

STRUCTURAL RACISM IN HOUSING IN INDIANAPOLIS

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*“[N]ow arise political extremism, white supremacy, domestic terrorism that we must confront and we will defeat We face an attack on our democracy and on truth. A raging virus, growing inequity, the sting of systemic racism, a climate in crisis.”*¹

“Structural racism” is a newly popular term but a long-standing problem. It has been defined as “the policies, programs, and practices of public and private institutions that result in greater rates of poverty, dispossession, criminalization, illness, and ultimately mortality of African Americans. Most importantly, it is the *outcome* that matters, not the intentions of the individuals involved.”²

In no field of human activity is structural racism more significant, more consequential, than in housing. With housing, indeed, we literally see the structures – and the land use patterns – that have been produced by structural racism. And because housing and land use patterns are so concrete and long-lasting, we in the 21st century experience the impact of structural racism from past centuries as well as what is occurring today.

The reality in the Indianapolis metropolitan area is that it – like most major metropolitan areas in the U.S. – is pervasively segregated on the basis of race, with most African Americans in particular living in under-resourced

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I dedicate this Article to the memory of John and Julie Riordan Coburn, grandparents of my grandchildren; John and Julie both powerfully believed in the dignity and worth of all human beings.

1. Joseph R. Biden, Jr., President of the United States, Inaugural Address (Jan. 20, 2021).
2. KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 8 (2016) (crediting Stokely Carmichael and Charles Hamilton with coining the phrase “institutional racism,” which is said to be synonymous with “structural racism”); STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 5-7 (1967). Pertinently, Carmichael and Hamilton write: “Institutional racism relies on the active and pervasive operation of anti-black attitudes and practices. A sense of superior group position prevails: whites are ‘better’ than blacks; therefore[,] blacks should be subordinated to whites.” *Id.* at 5.

neighborhoods isolated from white people and the amenities associated with white neighborhoods – good schools; healthy, safe, and pleasant environments; varied employment opportunities; inviting recreational facilities.

The Indianapolis Metropolitan Statistical Area (“MSA”) has been and continues to be one of the most segregated in the U.S. Although segregation did decrease significantly after 2000, it still is at a very high level – 64.4%.³

In 1971, U.S. District Judge Samuel Hugh Dillin, deciding a school desegregation case brought by the U.S. against the City of Indianapolis and the Indianapolis School Board, wrote that the Indianapolis MSA “includes, in addition to Marion County, the contiguous counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Morgan, and Shelby.”⁴ The 1970 census showed the Black population of those seven counties to be 0.897%.⁵

Today, the Black population of those counties is, in decreasing order:

- 5.96% for Hendricks – which has the highest percentage;
- 3% for Hamilton;
- 2.9% for Hancock;
- 1% for Johnson;
- 1% for Shelby;
- Less than 1% for Boone; and
- 0.5% for Morgan.⁶

Residential racial segregation is coordinated with economic segregation, so that most African Americans and other people of color live in neighborhoods characterized by high poverty as well as poor schools, poor employment opportunities, and unhealthy and unsafe environments.⁷

3. *Residential Segregation Data for U.S. Metro Areas*, GOVERNING, <https://www.governing.com/archive/residential-racial-segregation-metro-areas.html> [<https://perma.cc/W8B3-KMKR>] (last visited Apr. 10, 2021) (explaining that the dissimilarity index was the primary metric used and the data used the U.S. Census Bureau’s 2013-2017 American Community Survey).

4. *United States v. Bd. of Sch. Comm’rs of Indianapolis*, 332 F. Supp. 655, 663 (S.D. Ind. 1971).

5. *Id.* The Black population of the Indianapolis Metropolitan Statistical Area in 1970 was 2,849 of a total population of 317,583. *Id.*

6. The African American population of the Indianapolis MSA in 2019 was 330,987. *Indianapolis – Carmel – Anderson*, CITY POPULATION, https://www.citypopulation.de/en/usa/metro/26900__indianapolis_carmel_a/ [<https://perma.cc/YYG6-5HL7>] (last visited Feb. 28, 2021).

7. RICHARD B. PIERCE, *POLITE PROTEST: THE POLITICAL ECONOMY OF RACE IN INDIANAPOLIS 1920-1970*, at 84 (2005) (stating that a Notre Dame professor’s study concluded that: “By the late 1960s, whites no longer needed racial covenants and neighborhood associations to block African-American movement into white neighborhoods. The economic gap between whites and African-Americans had grown sufficiently that economic realities provided the most effective barrier”); Nikole Hannah-Jones, *What Is Owed*, N.Y. TIMES MAG. (June 24, 2020), <https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html> [<https://perma.cc/3QWW-F43P>] (stating that “in a country where black people have been kept disproportionately poor and prevented from building wealth, rules and policies involving money can be nearly as effective for maintaining the color line as legal segregation. You do not have to have laws forcing segregated

The harms caused by residential racial segregation are many and deep. One might think that climate change, or gun violence, or police brutality, or extreme political polarization, is our most serious domestic problem. All these are serious problems, and all are caused in substantial part by residential racial segregation.⁸ The principal causes of residential racial segregation have been public policies at the federal, state, and local levels.

Many such policies continue today. These principal causes are eight:

- (1) Racial Zoning;
- (2) Racial Covenants;
- (3) The Home Owners Loan Corporation (“HOLC”)/Federal Housing Administration (“FHA”)/ and Veterans Administration (“VA”) Homeownership programs;
- (4) Public Housing;
- (5) Urban Renewal;
- (6) Federal Aid Highways;
- (7) Euclidean Zoning; and
- (8) The Administration of the LIHTC and Voucher programs.

In addition to these policies, as Judge Dillin found:

Negroes were discouraged from purchasing homes in predominantly “white” neighborhoods by various methods: white realtors refused to show such homes to Negroes (and no Negro real estate broker was permitted to become a member of the Indianapolis Real Estate Association until 1962), a two-price system was used: a realistic market price to whites and a ridiculously inflated price to Negroes, lending institutions refused to finance homes sought to be purchased by Negroes in ‘white’ areas. Those pioneering Negroes who nevertheless overcame all obstacles and succeeded in purchasing such a home were then harassed by such devices as threatening and obscene telephone calls, stones hurled through windows, neighborhood ostracism, etc. Certain streets and other landmarks, such as Fall Creek, White River, certain railroad tracks, etc., were regarded at different times as barriers to be hurdled by Negroes at their peril.⁹

I briefly discuss below each of these eight and some actions we should take, as individual citizens, as leaders in our communities, and as real estate professionals, to undo and redress some of the harms caused by these policies.

housing and schools if white Americans, using their generational wealth and higher incomes, can simply buy their way into expensive enclaves with exclusive public schools that are out of the price range of most black Americans”).

8. *See, e.g.*, METZL, *supra* note * (showing how white supremacy has led to increased gun violence and decreased health and education services); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 195-96* (2017) (discussing residential racial segregation as a cause of political polarization).

9. *Bd. of Sch. Comm'rs of Indianapolis*, 332 F. Supp. at 662 (footnote omitted).

1. RACIAL ZONING

Beginning toward the end of the 19th century, a number of cities and states enacted explicit racial zoning ordinances and statutes that required that persons of certain “races” reside only in particular – and particularly undesirable – parts of town. This racial zoning was directed especially against people of Asian descent on the West Coast and against African Americans throughout the country.¹⁰ In 1917, the U.S. Supreme Court held such explicit racial zoning unconstitutional.¹¹ Nonetheless, communities continued to enact and enforce such laws. Indianapolis enacted such a law in 1926.¹² The U.S. Supreme Court continued to invalidate those laws, but the laws stayed on the books and were adhered to in many communities nonetheless.¹³

10. With respect to persons of Asian descent, see, for example, *In re Lee Sing*, 43 F. 359 (N.D. Cal. 1890); ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 257 (1971); CHARLES J. McCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 282-83 (1996); ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 18-22 (1962). With respect to African Americans and others, see Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983); RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* (2013).

11. *Buchanan v. Warley*, 245 U.S. 60 (1917).

12. *Bd. of Sch. Comm'rs of Indianapolis*, 332 F. Supp. at 662.

13. See, e.g., *Tyler v. Harmon*, 273 U.S. 668 (1927) (New Orleans); *City of Richmond v. Deans*, 281 U.S. 704 (1930); *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951).

2. RACIAL COVENANTS

Although racial covenants also date from the 19th century, they became particularly widely used as explicit racial zoning laws were invalidated.¹⁴ They are common in Indianapolis. As Judge Dillin noted in his 1971 opinion, “many of the better known subdivisions, such as Williams Creek Estates, Broadmoor Estates, Meridian Hills, Highwoods Addition, Forest Hills, Wellington Estates, Fall Creek Highlands, Greenslopes, Wynedale, Ellenberger Plaza, and Meridian-Kessler Terrace, contained such covenants.”¹⁵

The U.S. Supreme Court held the covenants judicially unenforceable in 1948 and in 1968 the covenants became unlawful under the federal Fair Housing Act, which prohibited statements indicating a preference based on race, color, religion, or national origin; the act subsequently was amended in 1974 and 1988 to extend this prohibition to sex, disability, and familial status.¹⁶ Despite their unenforceability and illegality, racial and other discriminatory covenants were produced even after these rulings and statutes, and generally the covenants continue to appear in deeds throughout the country. We know of several relatively recent instances in which people have tried to enforce them – a racial covenant in Virginia, a national origin covenant in New York, a religious covenant in Michigan.¹⁷

14. BROOKS & ROSE, *supra* note 10, at 46; CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 9 (1959).

15. *Bd. of Sch. Comm'rs of Indianapolis*, 332 F. Supp. at 662.

16. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (invalidating judicial enforcement of racial covenants); *Hurd v. Hodge*, 334 U.S. 24 (1948) (invalidating judicial enforcement of racial covenants); *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc) (holding racial covenants invalid under 42 U.S.C. Section 3604(c)). The Fair Housing Act was amended in 1974 to prohibit discrimination because of sex and in 1988 to prohibit discrimination because of “handicap,” now called “disability,” and familial status. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808(b), 88 Stat. 633, 729; Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, 1619-39; see ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION §§ 11C:1, 5.3 (2017). Covenants often restricted ownership and occupancy not only against Blacks but also against “Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, and Filipinos, among others.” *Shelley*, 334 U.S. at 21 (1948).

17. Motoko Rich, *Restrictive Covenants Stubbornly Stay on the Books*, N.Y. TIMES (Apr. 21, 2005), <https://www.nytimes.com/2005/04/21/garden/restrictive-covenants-stubbornly-stay-on-the-books.html> [<https://perma.cc/9U3Y-FEHK>] (reporting a conversation “three years ago” and a homeowner’s testimony to the Virginia Fair Housing Board that he believed a clause in his deed prohibited him from selling to “any person not of the Caucasian race”); The Associated Press, *National Briefing/South: Virginia Man Must Pay for Housing Discrimination*, N.Y. TIMES (Dec. 10, 2005), <https://www.nytimes.com/2005/12/10/us/national-briefing-south-virginia-man-must-pay-for-housing-discrimination.html> [<https://perma.cc/77NM-T2U7>]; Josh Russell, *Settlement Ends Nazi-Era ‘Whites Only’ Enclave in New York*, COURTHOUSE NEWS SERV. (May 17, 2017), <https://www.courthousenews.com/settlement-ends-nazi-era-whites-enclave-new-york>

3. HOLC/FHA/VA

With the Great Depression, the federal government began to act to protect and encourage homeownership. The Home Owners Loan Corporation created the Residential Security Maps that nationalized the practice of “redlining” neighborhoods in which African Americans and other people of color lived.¹⁸ The FHA and VA made it possible for working Americans to afford homeownership, which previously had been too expensive for them. The FHA created long-term, low-interest, low-down-payment, fully amortized mortgage lending insured by the federal government, and the VA reproduced this with guarantees rather than insurance. But the devil in both programs was that the loans were available almost exclusively to whites, and only for housing in racially exclusive developments.¹⁹ Between 1946 and 1959, 98% of the funding for the FHA and VA homeownership programs went to whites.²⁰ Homeownership became the American Dream because of these federal programs, but the federal programs – even the GI Bill – benefitted whites, not people of color, and insisted on racially exclusionary communities.²¹

[<https://perma.cc/D3BZ-2LTR>] (settling litigation challenging a subdivision that “remains a white enclave by ‘enforcing a number of rules that restrict homeownership to members who are required primarily to be individuals of German extraction”). In Michigan, a 2017 lawsuit challenged a covenant that excluded from a subdivision all persons who were not Christians. See John Agar, *Christian Requirement at Northern Michigan Resort Illegal, Federal Government Says*, GRAND RAPIDS NEWS (July 10, 2019), <https://www.mlive.com/news/grand-rapids/2019/07/christian-requirement-at-northern-michigan-resort-illegal-federal-government-says.html> [<https://perma.cc/DB28-X5LA>]. Covenants also attained much public attention in the confirmation hearings for Justice William Rehnquist in 1986 and the California Senate contest between Diane Feinstein and Michael Huffington in 1998, as each of these individuals owned homes with racial covenants. See BROOKS & ROSE, *supra* note 10, at 1; Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 494 n.73, 494-95 (1995).

18. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 199 (1985).

19. *Id.* at 203-18, 233.

20. MARK I. GELFAND, *A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA 1933-1965*, at 221 (1975). In the ILTA speech, I gave these dates as 1933 to 1960; I regret and apologize for this error.

21. See ROTHSTEIN, *supra* note 8, at 180-83.

4. PUBLIC HOUSING

Again, in Indianapolis as elsewhere in the U.S., public housing sites were chosen and tenants selected to enforce residential racial segregation.²² The first public housing project in the city was Lockefield Gardens, which was constructed for Black families. Its 784 units were built in what was called “the worst Negro slum in America.”²³ In the school desegregation case, the district court found, and the U.S. Court of Appeals for the Seventh Circuit affirmed, that the sites for the other ten public housing projects all were chosen by the Housing Authority of the City of Indianapolis to be within the boundaries of the old City of Indianapolis – that is, within the boundaries of Indianapolis Public Schools (“IPS”) – and that this was done with the unconstitutional intent on the part of the responsible state agencies to impose residential racial segregation.²⁴ In the projects that housed families, 98% of the residents were Black.²⁵ The ten projects comprised units for more than 1,600 families and, as the court of appeals noted, “once a public housing project was opened other blacks tended to settle in the area.”²⁶ “The connection between that policy and suburban housing and school enrollment patterns is obvious,” the court of appeals said.²⁷

22. PIERCE, *supra* note 7, at 63 (explaining that public housing was used “to help maintain racially separate neighborhoods”).

23. *Id.* at 64 (quoting Nathan Straus, former U.S. Housing Administrator). Pierce also says that public housing “reserved for whites” was located at less dense, scattered sites. *Id.* at 64-65.

24. *United States v. Bd. of Sch. Comm’rs of Indianapolis*, 37 F.2d 1101, 1111 (7th Cir. 1980).

25. *Id.* at 1109.

26. *Id.* at 1114.

27. *Id.*

5. URBAN RENEWAL AND 6. HIGHWAYS

Urban renewal and highways really can be discussed together. Again, in Indianapolis as elsewhere throughout the U.S., both were used to destroy housing – most of it occupied by African Americans – and vibrant communities. Homeowners were accorded very small compensation for their homes; tenants were given no compensation, no relocation assistance, and no replacement housing other than sometimes the offer of a public housing unit.²⁸ The expansion of Indiana University-Purdue University Indianapolis and the downtown hospitals, the revitalization of the downtown canal, all were part of this program.²⁹ The later development of Fall Creek replicated the problems of the earlier urban renewal.³⁰ Urban renewal was known as “Negro removal” – for excellent reasons – and the federal aid highway program had the same effect.³¹

28. See ROTHSTEIN, *supra* note 8, at 189. With regard to highways, see, for example, MARK ROSE & RAYMOND MOHL, *INTERSTATE HIGHWAY POLITICS AND POLICY SINCE 1939* (2012).

29. See, e.g., Wildstyle Paschall, *Indiana Avenue: The Ethnic Cleansing of Black Indianapolis*, *NEW AM.* (Feb. 4, 2020), <https://www.newamerica.org/indianapolis/blog/indiana-avenue-ethnic-cleansing-black-indianapolis/> [<https://perma.cc/C368-BC8B>]; Sarah Bowman, *The White River: Boundaries of ‘Redlining’ Maps Still Etched in Indianapolis Neighborhoods*, *INDIANAPOLIS STAR* (May 2, 2020), <https://www.indystar.com/in-depth/news/environment/2020/05/02/redlined-indianapolis-areas-still-see-poverty-poor-health/3017810001/> [<https://perma.cc/3MNY-RJKS>].

30. MATT NOWLIN ET AL., *NEIGHBORHOOD CHANGE 1970-2016: SUBURBANIZATION, GENTRIFICATION, AND SUBURBAN REDEVELOPMENT* 5 (2018), <https://www.savi.org/wp-content/uploads/2017/10/Neighborhood-Change-SAVI-Community-Trends.pdf> [<https://perma.cc/VC45-WVYB>].

31. In 1963, James Baldwin during an interview with Kenneth Clark stated that urban renewal means Negro Removal and that “the Federal Government is an accomplice to this fact.” To view part of this interview, see Vince Graham, *Urban Renewal...Means Negro Removal. ~ James Baldwin (1963)*, *YOUTUBE*, <https://www.youtube.com/watch?v=T8Abhj17kYU> (last visited Apr. 10, 2021). Barak Atiram, *The Wretched of Eminent Domain: Holdouts, Free-Riding and the Overshadowed Problem of Blinded-Riders*, *BERKELEY J. AFR.-AM. L. & POL’Y* 52, 86 (2016); Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 47 (2003) (noting that “urban renewal came to be known as ‘Negro removal’”).

7. EUCLIDEAN ZONING

We come now to some of the most important, continuing programs imposing residential racial segregation in Indianapolis. When explicit racial zoning was invalidated by the U.S. Supreme Court (and a number of state courts), local communities turned to the “use” zoning that we know today to achieve the same purposes without employing the language of racial exclusion.³² This is the zoning that controls land use today, reserving vast areas of the suburbs for single-family housing on relatively large lots and excluding from those suburbs any multi-family or clustered housing that would serve families rather than elderly persons. Subsidized housing of any kind – if it is for families and not seniors – is almost entirely excluded from the suburbs. This goes far to explain the very low percentage of African Americans who live in the suburbs.³³

32. TAYLOR, *supra* note 2, at 114-15; ROTHSTEIN, *supra* note 8, at 48-57, 204-05; Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 94 (2001); CHRISTOPHER SILVER, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 21 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

33. See, e.g., Kaitlin Lange, *Carmel Has a Negative Reputation When It Comes to Race Relations. Here's Why.*, INDIANAPOLIS STAR (July 12, 2020), <https://www.indystar.com/story/news/local/hamilton-county/carmel/2020/07/12/carmel-negative-reputation-race-relations/3236395001/> [<https://perma.cc/DAG5-5NNV>]; Travis Robinson, *Carmel Students Say They Face Racism as Group Pushes for Change*, WISHTV (Aug. 30, 2020), <https://www.wishtv.com/news/local-news/carmel-students-say-they-face-racism-as-group-pushes-for-change/> [<https://perma.cc/XM6M-B8KH>]; Casey Kensley, *Hamilton County Begins to Reconcile a Shameful Klan Past*, INDIANAPOLIS MONTHLY (June 11, 2020), <https://www.indianapolismonthly.com/longform/hamilton-county-begins-to-reconcile-a-shameful-klan-past> [<https://perma.cc/J5K5-NVT7>]; Brook Kemp & Justin Mack, *Controversial Lyrics Raise Calls of Racism During Dance Performance for Noblesville Duck Race*, INDIANAPOLIS STAR (July 26, 2020), <https://www.indystar.com/story/news/local/hamilton-county/2020/07/26/lyrics-during-dance-performance-noblesville-indiana-stir-complaints-racism/5515426002/> [<https://perma.cc/H5GT-RBDT>].

8. THE ADMINISTRATION OF THE LOW INCOME HOUSING TAX CREDIT
 (“LIHTC”) AND VOUCHER PROGRAMS

The final item on my list also is a double bill – the administration of the LIHTC and voucher programs. These are two of the three major federal housing subsidy programs, the third being the conventional public housing program, which produces no new units but in fact suffers significant reductions of housing stock each year.³⁴ The LIHTC program is the largest federal program for producing new or substantially rehabilitated subsidized housing, and the voucher program assists millions of households by enabling them to pay approximately 30% of household income for rent with the federal government paying the difference between that and a payment standard established by the government.³⁵ The programs are related because LIHTC units, despite the program’s name, are not designed to accommodate really poor people – this is a shallow subsidy program.³⁶ LIHTC works for poor people only if they have vouchers.³⁷ And federal law prohibits LIHTC developments from discriminating against voucher holders because they have vouchers.³⁸

These programs have potential for enabling residential racial desegregation, except for three facts:

- (1) Local communities usually zone out multifamily housing, particularly if it is for families and most particularly if it is subsidized;³⁹
- (2) The state and private actors who control the location of LIHTC developments put virtually all the family developments into areas that already are predominantly minority, high poverty, inner-city areas;⁴⁰ and
- (3) Federal law allows private landlords, other than LIHTC

34. For information on LIHTC, see NAT’L LOW INCOME HOUS. COAL., *ADVOCATES’ GUIDE 2020*, at 5-17 (2020). For information on vouchers, see *id.* at 4-1. For information on public housing, see *id.* at 4-30.

35. U.S. DEP’T OF HOUS. & URBAN DEV., *WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND?* 2 (2012), https://www.huduser.gov/portal/publications/pdf/what_happens_lihtc_v2.pdf [<https://perma.cc/W7ZS-A4SQ>]; *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T HOUSING & URB. DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [<https://perma.cc/S7QE-FTPW>] (last visited May 7, 2021).

36. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 35, at 3-4.

37. *Id.* at 3 (“[T]he program reaches a somewhat higher income group than previous production programs, unless it is coupled with other subsidies such as tenant-based housing vouchers.”).

38. 42 U.S.C. § 12745(a)(1)(D) (2021).

39. Richard A. Epstein, *Positive and Negative Externalities in Real Estate Development*, 102 MINN. L. REV. 1493, 1524 (2018) (“[I]t is certain that local governments will use all the resources at their disposal to keep out low-income families, often . . . families with school-age children.”).

40. See ROTHSTEIN, *supra* note 8, at 190.

developments, to refuse to accept voucher holders as tenants.⁴¹ A number of other states prohibit this kind of discrimination, which is based on stereotypes about voucher holders, but such discrimination is not prohibited in Indiana.⁴²

41. *Id.* at 190-91, 210 (pointing out also that Fair Market Rent levels are too low to allow vouchers to be used in well-resourced neighborhoods).

42. *See* POVERTY & RACE RESEARCH ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM (2021), <https://www.prrac.org/pdf/AppendixB.pdf> [<https://perma.cc/QE34-FQ3D>].

WHAT CAN WE ALL DO?

As I have said, residential racial segregation is, in my view, the most serious problem in the U.S. today. The most important task for all of us – as citizens, as parents and grandparents, as lawyers, and as real estate professionals – is to reduce this segregation, discrimination, inequality, and separation. I suggest four kinds of actions we can take.

First, keep educating yourselves and your friends and neighbors about the sources, history, and evils of residential racial segregation. I have been teaching about them for fifty years, and students always say they are shocked that they had not learned about much of this before law school. An excellent place to start is with Richard Rothstein's book, *The Color of Law: A Forgotten History of How Our Government Segregated America*.⁴³

Try to learn also from people. White people tend to associate mostly with other white people. Try to expand your horizons. Talk to people of color with whom you share interests in work or religion or sports.⁴⁴

Second, get involved in community anti-racist activities. Several suburban communities experienced serious racist incidents within the past few months – I think of Carmel and Noblesville, in particular.⁴⁵ When such things happen in your community, speak and act for inclusion. Encourage multi-racial conversations of many kinds. Encourage open housing activities.

Third, you might promote political action on the local, state, or federal level. Locally, inclusive zoning would be a wonderful innovation. Montgomery County, Maryland, a suburb of Washington, D.C., pioneered this in 1974, and many localities all over the country have emulated it. Local zoning laws require that some percentage – 15% to 30% – of all new developments be subsidized units. Studies have shown this to be very successful in integrating housing and schools, with great benefits for all involved.⁴⁶

43. ROTHSTEIN, *supra* note 8. It is particularly important to educate young people – those in middle school, high school, and college. *See id.* at 199-200; JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG (1995); Florence Wagman Roisman, *Lessons for Advocacy from the Life and Legacy of the Reverend Doctor Pauli Murray*, 20 U. MD. L.J. RACE RELIG. GENDER & CLASS 1, 29-33 (2020); ISABEL WILKERSON, CASTE (2020); IBRAM X. KENDI, HOW TO BE AN ANTI-RACIST (2019); ROBIN DIANGELO, WHITE FRAGILITY (2018); JON MEACHAM, HIS TRUTH IS MARCHING ON (2020). One also would do well to read works by James Baldwin and Toni Morrison, among many others.

44. *See* SUSAN NIEMAN, LEARNING FROM THE GERMANS 67 (2019) (discussing “the idea that when people tell their stories, you can always find something that is yours too, and then they’re not strangers anymore. I’ve seen it happen with people who initially refused to look at each other”).

45. *See* Lange, *supra* note 33; Robinson, *supra* note 33; Kensley, *supra* note 33; Kemp & Mack, *supra* note 33.

46. ROTHSTEIN, *supra* note 8, at 205; HEATHER SCHWARTZ, HOUSING POLICY IS SCHOOL POLICY: ECONOMICALLY INTEGRATIVE HOUSING PROMOTES ACADEMIC SUCCESS IN MONTGOMERY COUNTY, MARYLAND (2010). Unfortunately, the Indiana General Assembly has prohibited such

In a similar vein, local communities should welcome family LIHTC developments, and the Indiana State Housing Finance Authority should amend its annual Qualified Allocation Plan to encourage the development of family units in well-served suburban neighborhoods with good schools, safe streets, and healthy environments.⁴⁷ Both local governments and the state should prohibit discrimination against voucher holders and provide incentives to landlords who do rent to voucher holders.⁴⁸ Nationally, the government should encourage expansion of the LIHTC and voucher programs. In fact, Senator Young has co-sponsored a bill that would improve and expand the voucher program; I am sure he would welcome Hoosier support.⁴⁹ For every four families in need of and eligible for housing assistance before the pandemic began, only one family received housing assistance – one in four, before the pandemic.⁵⁰ Now, with millions of households having lost their jobs and facing loss of their homes, the need for further income and housing assistance is enormously greater.⁵¹

Fourth, and finally: take action with respect to racially restrictive covenants. Although they were made judicially unenforceable in 1948 and illegal in 1968, they still are in many deeds in Indianapolis and elsewhere.⁵²

What should be done about these covenants? About a dozen states have enacted legislation to make it easier and less expensive to eliminate them from deeds.⁵³ Since the covenants plainly are illegal under the 1968 Federal Fair Housing Act, and have been held to be illegal under that statute, another

local legislation. IND. CODE § 32-31-1-20 (2020). This state law should be reversed.

47. Katie Whitley, *Increasing Access to High-Quality Schools in Indianapolis Through the Low-Income Housing Tax Credit Qualified Allocation Plan*, 55 IND. L. REV. (forthcoming 2021).

48. ROTHSTEIN, *supra* note 8, at 208-09. Rothstein also points to Illinois's allowance of a property tax deduction for landlords who rent to voucher holders. *Id.* at 210.

49. See Press Release, Young and Van Hollen Introduce Bipartisan Bill to Increase Mobility, Keep Families Together, and Move Children to Areas of Opportunity (Dec. 18, 2019), <https://www.young.senate.gov/newsroom/press-releases/young-and-van-hollen-introduce-bipartisan-bill-to-increase-mobility-keep-families-together-and-move-children-to-areas-of-opportunity> [<https://perma.cc/P4YR-GG7R>]. Senator Todd Young and Maryland Senator Chris Van Hollen have sponsored the Family Stability and Opportunity Vouchers Act, which champions an additional 500,000 housing vouchers over five years for low-income, high-need families with young children to provide supports for families to move to high-opportunity areas to increase successful life outcomes. Family Stability and Opportunity Vouchers Act of 2019, S. 3083, 116th Cong. (2019).

50. NAT'L LOW INCOME HOUS. COAL., *supra* note 34, at 1-11.

51. *Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES (May 7, 2021), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> [<https://perma.cc/2P44-YPZN>].

52. See *supra* Section 2.

53. See CITY ROOTS CMTY. LAND TR. & YALE ENVTL. PROT. CLINIC, *CONFRONTING RACIAL COVENANTS: HOW THEY SEGREGATED MONROE COUNTY AND WHAT TO DO ABOUT THEM* (2020) (listing states that have done this and cities that are mapping racial covenants).

possibility would be for the covenants to be crossed out on the deeds, with notations that the covenants are illegal and unenforceable. A law professor reported that when he bought a house in Los Angeles, prior transactions that had been superseded were “carefully lined out in blue ink and initialed by a title company employee to highlight that they were no longer effective,” though the racial covenant in his deed “was untouched.”⁵⁴

Notice of the covenants’ illegality might be provided with the deeds that contain them. The full U.S. Court of Appeals for the District of Columbia Circuit held in 1972 that it was unlawful for the Recorder of Deeds to accept and file or provide copies of deeds with such covenants without providing a notice that the covenants are “null and void.”⁵⁵ An opinion in that case reported that “the major title companies . . . responsible for 95% of the deeds presented for recordation . . . have agreed with the Justice Department not to report racially restrictive covenants in their title policies.”⁵⁶ In another case, the U.S. Department of Justice secured from a federal trial court an order requiring a county clerk to “post in her office and affix to all documents pertaining to real property furnished by her office a notice stating that racially restrictive covenants are void under federal law.”⁵⁷

Yet another response is to use the covenants as educational or exorcistic tools. Rothstein, for example, suggests adding to a deed with a racial covenant a provision that says the covenant is “unenforceable, unlawful, and morally repugnant”; and that the owners “repudiate this clause, are ashamed for our country that many once considered it acceptable, and state that we welcome with enthusiasm and without reservation neighbors of all races and ethnicities.”⁵⁸

Similarly, each house that is the subject of such a covenant might bear a plaque reporting the covenant’s creation, purpose, and repudiation.⁵⁹ This would be similar to the *Stolpersteine* – stumble stones – in Germany, that mark the last homes in which victims of the Nazis lived in freedom.⁶⁰ Michael Gorra praises the *Stolpersteine* as

the best vehicle I know for the process of what in German is called
Vergangenheitsbewältigung, the process of working through or

54. E-mail from David Glazier, Professor of Law, Loyola Law Sch., to the Ass’n of Am. Law Schs.’ Section on Prop. Law Listserv (Aug. 6, 2020) (on file with author).

55. *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc). But see the powerful dissent of Judge Fearing in the recent case of *May v. Spokane County*, 481 P.3d 1098, 1104-14 (Wash. Ct. App. 2021) (arguing that any remedy but physical elimination of the covenant is inadequate).

56. *Mayers*, 465 F.2d at 646 (referring to Judge Wright’s concurrence).

57. *United States v. Univ. Oaks Civic Club*, 653 F. Supp. 1469, 1476 (S.D. Texas 1987).

58. ROTHSTEIN, *supra* note 8, at 221-22.

59. See generally Florence Wagman Roisman, *Stumbling Stones at Levittown: What to Do About Racial Covenants in the United States* (Dec. 10, 2020) (unpublished manuscript) (on file with the author).

60. See MICHAEL GORRA, *THE SADDEST WORDS: WILLIAM FAULKNER’S CIVIL WAR* 324 (2020).

overcoming through the past . . . a fusion of the noun for ‘pasts’ . . . with the word that denotes the idea of coping or mastering, and always with a sense of struggle. It is what one does, must do, with a difficult and recalcitrant history, a history for which one’s people bear responsibility: a struggle that may last for generations and that extends even to those individuals who carry no personal share of the burden.⁶¹

A combination of Rothstein’s correction of the deeds and plaques on the houses seems to be potentially very effective. To enhance both, the extent of the covenants’ use should be documented.

Racial covenants have been analogized to monuments to slaveholders, Confederate soldiers, and leaders of the Ku Klux Klan.⁶² Like those monuments, the covenants are offensive, hurtful reminders of racial hatred and degradation. What has been written of the slavery/confederacy/Klan monuments is, I think true of the racial covenants – that they “poison[] our generations like radioactivity in the soil.”⁶³ That radioactivity should be eliminated.

61. *Id.* at 325.

62. This analogy is implicit in *Mason v. Adams Cty. Recorder*, 901 F.3d 753, 758 (6th Cir. 2018).

63. Ayana Mathis, reviewing GORRA, *supra* note 60, wrote that in his final chapters, Gorra “compares America’s monuments to the Confederacy with Germany’s memorials to the Holocaust. It would be unthinkable to most Americans if such memorials celebrated the Third Reich, yet monuments to the Confederacy and its legacy of slavery are ubiquitous . . . poisoning our generations like radioactivity in the soil.” Ayana Mathis, *The Trauma of the Civil War Lives On in Faulkner’s Fiction*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/books/review/the-saddest-words-michael-gorra.html> [<https://perma.cc/HE7X-5THX>].