation from year to year, the general trajectory for FHAP settlements was downward. In a relative sense, average FHAP settlements are nominal and serve as a disincentive to individuals weighing the costs and benefits of pursuing a fair housing complaint.

Modest case loads and settlements are symptomatic of a program that is chronically underfunded by Congress. Table 1 presents FHAP data for 2004–8. During that period, the program's overall and average annual agency appropriations declined in real dollars.

The decline in FHAP appropriations occurred while the number of FHAP agencies receiving funding expanded. In 2004, a total of 95 agencies received FHAP funding. In 2008 a total of 104 agencies received funding. On average, 2.1 FHAP agencies received funding in each state, the District of Columbia, and Puerto Rico during the 2004–8 period. FHAP agencies in 11 States and one territory did not receive program funding between 2004 and 2008. These places relied on HUD to investigate fair housing complaints.

The Fair Housing Initiatives Program, Underfunding and Inconsistent Implementation

Then another horse came out, a fiery red one. Its rider was given power to take peace from the earth and to make men slay each other. *Revelations* 6: 1–8.

The FHIP was established as a component of the Housing and Community Development Act of 1987 (amended in 1992). Under the program, grants are awarded to nonprofit housing organizations on a competitive basis. FHIP organizations undertake activities to enhance compliance with fair housing law. These activities include education, monitoring, routing complaints to other agencies for investigation, and fair housing compliance programs. The FHIP is designed to complement and support investigative activities of HUD, FHAP agencies, and the DOJ. FHIP organizations educate the public about fair housing law, screen complaints at the local level, attempt to foster voluntary compliance, and encourage informal resolutions of fair housing violations. In 2009, FHIP organizations processed 66 percent of all fair housing complaints (National Fair Housing

Alliance, 2010). The FHIP also represents an additional layer of devolution in fair housing policy. The program contracts out key elements of policy implementation to nonprofit organizations. The expansion of the FHIP formalized the nonprofitization of fair housing policy. Like the FHAP, the FHIP has suffered from chronic underfunding, uneven administration across states and agencies, and inconsistent reporting of case outcomes.

Historically, FHIP has also placed a heavy emphasis on funding relatively symbolic public education activities pursued by nonprofits, such as circulating fliers about housing rights and broadcasting public service messages during fair housing month. Until recently, efforts to detect and test for housing discrimination in localities have received less attention. FHIP agencies are currently eligible for three categories of funding.⁷ The first category is the Fair Housing Organizations Initiative (FHOI). This category provides funds for capacity building to nonprofit organizations. The FHOI has a particular focus on nonprofits that protect the right of the disabled. The second category is the Private Enforcement Initiative (PEI). This category funds nonprofits engaged in testing and enforcement activities. The third category is the Education and Outreach Initiative (EOI). This category of funding focuses on educating the general public and housing providers about the fair housing laws. In 2010, HUD awarded \$26.3m in FHIP grants. A total of 98 organizations were funded in 37 states and the District of Columbia. The average award was \$268,376 per organization. The largest allocation of FHIP funding, 80.2 percent, went to PEI activities. EOI activities were awarded 11.8 percent of grants. FHOI activities received 8.0 percent of grants. The overwhelming majority of 2010 funding went to activities that focused on testing for the presence of housing discrimination, while less than 20 percent of funding was allocated for activities related to education about fair housing law and issues impacting the disabled. This represented a shift in the allocation of FHIP funding which reflects priorities of Democratic majorities in the House of Representatives and the Senate, as well as the Obama administration. However, this change in priorities may be transient, and highly dependent on future electoral outcomes rather than empirical analysis of which policies are most effective in combating housing discrimination.

The distribution of FHIP funding in 2010 is fairly representative of current trends in grant awards. Table 2 summarizes overall allocations for FHIP activities for 1994–2010. These figures are reported in 2010 dollars. After peaking in 1995, the program's annual appropriations remained relatively static in real dollars. However, total allocations for the program do not reflect all of the patterns in funding.

A more detailed analysis of FHIP funding was possible using FHIP award data released to the public by HUD for 2004–8 and data from IRS Form 990s for each of the organizations receiving funding in those years. Combined, these data sources allow for an examination of trends across the three categories of FHIP funding, as well as an assessment of organizations' relative dependence on FHIP funding for their survival. Table 3 summarizes this data in 2008 dollars.

Similar to the data presented in Table 2, total and average organizational funding for 2004–8 was relatively static. However, funding across the three FHIP categories reveals an important shift in FHIP priorities. Beginning in 2008, funding allocations for PEI activities increased substantially. The increased emphasis on testing for the presence of housing discrimination represents an important shift away from educational activities. This shift is even more pronounced given the simultaneous expansion in funding for activities in the FHOI category. It is plausible to assume that this shift can be attributed to a stronger posture toward fair housing enforcement emanating from Democratic majorities in the House of Representatives and the Senate, as well as the priorities of the Obama administration. Despite relatively static levels of overall funding, the transition to a Democratic Party controlled Congress and administration appear to have reordered priorities in how FHIP grants are allocated. Given this assumption, the sustainability of such allocation decisions may be more dependent on the future political climate than on evidence

Table 2. Congressional appropriations for FHIP, 1994–2010 (in 2010 dollars)

Fiscal Year	FHIP Funding in 2010 dollars
1994	\$30.96 million
1995	\$37.2 million
1996	\$23.6 million
1997	\$20.4 million
1998	\$20.1 million
1999	\$19.6 million
2000	\$21.5 million
2001	\$17.3 million
2002	\$21.8 million
2003	\$21.3 million
2004	\$20.8 million
2005	\$20.1 million
2006	\$19.5 million
2007	\$18.9 million
2008	\$22.3 million
2009	\$25.4 million
2010	\$26.3 million

Source: National Fair Housing Alliance, 2010

Table 3. Congressional appropriations for FHIP, 2004–8 (in 2008 dollars)

Fiscal Year	Total Organizations	Total Funding	Average Organization Funding	Percent Overall Revenue	Percent FHOI	Percent PEI	Percent EOI
2004	102	\$18,764,031	\$183,961	38.7	0.9	52.0	47.1
2005	103	\$19,678,446	\$191,053	39.7	1.0	57.3	41.7
2006	101	\$19,472,930	\$192,891	46.5	0.0	54.5	45.5
2007	82	\$17,915,348	\$218,480	36.7	6.1	61.0	32.9
2008	93	\$21,799,999	\$234,409	65.1	0.0	83.5	16.5

Sources: HUD Office of Fair Housing and Equal Opportunity (TEAPOTS), and IRS Form 990

based decision-making. Much of the historic inconsistency in fair housing policy can be explained by the degree to which it has been embedded in agencies and organizations that are malleable to the politics of the day. This can be contrasted with other aspects of public policy that are housed in independent agencies and relatively insulated from political pressures.

Another aspect of Table 3 provides insights into the instability of implementation strategies that are dependent on the nonprofit sector. During the period examined, there was a shift toward FHIP funding comprising a larger percentage of overall organizational revenues. By 2008, FHIP revenue constituted 65.1 percent of the typical nonprofit housing organization's revenue base. This is a concern since the loss of FHIP funding could place local housing organizations at risk of insolvency. By 2009, 20.3 percent of all the organizations that received FHIP funding from 2004–8 were no longer in operation. The trend toward reduced funding diversification among FHIP organizations raises concerns about their long-term stability and the continuity of their program activities. This trend also raises the specter of organizations becoming overly dependent on governmental funding, and subsequently forfeiting some of their autonomy. During periods when organizational

missions align with the political climate in Washington DC, this is not a highly salient issue. However, when the goals of nonprofit housing organizations and elected officials clash, overdependence on a single funding source may reduce the potency of nonprofit advocacy.

These concerns are supported by research on resource dependency (Chaves et al., 2004; Gronbjerg, 1993; Leech, 2006; O'Regan and Oster, 2002; Schmid et al., 2008). This research argues that nonprofits which are dependent on government funding for their survival may reduce their advocacy activities and temper criticism of government policy in order to shield against retaliatory budget cuts. In essence, resource dependence may lead to organizations becoming less accountable to the communities they serve due to co-optation by their funders. Some scholars have argued that nonprofits that are overly dependent on philanthropic dollars can also fall victim to resource dependence (Arnove and Pinede, 2007; Martin, 2004; Silverman, 2008). This becomes an even larger concern because many philanthropic organizations lack public accountability. These critiques have crystallized around the concept of a *nonprofit industrial complex* (INCITE!, 2007). From this perspective, increased pressure to contain the scope of nonprofit advocacy emanates from the growing influence of foundations, federated funders, and other philanthropic organizations that subscribe to neoliberal ideologies. As a result, the problem of resource dependency for nonprofits is not exclusive to public funding. It should be viewed as a more general issue of nonprofit public accountability.

The US Department of Justice (DOJ), a Lack of Continuity in Fair Housing Enforcement

I looked, and there before me was a black horse! Its rider was holding a pair of scales in his hand.
Revelations 6: 1–8.

The DOJ's Civil Rights Division is responsible for pursuing lawsuits under the Fair Housing Act. Under the 1968 Act, the DOJ is only permitted to initiate legal action when a person or entity is suspected of engaging in a 'pattern or practice' of discrimination or has discriminated in a manner that raises an issue of 'general public importance'. These requirements narrow the scope of DOJ activities in the area of fair housing enforcement, since legal action can only be pursued when the DOJ concludes a policy of discriminating is in place or when the US Attorney General interprets a form of discrimination as so egregious that intervention from the federal courts is warranted. Under the 1968 Act, the DOJ did not pursue cases involving individual instances of discrimination. HUD was responsible for investigating and resolving individual acts of housing discrimination. The DOJ was only empowered to pursue cases involving broader patterns or practices of discrimination of general public importance. The 1988 amendments to the Act modified this policy somewhat. Under current law, the DOJ can pursue a case of individual discrimination upon the request of one of the parties to a fair housing complaint. DOJ action on an individual case of discrimination can only take place after HUD has completed an investigation and charged a party with violating the law. These are referred to as 'election' cases. The 1988 amendments also permit the DOJ to pursue cases referred by HUD involving discrimination resulting from state and local zoning/land-use laws.

Fair housing cases pursued by the DOJ are primarily civil lawsuits. The DOJ can seek monetary awards for actual and punitive damages caused by patterns of discrimination. Civil penalties can also be sought to augment enforcement efforts of local housing organizations and to offset the government's costs of pursuing a case. In rare instances, where housing rights are violated by force or the threat of force, the DOJ can initiate criminal proceedings.

In addition to trying cases that are referred by HUD, the DOJ implements a fair housing testing program. This program was established in 1991 and uses paired testers to detect the presence of discrimination in local housing markets. From 1992 to 2008, the testing program resulted in 85

Table 4. DOJ cases filed, 1999–2009

Fiscal Year	Cases Filed
1999	48
2000	45
2001	53
2002	49
2003	29
2004	38
2005	42
2006	31
2007	35
2008	33
2009	45

Source: National Fair Housing Alliance, 2010

housing discrimination lawsuits that resulted in 82 resolved cases (see http://www.justice.gov/crt/housing/housing_testing.php). Those 82 cases resulted in over \$12m in penalties or damages, or an average of approximately \$146,000 in penalties and damages per case.

Given the narrow scope of fair housing issues that the DOJ can take action on, its annual case load is relatively light. Table 4 summarizes the number of DOJ cases filed annually from 1999–2009. This table shows that there has been some fluctuation in the number of new cases. Yet, the level of activity remains relatively low for the entire decade.

The DOJ has been criticized by organizations like the National Fair Housing Alliance for its relative inaction in the enforcement of fair housing laws. Among these criticisms are objections to the position that the DOJ has taken with respect to pursuing ‘election’ cases from HUD (National Fair Housing Alliance, 2009). The DOJ has taken the position that it is not required to file ‘election’ cases and it may perform additional investigations of such complaints. The effect of this position has been that fewer ‘election’ cases are pursued by the DOJ, and it takes longer for the DOJ to move forward with those it does accept.

Another criticism of DOJ practices relates to the prosecution of disparate impact cases (National Fair Housing Alliance, 2009). These cases involve indirect forms of discrimination that grow out of standardized policies and practices of housing providers. For example, occupancy limits on rental units have been cited as an example of policies that do not directly target families, but have a disparate impact on their access to housing. In 2003, the DOJ determined that it would no longer consider disparate impact cases.⁸ This decision reduced the pool of potential cases. Likewise, the DOJ has been criticized for curtailing the volume of cases it considers that deal with discriminatory land-use and zoning issues (National Fair Housing Alliance, 2009).

These criticisms reflect the degree to which the political climate in Washington, DC impacts the scope of DOJ activities. During the George W Bush Administration, the appropriate treatment of ‘election’, disparate impact cases, and land-use cases was hotly contested. In contrast, there is some evidence that the climate in the DOJ has changed with the Obama Administration. In 2009, DOJ case loads rose to their highest level since 2002, and ‘election’ and land-use cases saw similar increases (National Fair Housing Alliance, 2010). The DOJ also reversed the previous administration’s policy and decided to pursue new disparate impact cases. Like other aspects of fair housing enforcement, the scope and emphasis of DOJ litigation is heavily influenced by the political climate in Washington, DC. Although the Obama Administration appears more receptive to fair housing issues, there is no guarantee that this pattern of enforcement will persist in the long term.

The Neoliberal Harbinger of Death

I looked, and there before me was a pale horse! Its rider was named Death, and Hades was following close behind him. *Revelations* 6: 1–8.

The FHAP, FHIP, and DOJ's fair housing activities constitute the core components of the fair housing enforcement system in the USA. Individually and combined, these components have remained underdeveloped, underfunded, and poorly implemented throughout the life of the contemporary fair housing movement. This has been an outgrowth of a limited dialogue about the scope of housing rights in the USA and wavering support for fair housing in society. On an ideological level, resistance to fair housing policy has also been engrained in the branch of neoliberal thinking which is resistant to progressive views of social justice, government activism, and the regulation of markets (Duggan, 2003). In the contemporary period, neoliberal sentiment has been on the rise, and it has contributed to the emerging crisis in fair housing policy.

Evidence for the absence of dialogue about housing rights and wavering support for fair housing can be found in recent scholarship (Abravanel and Cunningham, 2002; Patterson and Silverman, 2011; Squires et al., 2002; Turner et al., 2002). The persistence of discrimination in housing markets has been documented through the use of paired testing. In paired testing, minority and white individuals with equivalent income and employment profiles attempt to rent or purchase housing units. The results of testers' experiences in a housing market are compared in order to identify instances of differential treatment. Paired testing is considered to produce relatively conservative estimates of discrimination in housing markets since it focuses on formal real estate businesses. It examines private real estate transactions to a lesser extent, and subsequently fails to detect other sources and types of housing discrimination.

Turner et al. (2002) used paired testing in a 2000 national study of discrimination in housing markets. This study found that discrimination remained present in metropolitan housing markets, although it had declined somewhat between 1989 and 2000. The largest decline in discrimination was found among paired testers attempting to purchase homes, where whites were favored over blacks in 29 percent of the tests in 1989 and 17 percent of the tests in 2000. In contrast, discrimination in rental markets saw the lowest change with whites favored over blacks in 26.4 percent of the tests in 1989 and 21.6 percent of the tests in 2000. It is noteworthy that discrimination had declined more in home purchase markets than rental markets. This follows the neoliberal narrative. The 1990s through the early 2000s was a period of aggressive efforts to promote homeownership in the USA. Between 1900 and 2005, homeownership rates climbed more than 7 percent in the USA for both whites and minorities (Landis and McClure, 2010). White homeownership rates reached 75.8 percent and minority homeownership rates reached 51.3 percent during this period. Declining discrimination in home sales should be understood in the context of expanding neoliberal policy discourse, an environment characterized by the deregulation of underwriting practices, predatory lending, and other forms of government mandated neoliberal housing policies. On the surface, these policies augmented minority homeownership, but this outcome was achieved by exposing this segment of homeowners to greater economic risks while simultaneously deregulating and insulating financial institutions.

In contrast, the slower decline of discrimination in rental markets should be understood in the context of a more constrained policy environment. A component of contemporary US homeownership policy has been the stigmatization of rental property as less beneficial to individuals and communities (Shlay, 2006). This also is an extension of the neoliberal narrative, which is designed to promote bourgeois values over communal interests. An outcome of the neoliberal attack on renters has been a vacuum in policy innovation accompanied by parochial resistance to affordable housing development. During the period under examination, affordable rental programs remained

confined to market based approaches such as the low-income housing tax credit program (LIHTC) and rent vouchers. Moreover, growth in the supply and available financing for owner-occupied properties outstripped rental property. It is not surprising that paired testing revealed that discrimination against renters was more persistent, especially given that renters are not fully enfranchised in neoliberal ideology, tend to cluster in lower-income groups than homeowners, and have fewer resources at hand to fight housing discrimination.

Results from paired tests provide some evidence of inadequate dialogue about housing rights and weak support for fair housing. Other studies have used surveys to detect the degree to which the general public is aware of fair housing laws. Abravanel and Cunningham (2002) conducted a national survey measuring public awareness of fair housing laws and found that the public has a general awareness of existing policies. However, there was a discrepancy in the degree to which the public was aware of protections for various groups covered by fair housing laws. For instance, there was greater awareness of laws prohibiting discrimination based on race than on disability. The public had the lowest level of awareness of laws prohibiting discrimination based on family status. This was an important finding since discrimination based on family status disproportionately impacts minority home seekers. In such instances, discrimination based on family status can also be a form of indirect discrimination based on race.

Another telling result from Abravanel and Cunningham's (2002) survey was that 14 percent of the adult public believed that they had experienced some form of housing discrimination during the course of their lives. Yet, only 17 percent of individuals who reported that they experienced discrimination did anything about it. Of those who took action, most reported that they simply confronted the offending party without pursuing a formal complaint. Parallel to this result, Squires et al. (2002) surveyed Washington, DC residents and found that over 25 percent of black respondents knew of someone who had experienced housing discrimination in the previous three years. The lack of reporting instances of discrimination is attributable to the poor dissemination and implementation of fair housing policy. Many victims of discrimination do not know where to seek assistance. The dearth of information is the product of inadequate resources being committed to fair housing implementation and the fragmented enforcement system that has evolved since the 1968 Act was adopted by Congress. For victims fortunate enough to know how to file a complaint, disincentives remain due to the low stakes that the conciliation/settlement process entails. Consequently, victims of everyday discrimination remain silent and disempowered. The current fair housing system accommodates complaints about the most extreme and repugnant forms of housing discrimination, but it is ill-equipped to eradicate the more common forms of discrimination that impact the daily lives of minorities, the disabled, families, and other protected groups.

In many respects, perceptions of housing discrimination held by those responsible for policy implementation mirror those of the general public. This is a chilling reality that further hampers fair housing enforcement. Patterson and Silverman (2011) examined the perceptions of public administrators, nonprofit providers, and elected officials responsible for fair housing enforcement in western New York. They found that key stakeholders responsible for fair housing implementation emphasized impediments encountered by the elderly while paying less attention to those impacting minorities, families, the disabled and the poor. This was ironic, since the elderly are not a protected class under federal fair housing laws. Yet, access to housing for the elderly was more salient to those responsible for policy implementation than forms of housing discrimination impacting groups protected by fair housing legislation. This emphasis was viewed as an indication that those responsible for policy implementation did not fully grasp the intent of fair housing laws and were resistant to enforcing them.

This study also raised questions about the degree to which local fair housing enforcement was dependent on cultural background, ideological predilections, and political agendas of those responsible for policy implementation. In a highly fragmented fair housing enforcement system, where a victim of housing discrimination lives heavily influences access to the legal process and administrative remedies. It is often the case that at the local level the activities of FHAP agencies, FHIP organizations, and the DOJ are not well coordinated. In some cases, these activities may be at odds with one another. By default, when the fair housing enforcement system is weak and disjointed, neoliberal ideology becomes the guiding principle, and those victimized by unregulated housing markets have few avenues for recourse. In the contemporary environment, growing neoliberal sentiment aggravates this problem. An increased emphasis is placed on market based remedies while historically underfunded and inconsistently implemented policies are cited as examples of unnecessary government interference in the economy. If left unchecked, the emergent neoliberal narrative could potentially eradicate over four decades of fair housing policy.

Conclusion: Post-Apocalyptic Fair Housing Policy

Fair housing policy has remained underdeveloped, underfunded, and poorly implemented since the beginning of the contemporary fair housing movement. After four decades, the fight for fair housing has been protracted and promises to remain bogged down. The public and policymakers have settled for a limited war against housing discrimination which ensures that minorities, the disabled, families, and other protected groups will continue to be shut out of housing markets. In its present state, the fight for fair housing cannot be won. It is time for fair housing policy to be reconsidered.

Although we have reached these conclusions based on a critical examination of fair housing policy, mainstream organizations have come to parallel conclusions. Recently, the National Commission on Fair Housing and Equal Opportunity (2008) released a report calling for an overhaul of US fair housing policy. In the spirit of that report and our analysis, we offer the following recommendations for policy reform. Our recommendations focus on three fundamental changes aimed at institutionalizing uniform fair housing enforcement and promoting structural reform in US housing markets. First, we propose that an independent fair housing enforcement agency be created at the national level. Second, we propose that the federal government take proactive steps to affirmatively further fair housing by mandating the incorporation of fair housing goals with all of its programs and agency activities. Third, we call for increased lobbying, litigation, and activism by community based advocacy organizations. We acknowledge that each of these changes flies in the face of neoliberalism. Given this reality, we emphasize that a component of this effort at reform address the neoliberal narrative head on. Part of the retort to the neoliberal narrative should include an articulation of an expanded view of housing rights parallel to arguments made by Hartman (1998), Bratt et al. (2006), and Marcuse (2009).

Our first proposal is for the creation of an independent fair housing enforcement agency. Historically, fair housing enforcement has been hampered due to its implementation through HUD. Critics have argued that HUD has a conflict of interest when enforcing the Fair Housing Act, since the agency maintains partnerships with lenders, builders, property management companies, nonprofits, and local agencies that are often in violation of the law (National Fair Housing Alliance, 2009). At the very least, HUD has been lax in *affirmatively* furthering fair housing when interacting with these partners. Instead, HUD has taken a minimalist approach to fair housing enforcement. The agency has primarily relied on complaints and initiated few of its own investigations of housing discrimination. Fair housing enforcement has also been hindered in HUD due to its status as an

executive branch agency. As such an agency, the emphasis of policy implementation can shift with the political climate in Washington, DC. The creation of an independent fair housing agency would insulate policy implementation from these pressures.

An independent fair housing agency would be structured like other independent agencies. Examples of independent agencies in the US Government include: the National Labor Relations Board (NLRB), the Federal Trade Commission (FTC), the National Transportation Safety Board (NTSB), and the Securities and Exchange Commission (SEC). The advantage of charging an independent board or commission with the task of enforcing fair housing policy is that it would function semi-autonomously from the legislative and executive branches. Commission or board members would be appointed on a staggered basis by the President, confirmed by the Senate, and could not be removed without good cause. An independent fair housing agency would have a singular purpose of *affirmatively* furthering fair housing, and it would dedicate all of its effort to investigation, education, coordination, rule promulgation, and related enforcement activities.⁹ This change in the institutional structure would depoliticize fair housing policy and create a singular focus at the federal level.

The creation of an independent fair housing agency would send a clear message to state and local government. It would establish that expectations for fair housing are not politically malleable at the federal level. With the establishment of such an agency, expectations for consistent fair housing enforcement would be the same as expectations for highway safety, workplace safety, and sound financial practices. The normalization and depoliticization of fair housing policy at the federal level would prompt state and local governments to follow suit. Consequently, the establishment of an independent fair housing agency is a prerequisite for our second proposal.

Our second proposal is that the federal government mandates the incorporation of fair housing goals in all of its programmatic and agency activities. This is a sweeping proposal. At its core, is the commitment to ensuring that all recipients of federal funds adopt structural policies aimed at *affirmatively* furthering fair housing. In the area of land-use planning, this would entail the universal adoption of inclusionary zoning regulations. A number of cities across the country have adopted this strategy to ensure that fair and affordable housing is a component of new development projects. For example Boston, MA and Denver, CO adopted inclusionary zoning in 2000 and 2002 respectively (Frug and Barron, 2008). Boston's inclusionary zoning ordinance requires a 15 percent set aside for affordable housing in new developments. Denver's inclusionary zoning ordinance requires a 10 percent set aside. Inclusionary zoning is often accompanied by provisions for density bonuses and other incentives for developers. Efforts to promote fair housing are stymied without legal mandates to include affordable housing set asides in all residential communities. At a minimum, affordable housing set asides should be a component of any development project that involves an infusion of public funds. Linking federal mandates for affordable housing to a broader spectrum of intergovernmental aid should be part of an oversight function of a federal independent fair housing agency.

The adoption of new mandates is also necessary at the regional and state levels. One tool available to metropolitan areas is regional fair-share housing allocation plans. These plans create a regional framework for the development and distribution of affordable housing. They use mechanisms like inclusionary zoning, density bonuses, developer subsidies, and the development of regional housing trust funds to implement fair housing strategies. The viability of regional fair-share housing allocation plans hinges on the coordination of land-use and affordable housing policy across municipalities at the regional level. State and county governments should be required to pursue such planning as a condition of receiving federal funding for community

development, education, transportation, healthcare and other programs. States that allocate federal funds should also expand the scope of their fair and affordable housing policies. New Jersey has one of the more aggressive stances toward the promotion of affordable housing (National Neighborhood Coalition, 2001). In 1983, the State of New Jersey passed a Fair Housing Act and created the Council on Affordable Housing (COAH) to oversee its implementation. Under the New Jersey Fair Housing Act, municipalities with approved affordable housing plans become eligible for a variety of funding benefits.

Inclusionary zoning, regional fair-share housing allocation plans, and statewide Fair Housing Acts suggest that policy focused on individual cases of discrimination is insufficient. In order for US fair housing policy to evolve, it must set out to eliminate structural forms of discrimination. The Fair Housing Act should be amended to give standing to groups disadvantaged by indirect discrimination. There is a need for an independent agency to have clear legislative authority to pursue disparate impact complaints. The number of groups protected under fair housing law should also be expanded. It has been over two decades since this has happened. A top priority should be the addition of discrimination by source of income to federal laws. This would extend fair housing protection to holders of housing vouchers and recipients of other public subsidies. Fair housing policy should also be applied to all housing units. The exemption of rental properties with four or fewer units and home sales where real estate agents are not used should be removed from federal, state, and local law.

Finally, an independent federal fair housing agency should be equipped with expanded resources and tools for fair housing education and enforcement. Funding for fair housing testing should be expanded in order to identify and correct violations of law before individuals become victims of discrimination. Testing should be accompanied by enhanced real estate agent and landlord training to curb discrimination in housing markets. For instance, a national real estate agents and landlords certification program should be established which would require all providers of housing to be licensed, with revenue generated from the licensing process earmarked for fair housing education and enforcement activities. In a similar manner, civil and criminal penalties for violations of fair housing laws should be increased.¹⁰

The adoption of these reforms will not come about without increased lobbying, litigation, and activism by community based advocacy organizations. Nonprofit housing organizations are on the front lines of the battle for fair housing. These organizations have remained engaged, as policy and available resources for fair housing have stagnated. In the face the emerging neoliberal narrative, nonprofit fair housing advocacy groups have become more aggressive in their efforts to litigate fair housing complaints (Cheever and deLeon, 2001). One result of these efforts has been a growing pool of resources for continued fair housing enforcement and policy advocacy based on punitive damages awarded in legal proceedings. These new resources have helped to supplement the limited public funding available for fair housing efforts. Equally important, fair housing advocacy groups have developed new networks through these actions which can be mobilized to advocate for reform at the federal level. It is incumbent upon practitioners and scholars engaged in fair housing to focus their efforts on lobbying and advocating for broad-based reforms. Without such direction from the grassroots, the neoliberal narrative will continue to guide fair housing policy down a path of destruction.

It is time for America to acknowledge that discrimination remains a mainstay in US housing markets. We are at a pivotal point in history. There is growing evidence that neoliberal policies have failed. The current state of financial institutions and housing markets are clear indications of this situation. These crises have prompted calls for reform at the federal and state levels. Prolonging the fair housing quagmire is no longer an acceptable policy.

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Notes

- 1 We adopt this rhetorical device in a deliberate effort to punctuate the degree to which fair housing policy has entered a state of crisis in the contemporary period. This crisis has been the result of the cumulative effects of underfunding and inconsistencies in implementation, as well as growing neoliberal sentiment in the contemporary period. Although controversial, we believe framing the problem in apocalyptic language adds weight to the argument. This approach is similar to that of past scholars who have used rhetorical devices to frame issues related to race and class inequality in urban studies. Our approach is in the tradition of Memmi (1991) and Blauner (1969) who framed low-income minority communities as 'internal colonies', Anderson (1964) who framed urban renewal as 'Negro removal', and Kotler (2005) who framed the municipal annexation process as the emergence of the 'imperial city'.
- 2 In this study, Patterson and Silverman conducted a series of focus groups with individuals from the public and private sectors responsible for the implementation of the fair and affordable housing program in western New York. In addition to other impediments to fair housing, those responsible for policy implementation were found to have incomplete knowledge of fair housing law and were resistant to the concept of affirmatively furthering fair housing.
- 3 The combined case load for 2009 was 30,213.
- 4 This analysis should be viewed as a starting point for a new direction in inquiry. It defines the parameters of the fair housing quagmire. Future research is warranted to examine the subtleties and complexities of the outcomes examined in this article. In part, this might involve field research and interviews with key informants in public agencies and nonprofit organizations that implement fair housing policy. Future research may also include comparative analysis of fair housing policy in other countries where neoliberal ideology is gaining ground. With the exception of Connerly's (2006) work comparing fair housing policy in the USA and the UK, there is a dearth of work of this nature.
- 5 Disaggregated data for conciliations/settlements for HUD and FHAP agencies was reported for 2008. Both rates were 30.2 percent.
- 6 2004–8 data from the Title Eight Automated Paperless Office Tracking System (TEAPOTS) for FHAP agency funding and case load dispositions was used in this analysis.
- 7 Originally, there was a fourth category of FHAP funding called the Administrative Enforcement Initiative (AEI). This category of funding focused on building the capacity of state and local governments engaged in fair housing enforcement. The AEI has not been funded by Congress since 1995, since the program duplicated FHAP activities.
- 8 *Village of Arlington Heights vs Metropolitan Housing Development Corp.* 492 US 252 (1977) established a strict judicial standard for proving the presence of a disparate impact. Under this standard, the DOJ continued to forward disparate impact cases until 2003. At that time, DOJ policy was brought into line with the priorities of the Bush Administration, and disparate impact cases were no longer considered. This was the situation regardless of their merit under existing judicial standards. Six years later, the Obama Administration reversed this policy. This is an example of how the lack of continuity in DOJ activities related to fair housing reflects shifts in the political climate.
- 9 The development of the mission, objectives and goals of such an agency would be central to function as a check against neoliberal ideology. In addition to being insulated from shifts in the political climate, an organizational culture would need to be developed that focuses exclusively on affirmatively furthering fair housing without compromising the agency's mission to accommodate incompatible interests in the public and nonprofit sector. In essence, the development of an independent agency should be informed by the limitations of HUD's and DOJ's experiences with fair housing policy.

- 10 This would include providing for earmarked civil damages to enhance fair housing enforcement and elevating some forms of housing discrimination to the status of hate crimes and other felonies with substantial periods of incarceration.

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