

Protecting Privilege: Race, Residence and Rodney King

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The 1992 acquittal of the Los Angeles police officers who beat Rodney King, and the resulting devastation of an already ravaged community, is a parable that contains many different lessons about race in America.¹ Although the verdict's most graphic illustrations are about the manner in which our criminal justice system abuses African Americans,² the events also reflect a fundamental injustice

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1. On March 3, 1991, Rodney King was beaten by police officers during his arrest following a high speed chase. The beating was videotaped by George Holliday, a neighborhood resident, and was broadcast on local and national television. A California grand jury indicted four officers for the beating on assault charges. The state trial originated in Los Angeles County, but venue was moved to Ventura County due to the extensive publicity surrounding the case. On April 29, 1992, a jury in suburban Simi Valley, California acquitted the police officers of all charges except one count of excessive force against officer Laurence Powell. A mistrial was found on that count. Geoffrey P. Alpert et al., *Law Enforcement: Implications of the Rodney King Beating*, 28 CRIM. L. BULL., 469, 471 (1992).

The four officers were later tried in federal courts for violating King's civil rights. On April 17, 1993, the federal court jury found Sgt. Stacey Koon and Officer Powell guilty.

An article in the popular press presented some reasons for the opposing verdicts. The state court proceedings were held in

a mostly suburban, middle-class area northwest of Los Angeles. The jury there consisted of 10 whites, one Asian and one Latino (sic). By contrast, the federal district encompasses a larger and more socially diverse area that includes the count[y] of Los Angeles The federal jury consisted of nine whites, two blacks and one Latino. Experts said that far more important than race were the different experiences and world views of suburban and urban jurors.

Seth Rosenfeld & Marsha Ginsburg, *King Beating Trial Legal Issues*, S.F. EXAMINER, Apr. 18, 1993, at A10. See also Mark Hansen, *Different Jury, Different Verdict?*, 78 A.B.A. J. 54 (1992). A discussion of suburban perceptions about race, crime and police brutality appears *infra* at text accompanying note 33.

2. African Americans, particularly African American males, face racial discrimination from each component of the criminal justice system, from law enforcement to

of another sort—how and where Americans reside.³ The America represented by Rodney King and South Central Los Angeles lives in segregated cities⁴ while the America of the police defendants and Ventura County jurors resides in segregated suburbs.⁵

prosecution to incarceration. See *Developments In The Law—Race And The Criminal Process*, 101 HARV. L. REV. 1472 (1988) (examining the institutional problem of racial discrimination throughout the U.S. criminal justice system). See also Paul Hoffman, *The Feds, Lies and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1455, 1459 (1993) ("The predominant, though not exclusive feature of police abuse in Los Angeles is the singling out of young African-American and Latino males for special attention, harassment, detention, physical abuse, brutality, and sometimes death."); Charles J. Ogletree, *Does Race Matter in Criminal Prosecutions?*, 15 CHAMPION 7, 7 (1991) ("Racial disparity and racial prejudice continue to corrupt the criminal justice system, the level of despair there far outdistancing the level of hope."); Cassia Spohn et al., *The Effect of Race on Sentencing: A Re-examination of an Unsettled Question*, 16 L. & SOC. REV. 71 (1981-82) (finding that black males are sentenced to prison at a twenty percent higher rate than white males, while white males are more likely to receive probation, although once the decision to incarcerate is made, no disparity in sentencing was found).

Even as victims of crime, African Americans fail to receive justice from the criminal law systems. Because murderers of whites are four times more likely to be sentenced to death than murderers of blacks, African American communities are denied equal treatment with respect to those who kill their members. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1391 (1988).

3. A recurring metaphor for the racial configuration of the United States is that of "two nations." The term was used in 1968 to summarize the findings of a federal commission established by President Johnson to investigate the causes of urban "racial disorders" that occurred in cities across the nation during the summer of 1967. The Commission wrote: "This is our basic conclusion: Our Nation is moving towards two societies, one black, one white—separate and unequal." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (KERNER COMMISSION REPORT) 1 (1968) [hereinafter KERNER COMMISSION REPORT].

Andrew Hacker revives the metaphor "Two Nations" in his 1992 book about the role of race in the United States. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992). I continue this metaphor in the discussion of different Americas that follows.

4. "The most salient feature of postwar segregation is the concentration of blacks in central cities and whites in suburbs." DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 67 (1993). "By 1970, racial segregation in U.S. urban areas was characterized a largely black central city surrounded by predominantly white suburbs . . ." *Id.* at 61. Metropolitan areas throughout the United States experience high levels of black-white residential segregation. Measures of residential segregation for metropolitan areas with the largest black population in 1980 indicated an average index of 77 (where 0 would indicate a random distribution and 100 equals total separation). The index for metropolitan Los Angeles was 79. NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 78-79 (Gerald D. Jaynes & Robin M. Williams eds., 1989).

5. According to the 1990 Census, Ventura County had a total population of 669,016. BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS, CAL. tbl. 5 at 32 (1992). White residents numbered 529,166 (79.2%), while 15,629 (2.3%) were black. *Id.* The population of the city of Simi Valley was 100,217 in 1990, including 88,345 (88.2%) whites and 1,527 (1.5%) blacks. *Id.*, tbl. 6 at 104. Simi Valley is an area "dispropor-

Metropolitan residential patterns reflect widely held convictions that "good neighborhoods" exclude poor blacks and Hispanics.⁶ The segregation of poor minorities, particularly African Americans, in urban ghettos exacerbates their poverty⁷ and creates a false sense that urban problems are not the concern of suburban residents. But the suburbs are not insulated from urban crises, "[t]he real city is the total metropolitan area—city and suburb."⁸ The urban inner city and outlying suburbs will inevitably clash because American society cannot back away from its proclamations that the segregation which sustains these contrasting worlds will no longer be tolerated.

According to our nation's Constitution and the Fair Housing Act, both governmental and privately imposed discrimination are prohibited.⁹ The Fair Housing Act, enacted in 1968, provides that it is unlawful "[T]o discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling . . . because of

tionately the home of L.A.P.D. officers and retirees." Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DENV. U. L. REV. 283, 286 (1993). Several of the jurors were either in law enforcement themselves or had relatives or close friends in such a job. Nina Bernstein, *Bitter Division in Jury Room; How 12 Ordinary Citizens Met For 7 Days To Produce Verdict That Shook L.A.*, NEWSDAY, May 14, 1992, at 5, available in LEXIS, NEWS Library, NEWSDY File. A poll indicated that 24 percent of Ventura County residents have similar connections. *Id.* Three of the four defendants lived in suburban or rural areas of Los Angeles County. Sgt. Stacey Koon lived in Castaic, a hilly town 40 miles north of Los Angeles, an area more rural than suburban. Timothy Wind lived in Santa Clarita which is located near Castaic. Theodore Briseno lived in Sepulveda, a suburb due east of the city of Los Angeles. Leslie Berger & John Johnson, *Officers from Diverse Backgrounds*, L.A. TIMES, Mar. 16, 1991, at A24; see also *A Look at Four Officers Acquitted*, USA TODAY, Apr. 30, 1992, at 2A. I could find no information about the residence of Laurence Powell.

6. Although a number of factors contributed to the postwar suburban expansion "in many metro areas, racially motivated 'White Flight' was undeniably a major factor in suburban growth. 'Good' neighborhoods with 'good' schools often were seen as neighborhoods and schools without any Blacks and, to a lesser degree, without any Hispanics. After the civil rights revolution in the 1960s, neighborhoods and schools without poor Blacks and Hispanics met the 'good' test.

Racial prejudice played a role in the evolution of overwhelmingly White suburbs surrounding increasingly Black cities." DAVID RUSK, *CITIES WITHOUT SUBURBS* 29 (1993).

7. MASSEY & DENTON, *supra* note 4, at 130-42.

8. RUSK, *supra* note 6, at 5.

9. U.S. CONST. amend. XIV, § 1, guarantees equal protection of the law from state governments. Despite constitutional guarantees, legislation and government action "undoubtedly played an important part" in the segregation of American cities that occurred with the black migration to northern states after the end of World War I. Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 877 (1988).

The Fair Housing Act, 42 U.S.C. §§ 3601-14 (1988 & Supp. 1992), prohibits racial discrimination in most private housing transactions. Owner conducted sales and rentals in dwellings that contain four or fewer units are exempt from the Act. 42 U.S.C. §§ 3603(b)(1) & (2).

race, color, religion, sex, familial status or national origin."¹⁰ But despite this broad mandate, the law has been interpreted to reach only a narrow spectrum of racial exclusion. The law provides no redress for much of the widespread segregation of poor minority Americans committed under the auspices of privilege, both racial and economic.¹¹

This article argues that, rather than prohibit economic discrimination, our legal system insulates it from the reach of civil rights law. Our system allows easy circumvention of fair housing law when discrimination takes the form of financial requirements or if exclusion is attributed to protection of property interests. Such economic discrimination has been accorded a race-neutrality belied by the prevalence of hyper-segregated black urban ghettos.¹² The article will also examine how courts protect commonplace assertions of racial privilege by designating the tendencies of middle-class whites to flee school and residential integration as *de facto* (and therefore irremediable) segregation. This protection of established racial and economic privilege is so embedded in our society

10. 42 U.S.C. § 3604(b). Addressing the enactment of fair housing legislation Prof. Derrick Bell writes:

it took three years of "protracted and chaotic" legislative effort by Congress before Title VIII was enacted. It became law exactly one week after Dr. Martin Luther King, Jr., was killed by a white assassin. As a further incentive to its enactment, the bill was attached to extremely broad legislation enabling the federal government to prosecute persons involved in riots and civil disorders . . . when the self-interest factors that really motivated white support were taken care of (e.g., a symbolic recognition that housing discrimination was wrong, combined with new tough penalties for those convicted of urban disorders planned and activated by some national, black conspiracy), commitment to the cause of fair housing almost disappeared.

DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 720-21 (2d ed. 1992) [hereinafter *RACE, RACISM*]; see also DERRICK BELL, *The Benefits to Whites of Civil Rights Litigation*, in *AND WE ARE NOT SAVED* 51, 51-74 (1987).

Despite ample evidence that these proscriptions were enacted to advance majority interests as much as they were directed at benefiting the victims of racial discrimination, the equality of access promised by American law and policy continues to contrast sharply with reality and with popular attitudes. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61 (1988).

11. Fair Housing Act coverage does not recognize economic discrimination and does not address the injury that discrimination causes racial groups. See Margalynne Armstrong, *Desegregation and Private Litigation: Using Equitable Remedies to Achieve the Purposes of The Fair Housing Act*, 64 *TEMP. L. REV.* 909 (1991).

12. Since the civil rights laws of the 1960s were enacted

[h]ousing segregation has changed importantly in ways that make it appear much less severe to whites and a small sector of middle-class blacks, but the overall consequences of the ghetto system for working-class and poor blacks, and for the economic viability of central cities, have become more severe.

Gary Orfield, *Separate Societies: Have the Kerner Warnings Come True?*, in *QUIET RIOTS: RACE AND POVERTY IN THE UNITED STATES* 100, 106 (Fred R. Harris & Roger W. Wilkins eds., 1988) [hereinafter *QUIET RIOTS*].

that formal equality is rendered meaningless to poor minority Americans.¹³

To truly eradicate housing segregation, our society must examine and challenge the way our legal system reinforces two underlying assumptions: that white people have the privilege of escaping people of color, and that anyone who can afford to is entitled to abandon the urban poor. By casting economic discrimination as colorblind and as an unassailable right, American law ignores the symbiotic relationship between employment discrimination, urban poverty and contemporary residential segregation.¹⁴

The Los Angeles uprising echoes a lesson proffered to our nation in the past. Twenty-five years ago, a commission appointed to study the uprisings of the summer of 1967¹⁵ concluded:

Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans. What white Americans have never fully understood—but what the Negro can never forget—is that white society is

13.

[T]he attainment of formal equality is not the end of the story. Racial hierarchy cannot be cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of Black people. White race consciousness . . . plays an important, perhaps crucial, role in the new regime that has legitimated the deteriorating day-to-day material conditions of the majority of Blacks.

Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV L. REV. 1331, 1378-79 (1988).

14. The cycle is illustrated in the following summary of sociologist William Julius Wilson's report on research findings from the Urban Poverty and Family Life Survey:

Impoverishment . . . [began], in the loss of the blue-collar positions black men could once count on. Men could feed their families with these jobs; they had a sense of control and self-worth. At one time in Chicago, the proportion of blacks in manufacturing had exceeded the portion of whites.

But when those jobs disappeared, joblessness wasn't the only result. The unemployed increasingly found themselves concentrated in problem-plagued low-income neighborhoods. With no one working, no one had ties to the labor market and no one could recommend anyone for available jobs. The despair, isolation and anger . . . soon began feeding on themselves.

Gretchen Reynolds, *The Rising Significance of Race*, CHI. MAG., Dec. 1992, at 81, 83. See also William Julius Wilson, *The Plight of the Inner-City Black Male*, 136 PROC. AM. PHIL. SOC'Y 320 (1992).

15. The summers of 1965 and 1966 had seen major uprisings in black ghettos in Los Angeles, Chicago, San Francisco and Cleveland. In 1967 riots triggered by racism, economic deprivation, police brutality and other factors occurred in cities throughout the United States, the most infamous and deadly occurring in Newark, N.J. and Detroit. See Fred R. Harris, *The 1967 Riots and the Kerner Commission*, in QUIET RIOTS, *supra* note 12, at 5, 5-15.

deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.¹⁶

The acquittal and the riots of 1992 illustrate the consequences of society's continuing insistence on maintaining spaces where the poor or the black or the brown are sequestered from privileged lives.

I. The Illusion of Separable Societies

The polarization of the privileged and the unprivileged¹⁷ in our society is reflected in the divergent demographics of South Central Los Angeles and Simi Valley in Ventura County. The population of South Central L.A. is 52.8 percent African American and 41.9 percent Hispanic.¹⁸ The South Central region of Los Angeles was once predominantly inhabited by African American working class families employed in manufacturing plants located along a local railroad corridor. Today "those jobs have largely dried up, leaving the area with a negligible source of local employment."¹⁹ The unemployment rate in L.A.'s African American communities is as high as 50 percent.²⁰ Those who are able to leave these neighborhoods do; the number of black people who live in the city of Los Angeles decreased between 1980 and 1990.²¹

Simi Valley, in contrast, is a "garden spot with safe streets, good schools [and] a nice industrial base."²² It has a population of approximately 100,000, many of whom left Los Angeles and its substantial population of people of color.²³ Only 1.5 percent of the suburb's residents are African American.²⁴ Suburban housing tends to

16. KERNER COMMISSION REPORT, *supra* note 3, at 1.

17. I use the term unprivileged rather than the euphemism "underprivileged." The latter ironically understates the situation faced by urban minorities, for certainly to possess no privilege is to be accorded less than enough privilege and to thus be more than "underprivileged."

18. Tim Schreiner, *Simi Valley, South Central L.A.—Sharp Contrasts*, S.F. CHRON., May 1, 1992, at A14.

19. DAVID DANTE TROUT, WEST COAST REGIONAL OFFICE, CONSUMERS UNION OF U.S., INC., *THE THIN RED LINE: HOW THE POOR STILL PAY MORE* 19 (1993).

20. *American Survey: Pull Together?*, ECONOMIST, May 9, 1992, at 25.

21. *Id.* Middle-class African Americans can relocate to middle-class black and integrated communities (if available). Until the 1960s America's inner city neighborhoods featured a "vertical integration of different segments of the urban black population. Lower-class, working-class, and middle-class black families all lived more or less in the same communities" WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 7 (1987).

22. Schreiner, *supra* note 18, at A14.

23. Most of Simi Valley's residents are "from L.A., escaping the big city and its problems." *Id.*

24. See *supra* note 5 for statistics on the racial makeup of Simi Valley and Ventura County.

be in the form of individually owned houses,²⁵ whereas "two thirds of the families in South Central Los Angeles rent their small stucco bungalows, and they live there because they cannot afford to live anywhere else."²⁶ Despite state legislation requiring local governments to establish policies to ensure that the housing needs of all income groups are met,²⁷ California's suburban communities avoid setting up affordable housing programs using techniques such as under-assessing low income housing needs and enacting ordinances that restrict the supply of housing.²⁸ But even though the residents of central Los Angeles cannot readily move to the suburbs, the suburbs come to them every day.

Despite rejecting Los Angeles as a place to live, a number of Simi Valley residents maintain weekday association with the city as commuters. Some of these commuters are L.A. police officers: the town has been described as a white, middle-class "bedroom community" for police.²⁹ Suburbanites tend to see the police as a "thin blue line"³⁰ or "bulwark against urban chaos and crime."³¹ Appar-

25. "[T]he officials of affluent jurisdictions have managed to exclude the poor entirely from their communities through the manipulation of zoning and land use controls that bar the construction of housing affordable by low-income families." William L. Taylor, *Brown, Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1729 (1986).

26. Schreiner, *supra* note 18. In South Central Los Angeles 67.7 percent of the housing units are renter-occupied. TROUT, *supra* note 19, at 47. Even when able to afford to purchase homes, African Americans are subject to bias in home mortgage lending.

In 1992, African-Americans in California were 1.75 times more likely to be rejected for mortgage loans than white applicants by Citibank and 1.5 times as likely to be rejected by Bank of America Across the country, from California to New York, minorities are disproportionately denied mortgage loans. Disparities in mortgage loan rejections and in application rates raise serious questions about minority borrowers' access to credit.

MICHAEL A. TERHORST, WEST COAST REGIONAL OFFICE, CONSUMERS UNION OF U.S., INC., *THE AMERICAN DREAM: OPENING THE DOOR TO CREDIT AND ENDING MORTGAGE DISCRIMINATION* 2-3 (1993).

27. The California Housing Element Law requires local governments to "assist in the development of adequate housing to meet the needs of low- and moderate-income households." CAL. GOV'T CODE § 65583(c)(2) (1994).

28. WILLIAM FULTON, *GUIDE TO CALIFORNIA PLANNING* 74 (1991). More than 40 percent of the adopted housing elements in California do not comply with the law. *Id.* at 75.

29. Schreiner, *supra* note 18; Don DeBenedictis, *Cop's Second Trial in L.A.*, A.B.A. J., July 1992, at 16.

30. This metaphor has been used repeatedly with respect to the police defendants in the Rodney King beating case. Terry White, the prosecutor in the state trial, said that the jurors saw the police as a "thin blue line separating the law abiding citizens from the jungle." Henry Weinstein, *After the Riots: The Search for Answers*, L.A. TIMES, May 8, 1992, at 3A (emphasis added). The defense attorneys in the federal civil rights trial referred to the police as "a thin blue line that protects the law-abiding citizenry in our communities from the criminal element." *King Case Nears*

ently, during working hours the police are driven by the attitude of revulsion felt by the privileged towards ghetto inhabitants;³² at night they join the privileged in the suburbs. The police serve as contact points, forced to confine people who have deliberately been left behind in the chaos and who know they have little chance of escaping it.

The acquittal of the officers in the first Rodney King beating trial reflects this view of the police as a breakwater.

Living just up the freeway and over the hills from Los Angeles, the jurors ended up viewing the four police officers as their own protection against the spread of inner-city crime The jurors feared "that if they punished these cops they would be less safe in their little community up there"³³

Simi Valley and other suburban residents long ago surrendered Los Angeles to the perceived enemy and attempted to sever any responsibility to the city.³⁴ But it was impossible to completely sever connections to Los Angeles because no suburb, particularly a

Climax; City On Guard, CHI. TRIB., Apr. 10, 1993, at 3. The urban jury in the federal case was not persuaded by the metaphor.

31. Jay Mathews, *Playing Politics with Crime*, NEWSWEEK, May 11, 1992, at 40.
32.

One indication . . . that day-to-day law enforcement might be contravening society's commitment to racial equality is the startlingly disproportionate representation of blacks and other minorities among persons whom police arrest [T]he argument that police behavior is undistorted by racial discrimination flatly contradicts most studies, which reveal what many police officers freely admit: that police use race as an independently significant, if not determinative, factor in deciding whom to follow, detain, search, or arrest.

Developments in the Law—Race and the Criminal Process, *supra* note 2, at 1495-96.

33. DeBenedictis, *supra* note 29 (quoting Prof. Bernard Segal). These attitudes raise the question: When suburban cops work in urban jobs, which community is better served by the police, the community that employs them or the communities where the police live? The police perform one aspect of their jobs vigorously, arresting African Americans in numbers that are roughly 100 percent higher than their crime rate. Evan Stark, *The Myth of Black Violence*, USA TODAY MAG., Jan. 1992, at 32, 33. "The National Crime Survey indicates that blacks commit 26.3% of violent crimes, which is roughly twice their percentage in the population. However, they comprise over half of those arrested for violent crimes, four times their percentage in the population." *Id.* Despite this arrest rate, inner city residents receive notoriously poor police protection and service.

34. The metaphor of warfare continues Loren Miller's observations about metropolitan residential patterns, recorded almost three decades ago.

One of the most persistent bits of urban folklore is that a particular section of a city belongs to the ethnic group that inhabits it at the moment. That set of folk beliefs has a language of its own, bristling with military terminology: Negroes are said to "invade" or "infiltrate" a "white community" when one of their number moves in. Whites are stereotyped as beleaguered and standing heroic guard to repulse black invaders busting blocks and trampling on property values.

Loren Miller, *Government's Responsibility for Residential Segregation*, in RACE & PROPERTY, 58, 58 (John H. Denton ed., 1964).

"bedroom community" for urban employees, can cut its economic, cultural and infrastructural³⁵ ties to its urban center. A larger network of interdependency binds the residents of a metropolitan area, and of our nation as a whole.³⁶ Suburban Americans "cannot escape responsibility for choosing the future of our metropolitan areas and the human relations that develop within them."³⁷ The connection retained by urban police officers peculiarly reinforces the sense of white entitlement to an area that is off limits to most people of color. To residents who come face to face with urban crime and poverty on the job, Simi Valley must seem a well deserved home and resting place. Here, the besieged police can exercise the "earned" privilege of taking refuge from their work day battles with the unprivileged.

All over the United States, our cities are ringed by Ventura Counties, exclusive enclaves where middle-class people retreat in order to shut out urban problems. Americans have fled the cities in astonishing numbers. The 1992 presidential election was the first in which over 50 percent of the votes were cast by people who lived in the suburbs.³⁸ Although there has been an increase in black suburbanization, compared to whites, relatively few blacks reside in suburbs, and many of these suburbs are predominantly African American.³⁹

35. Infrastructural connections are particularly important in the Los Angeles metropolitan area. Water, waste-disposal and air quality control problems have required solutions that enable numerous cities and unincorporated areas to work together. See generally WINSTON W. CROUCH & BEATRICE DINERMAN, *SOUTHERN CALIFORNIA METROPOLIS: A STUDY IN DEVELOPMENT OF GOVERNMENT FOR A METROPOLITAN AREA* (1963).

36. This idea of connection is expressed by Prof. Cornel West:

[W]e need to begin with a frank acknowledgment of the basic humanness and Americanness of each of us. And we must acknowledge that as a people—*E Pluribus Unum*—we are on a slippery slope toward economic strife, social turmoil and cultural chaos. If we go down we go down together. The Los Angeles upheaval forced us to see not only that we are not connected in ways we would like to be but also, in a more profound sense that this failure to connect binds us even more tightly together. The paradox of race in America is that our common destiny is more pronounced and imperiled precisely when our divisions are deeper.

CORNEL WEST, *RACE MATTERS* 4 (1993).

37. KERNER COMMISSION REPORT, *supra* note 3, at 226.

38. *America's Cities: Doomed to Burn?*, *ECONOMIST*, May 9, 1992, at 21. Only 12 percent of the population in the United States now lives in cities with over 500,000 inhabitants. *Id.*

39. "Whereas an average of 71% of northern whites lived in suburbs by 1980, the figure for blacks was only 23%." MASSEY & DENTON, *supra* note 4, at 67. Furthermore, black suburbanization does not necessarily result in integration. Black isolation in most northern areas is remarkably high even though blacks do not exceed 10 percent of the suburban population. *Id.* at 73. This is true of cities including Chicago, Cleveland, Detroit, Gary, and Los Angeles. *Id.*

Many suburban residents continue to derive their income from the cities they have abandoned, but more and more frequently their employers also forsake the cities.⁴⁰ With this exodus, middle class and business interest in the welfare of the city dries up. Consequently, resources are redirected to serving the locus of their perceived interest—the suburbs. The result is a regressive redistribution of the costs of having a society that includes poor people, by which city residents who are least able to pay bear the lion's share of the expenses of poverty.⁴¹

II. Living Where You Want

1. *Extralegal "Rights"*

There are places in America in which you are not supposed to be if your skin is black or brown.⁴² Should an African American or Hispanic American (particularly a young male) walk through the streets of certain suburbs, towns, or urban neighborhoods he might notice that the inhabitants view his presence with suspicion, resentment or worse. A person of color can be in danger in such areas, for such areas are inexorably linked with violent attacks on people of color who happen to pass through. Infamous examples are Bensonhurst in Brooklyn, where 16 year old Yusef Hawkins was murdered when he came to the area to look at a used car,⁴³ and the Howard Beach section of Queens, where Michael Griffin was chased to his death by a gang of local residents.⁴⁴ Although some perpetrators of racially motivated violence attribute their actions to security

40. Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535 (1992).

41. *Id.* at 542.

42. The double entendre and the attendant metaphysical implications are intended. See RALPH ELLISON, *INVISIBLE MAN* (1947) ("Since you never recognize even when in closest contact with me . . . no doubt you'll hardly believe that I exist . . .").

43. See Ralph Blumenthal, *Black Youth Is Killed by Whites; Brooklyn Attack is Called Racial*, N.Y. TIMES, Aug. 26, 1989, at A1.

44. See Robert D. McFadden, *3 Youths are Held on Murder Counts in Queens Attack*, N.Y. TIMES, Dec. 23, 1986, at A1. Other predominantly white areas associated with racial bias and violence include Carnarsie in Brooklyn, South Boston and Charlestown in Boston, Canaryville, and Marquette Park, Bridgeport and other Chicago neighborhoods. See *Man Slashed in Carnarsie Bias Attack*, NEWSDAY, Aug. 2, 1991, at 4, available in LEXIS, NEWS Library, NEWSDY File; Herbert H. Denton, *In Reborn Boston, Race Hatred Still Festers*, WASH. POST, Dec. 7, 1980, at A1; Howard Witt, *Attack on 2 Blacks Barely Draws Notice*, CHI. TRIB., July 12, 1985, § 2, at 1. For a story of racial bias in ostensibly liberal Northern California see Bill Mandel, *Black Man's Ad is the Talk of the Town*, S.F. EXAMINER Jan. 24, 1993, at B1 (chronicling police harassment of Black resident of Sonoma, California, a town with a 97 percent white population). Of course, Simi Valley, California is now associated with racial exclusion.

concerns, others openly admit that they believe their neighborhoods should be reserved for whites.⁴⁵

Nonwhite visitors are greeted with palpable hostility in white enclaves because the residents collectively establish and enforce an extralegal "right" to practice racial discrimination. Although statutes explicitly prohibit racial discrimination in most housing transactions, the extralegal right receives more respect and private enforcement than the actual housing discrimination laws. Neighborhood residents protect and implement this "right" to discriminate. Transgressions against this right are redressed rapidly through violence, while violations of the legal right against discrimination require bureaucracy, lawyers, or courts for enforcement.⁴⁶ The false "right" arises from notions of entitlement and the primacy accorded property ownership in American legal and constitutional tradition.⁴⁷ Some white Americans believe that property ownership carries with it entitlement to racial exclusivity—by earning enough money they acquire the privilege of residing "where they want."⁴⁸ Other residents of white segregated neighborhoods explicitly believe that living where you want is a right or privilege incident to being born with white skin.⁴⁹

45. "We got a neighborhood to protect," and "This is our neighborhood . . . You let in one colored, you gotta let in a thousand," were among the justifications proffered for an incident where a racially mixed group of 12 year old students from Brooklyn was attacked by older white teenagers during a school arranged picnic in a Staten Island Park. Howard Blum, *"Bias Incident" at Staten Island's Miller Field: A Tale of Two Neighborhoods*, in RACE, CLASS, & GENDER IN THE UNITED STATES 67, 68 (Paula S. Rothenberg ed., 2d ed. 1992).

46. See *Stirgus v. Benoit*, 720 F. Supp. 119, 121 (N.D. Ill. 1989) and *Pina v. Abington*, 1 Eq. Opp. Hous. Cas. (P-H) ¶ 15,257, 15,495 (E.D. Pa. May 27, 1978), for examples of Fair Housing Act litigation where the facts involved violence against black residents.

47. The problem of designing a republican government that could provide security for property was a central one for the Federalists, whose views prevailed at the Constitutional Convention of 1787 Originally invoked as the defining instance of the larger problem of securing justice and liberty in a republic, property indeed came to define the terms of that problem for at least one hundred fifty years.

Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, in LAW AND THE ORDER OF CULTURE 162, 164 (Robert Post ed., 1991).

48. The widely held but false notion that property ownership gives the titleholder the right to "do anything I want with it" is discussed in the wider context of political discourse in America in MARY ANN GLENDON, RIGHTS TALK 8 (1991).

49. This attitude is illustrated by Bruce Fister, a resident of a white neighborhood on Chicago's south side. In a newspaper article that discussed the Republican party's election strategy of playing on the racial fears of whites to gain votes, Fister said, "I'm against civil rights, open housing, all that stuff I've come from too many neighborhoods that turned black and now have the highest crime rate in the city. I'm tired of being pushed away from all my neighborhoods." John Jacobs, *Rust Belt to Decide Campaign Battle*, S.F. EXAMINER, Sept. 27, 1992, at A1, A12. See also Cheryl T. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707 (1993).

The continued existence of predominantly white or predominantly minority neighborhoods and suburbs that appear to defy fair housing law has been attributed by some analysts to the cumulative expression of individual choices. This cynical use of "consumer preference" attempts to disclaim government or societal responsibility for segregation. At the same time it falsely implies that freedom of choice works in a neutral manner.⁵⁰ Free choice, however, is not available to all Americans. Generally, only white residents of segregated areas are able to actually exclude members of other races from residing in their communities.⁵¹ Although there is a growing movement of people of color who choose to live in predominantly black or brown neighborhoods,⁵² minority residents have traditionally been denied participation in shaping the configuration of their residential environments where there is any white interest in the area.⁵³ Although some African Americans affirmatively choose black neighborhoods, many blacks who live in segregated

50. "Decades of government-sponsored housing discrimination have significantly shaped patterns of residential segregation. Contrary to the notion that racial segregation occurs because of 'natural' migration patterns, ample evidence demonstrates the connection between government actions and private behavior." Robert L. Hayman Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 679.

51. The phenomenon of gentrification illustrates this point. A number of African American residents of urban neighborhoods throughout the country have been displaced by whites. Gentrification occurs in areas that are geographically and financially attractive because of their proximity to business districts and financially attractive because of comparatively low property costs. White buyers can afford homes in the area but black renters are pushed out. See Clarence Johnson, *Gays, Blacks Try to Cool Tensions*, S.F. CHRON., Aug. 28, 1993, at A1 (describing displacement of black homeowners and businesses in a San Francisco neighborhood by urban development and affluent gays); DeNeen L. Brown, *Preserving Low-Income Housing on the Hill*, WASH. POST, June 9, 1988, at J1 (community coalition formed to modify the force of twenty years of gentrification on Capitol Hill); Patrick Reardon, *City's Face is Still Changing, but More Slowly*, CHI. TRIB., Sept. 13, 1987, at 1, 22 (noting gentrification in two Chicago neighborhoods, Lincoln Park and the Near North Side); Philip Lentz, *The Rising Cost of Diversity*, CHI. TRIB., July. 20, 1986, at 6 (gentrification in Montclair, N.J.). Some gentrification has resulted from government action to systematically break up black neighborhoods through urban renewal programs. Kaye Thompson, *HUD Accuses Annapolis of Housing-Policy Bias*, WASH. POST, July 28, 1984, at B3.

52. John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-To-The-Future Essay*, 71 N.C. L. REV. 1487, 1506 (1993) [hereinafter *Spatial Equality*]. Middle-class African Americans are increasingly rejecting predominantly white neighborhoods which are often inhospitable, and deliberately choosing affluent or middle-class black neighborhoods. *Id.* As more African Americans move to the suburbs (in 1990, 32 percent of blacks in U.S. metropolitan areas lived in suburbs, a 6 percent increase from 1980) the number of predominantly black suburbs is also increasing. David J. Dent, *The New Black Suburbs*, N.Y. TIMES MAG., June 14, 1992, at 18, 20. Notably, affluent black suburbs are developing because the individuals want to live in a black community rather than by resegregation due to white flight. *Id.* at 22.

53. Examples include the placement of freeways and urban development projects.

middle-class neighborhoods would prefer more integration⁵⁴ or may have originally moved to an integrated neighborhood that resegregated because of white flight.⁵⁵

The urban minority poor find themselves doubly abandoned due to the exercise of two forms of privilege. Because the privilege of living where one wishes is disbursed on the basis of income as well as race, middle-class Americans of color also attempt to relinquish the urban ghettos to the poor.⁵⁶ Some move to middle-class

A state's decision to locate a freeway is often fraught with controversy and politics At times, the affected constituency can influence the decision to locate these projects. More often than not, however, the affected population has little to say and even less with which to say it The predicaments of discrete and insular minorities tend to be similar. Unable to block project locations themselves, the affected communities attempt to block an adverse governmental decision with other means and through alternative forums.

Anthony N.R. Zamora, *The Century Freeway Consent Decree*, 62 S. CAL. L. REV. 1805, 1820. (1989). The article relates the story of how a coalition of the NAACP, environmental groups and local residents successfully battled the proposed alignment of the Century Freeway through the low income minority neighborhoods of Compton, Lynwood, Watts and Willowbrook. *Id.*

54. A 1989 survey determined that 40 percent of the Black respondents considered living in racially mixed neighborhoods very important, almost double the percent of whites (21 percent) who expressed this view. Richard Morin & Dan Balz, *Shifting Racial Climate: Blacks and Whites Have Greater Contact But Sharply Different Views, Poll Finds*, WASH. POST, Oct. 25, 1989, at A1, A16 (reporting the results of a nationwide *Washington Post-ABC News* Poll of 1249 whites and 371 blacks).

55. See Sander, *supra* note 9. "The Black population outside of the central cities of urban areas increased by 2.8 million between 1970 and 1980 The developing patterns of racial and residential distribution duplicate the traditional patterns of racial segregation of the central city." Robert W. Collin & Robin A. Morris, *Racial Inequality in American Cities: An Interdisciplinary Critique*, 11 NAT'L BLACK L.J. 177, 180 (1989).

56. The notion of living in the "best" place that one can afford is so commonplace that many Americans would consider doing otherwise abnormal. Living in the nicest neighborhood possible is central to the middle-class American dream and is a goal creating incentive to work. This banal mindset can be found in an example of advice to mothers who feel guilty about working outside of the home: "Consider how your job benefits your family. Start with the most obvious—you have a higher standard of living, so you live in a nicer neighborhood and your children are safe and go to decent schools." Dianne Hales, *Letting Go Of Guilt*, WORKING MOTHER, Sept. 1992, at 47, 48.

The privilege of living in the "best" neighborhood one can afford is seen as an entitlement to middle-class people of color as well. Although access to some white communities is cut off to them, the exodus of the middle class from urban ghettos has been cited as a factor that has contributed to the disintegration of African American urban communities in the 1970s and 80s. See WILSON, *supra* note 21, at 7. Note, however, that Wilson's view is challenged by Professors Douglas Massey and Nancy Denton, who argue that concentrated poverty would have occurred in the ghettos during the 1970s with or without middle-class out-migration. MASSEY & DENTON, *supra* note 4, at 117-18. See also Collin & Morris, *supra* note 55, at 180 ("Despite this Black exodus from the central city, Black populations have continued to increase in percentage in American central cities.").

The attempt to create middle-class African American enclaves does not always meet with success.

black neighborhoods, but many seek housing in predominantly white integrated communities in which the populations are healthier,⁵⁷ and the neighborhoods offer superior services, better schools, and more resources.⁵⁸ Urban and suburban areas which are substandard, burdened by crime, environmental degradation,⁵⁹ and wretched schools are more likely to house predominantly minority populations.⁶⁰ Amenities that middle-class people take for granted, such as banks, supermarkets and stores that provide basic goods and services, are scarce in low income minority neighborhoods.⁶¹ Simply put, it is difficult to enjoy the benefits of a middle-class lifestyle in a poor minority neighborhood.

Indeed, if they wish to remain members of the middle class, black residents are almost forced to leave urban inner city neighborhoods because the areas provide limited opportunity to earn a living legally.⁶² The staggering unemployment figures for inner city neighborhoods⁶³ reflect a vicious cycle whereby the neighborhoods provide little work and the low income populations are too poor to move closer to areas where work can be found.⁶⁴ The scar-

Although upwardly mobile blacks, like whites, have sought to carve out neighborhood enclaves that contain only members of their own class, they have been relatively unsuccessful Even though the black middle class may not live in ghetto neighborhoods, they often share neighborhoods with the black working poor and near-poor.

Spatial Equality, *supra* note 52, at 1503.

57. The Department of Health and Human Services reported that death rates are 19 percent higher in large metropolitan counties than in suburban counties. *Growing Disparity in Ethnic Death Rates*, S.F. CHRON., Sept. 16, 1993, at A2. "In the 1980s, death rates had declined by 10 percent in the suburbs but by only half as much in the inner cities." *Id.*

58. See RUSK, *supra* note 6, at 29.

59. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); David Holmstrom, *Pollution In U.S. Cities Hits Minorities Hardest*, CHRISTIAN SCI. MONITOR, Jan 7, 1993, at 8.

60. See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991).

61. See generally TROUT, *supra* note 19.

62. The recent shift of manufacturing, office employment and residential development from inner cities to suburban cities has caused large economic and social disparities. The main disparity is that the inner cities have absorbed and retained the lower income minority population while suburban cities have taken in the White population. This departure of industry and jobs has left inner city urban areas without employment opportunities for low income residents, a minority labor force with less marketable skills and a community without an adequate tax base to provide municipal services.

Collin & Morris, *supra* note 55, at 180 (footnote omitted).

63. See *supra* text accompanying note 20.

64. See Michael Quintanilla, *Jobs: The Search for Work has Become a Full-time Job*, L.A. TIMES, Nov. 18, 1992, at J4 (describing the plight of the unemployed poor in Los Angeles who live far from where the jobs are, have no transportation or child-care, and cannot afford to move to areas offering employment).

city of employment opportunity is coupled with rampant employment discrimination against African Americans.⁶⁵ In the end, our inner cities are inhabited by people who have no means of leaving. If the choice of abandoning our inner cities was truly available to all Americans, our ghettos would surely become ghost towns.⁶⁶

2. *Economic Privilege and Residential Access*

Race plays a potent role in access to housing in America,⁶⁷ but financial status is probably the primary factor in residential exclusion. The inability to pay the price of housing excludes prospective home-seekers across racial lines. But the fact that financial determinants can operate against white people as well as against black people does not mean that economic discrimination is race neutral.⁶⁸

Many Americans see nothing wrong with using economic status to distribute access to housing opportunities. Economic discrimination, however, enables our nation to preserve and continue widespread racial exclusivity in the composition of our communities. Although acknowledgement of the racial implications of economic privilege may be psychologically difficult, people who are concerned about integration and equal opportunity must consider the ramifications of economic privilege. When protecting privilege is elevated above the goal of racial equality, the consequence is residential segregation. This segregation will not be limited to economically elite communities because upper-middle-class behavior sets a standard by which success is measured. Therefore, high income whites cannot live in segregated areas and expect lower income whites to abstain from using their racial privilege in similar ways.

65. Wilson, *supra* note 14, at 324. "Whether through skills tests, credentials, personal references, folk theories or their intuition, [employers] used some means of screening out the inner-city applicant [B]lack job applicants, unlike their white counterparts, must indicate to employers that the stereotypes do not apply to them." Joleen Kirschenman & Kathryn M. Neckerman, "We'd Love to Hire Them, But . . .": *The Meaning of Race for Employers*, in THE URBAN UNDERCLASS 203, 231 (Christopher Jencks & Paul E. Peterson eds., 1991).

66. David Rusk characterizes this phenomenon as "the point of no return" where city populations drop precipitously (up to 44 and 45 percent in Detroit and Cleveland), city-suburb economic disparities drop to a level where city incomes are only about 70 percent of suburban income, and the percentage of minority population in the city climbs due to a continuing exodus of whites. RUSK, *supra* note 6, at 75-77.

67. Black segregation remains high across "all levels of socioeconomic status, whether measured in terms of education, income or occupation." HOUSE JUDICIARY COMM., FAIR HOUSING AMENDMENTS ACT OF 1988, H.R. Doc. No. 711, 100th Cong., 2d Sess. 1, 14 (1988), *reprinted in* 1988 U.S.C.A.A.N. 2173, 2177.

68. See discussion of *Boyd v. LeFrak Org.*, *infra* text accompanying notes 90-97.

Our society uses economic privilege as a means of controlling access to good neighborhoods. Because America is a democracy which promises equality of opportunity, it would be unfair to arbitrarily deny people the prospect of residing in a decent environment. Thus, in order to justify the exclusion of the poor from safe areas with access to public services and good schools, income is used as a measure of worthiness. Economic privilege seems less inequitable if we pretend that it is distributed on the basis of merit.⁶⁹

The 1980s saw a resurgence in blaming poor people for their want of advantage.⁷⁰ Being unprivileged was no longer ascribed to misfortune or racism, it became a matter of just desserts. Under this line of reasoning, people who live in substandard areas or who are destitute are unprivileged because of their own decisions. The poor "choose" to drop out of school, to become teenage mothers, to apply for welfare; the unemployed are "determined" not to work.⁷¹ This attitude towards the unprivileged is rooted in the American mythology that any person, through her own will and effort, can work her way out of poverty.⁷² Such dogma neutralizes the unfairness of privilege by casting it not as something granted, but as something obtainable by all.

69. For a discussion of the psychological and philosophical ramifications of this attitude see Michele M. Moody-Adams, *Race, Class, and the Social Construction of Self-Respect*, 24 PHIL. F. 251 (1992-93).

70. See WILSON, *supra* note 21, at 13-19.

71. A popular perception, evidenced by callers to radio phone-in shows and in recent books such as Charles Murray's *Losing Ground*, Mickey Kaus' *The End of Equality* and Christopher Jencks' *Rethinking Social Policy: Race, Poverty, and the Underclass*, is that poverty is a lifestyle choice or the result of individual attitudes. The central question in addressing the issue of poverty has become "What's wrong with those people on welfare?", an approach that presumes a lack of merit on the part of the unprivileged. See Ruth Coniff, *The Culture of Cruelty*, PROGRESSIVE, Sept. 1992, at 16.

72.

The ubiquity of work and opportunity, of course, were myths, even in the early Republic. The transformation in economic relations, the growth of cities, immigrations, the seasonality of labor, fluctuations in consumer demand, periodic depressions, low wages, restricted opportunities for women, industrial accidents, high mortality, and the absence of any social insurance: together these chiseled chronic poverty and dependence into American social life.

MICHAEL B. KATZ, *THE UNDESERVING POOR* 14 (1989).

The opportunity myth is particularly spurious when poverty intersects with race.

The unspoken and totally facetious maxim is that with self-improvement the opportunity is available for all blacks to be successful. But success for individual blacks demands exceptional skills exercised diligently in settings where their efforts will further or, at least, not threaten white interests. Obviously, no more than a small percentage of blacks is likely to be graced by so felicitous a set of circumstances.

RACE, RACISM, *supra* note 10, at 49.

If privilege can be achieved, then lack of privilege is attributable to individual choice, i.e., the only thing preventing the poor from gaining privilege is their own lack of ambition or diligence. Because most people obtain their financial success through employment and do not see themselves as being unfairly advantaged, economic privilege is viewed as "earned." Since we work hard to obtain financial status rather than simply being lucky enough to inherit it as some form of birthright, economic privilege does not appear arbitrary or gratuitous. In fact, many Americans take it for granted that wealth should provide distance from poverty and the poor; they even see it as a reward and incentive for hard work. Such attitudes are blind to the fact that many of the poor work hard, yet are not rewarded with privilege.⁷³ A disproportionate number of minority Americans are among the working poor or involuntarily unemployed who lack privilege.⁷⁴ Our opinions about poor people sentence those who are unable to work, due to no fault of their own, to a world with few options and limited futures. A large number of the poor are children who are unable to "earn" the privilege of living in middle-class neighborhoods.⁷⁵ Children in poor and minority areas are often accorded mediocre or substandard educations which further impair their ability to compete for the type of work that could reward them with access to middle-class privilege.⁷⁶ In the end, economic privilege distributes benefits and privilege capriciously because, despite hard work, willingness to work, or inability to work, poor minorities are excluded from the opportunity to earn the financial status that provides an escape to areas available to the more privileged. For many people poverty results from structural deficiencies more than

73. In 1990 6.6 million workers in the U.S. could be categorized as "working poor"—people who devoted more than half of the year to working or looking for work and who lived in families with incomes below the official poverty level. Jennifer M. Gardner & Diane E. Herz, *Working and poor in 1990*, 115 MONTHLY LAB. REV. 20, 20 (1992). Furthermore, even though a person does not have remunerative employment, she may work very hard. The process of maintaining eligibility for benefits and the efforts that go into providing for family needs can be intense and exhausting. See Teresa L. Amott, *Black Women and AFDC: Making Entitlement Out of Necessity*, in WOMEN, THE STATE AND WELFARE 280 (Linda Gordon ed., 1990). This difficulty is exacerbated for homeless families.

74. Bureau of Labor statistics data show that Black and Hispanic workers in the labor force for more than half the year are much more likely to be poor than whites. Gardner & Herz, *supra* note 73, at 21. African Americans' poverty rate in 1990 was 2 1/2 times that for whites with similar labor force activity. *Id.*

75. In 1991 about 14.3 million American children (21.8%) lived in poverty. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 25 (1992). See also Gregory Mantsios, *Rewards and Opportunities: The Politics and Economics of Class in the U.S.*, in RACE, CLASS, & GENDER IN THE UNITED STATES, *supra* note 45, at 96, 98 (giving statistics on the demography of poverty in the United States).

76. See generally Kozol, *supra* note 60 (describing the state of public schools in several U.S. cities).

from their individual failings.⁷⁷ Economic privilege is not uniformly disseminated on the basis of merit and is, at best, an unjust and inadequate rationale for the segregation of the poor. It also serves as a mask to conceal unlawful exclusion for purposes of preserving racial privilege.

Even when we recognize that in denying the poor access to middle- and upper-class neighborhoods economic privilege perpetuates racial segregation, our courts fail to acknowledge the legal wrong. The courts give economic status such primacy that considerations of wealth actually insulate otherwise prohibited housing discrimination from legal scrutiny. These general notions of wealth and earned privilege are replicated and prevail, even in the administration of our fair housing laws.

III. Protecting Privilege

1. *The Poor and the Jurisprudence of Housing Discrimination*

The idea that race and money entitle people to the privilege of residential choice and the actual prerogative to exclude those who are not similarly privileged is a powerful influence in our society. Concepts of privilege are so firmly held as to effectively constitute a "right" in the minds of many American property owners.⁷⁸ Most frequently, courts protect the "right" to engage in racial discrimination as an unspoken corollary of the right to discriminate on the basis of income.⁷⁹ Courts also reinforce popular notions of an extra-legal "right" to discriminate on the basis of race by recognizing residential segregation as a legal impediment to judicial intervention in school desegregation cases.⁸⁰

The jurisprudence of housing discrimination generally rejects protecting the poor as a group⁸¹ and there is no fundamental right

77. See generally KATZ, *supra* note 72.

78. See generally GLENDON, *supra* note 48 (discussing the development of the ideology of "rights" in American society).

79. See *infra* note 83 and accompanying text.

80. See, e.g., Board of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237 (1991).

81. A notable exception is Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I), 336 A.2d 713 (N.J.), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975). The Supreme Court of New Jersey held that municipalities may not enact zoning requirements that foreclose housing opportunities for low and middle income people but must affirmatively provide housing for a fair share of lower income area residents. *Id.* The decision has not been particularly effective in increasing low income housing. See Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II), 456 A.2d 390 (N.J. 1983).

to housing under federal constitutional analysis.⁸² A series of United States Supreme Court cases, decided primarily in the 1970s, refused to recognize poverty as a suspect classification or find that legislation that discriminates against the poor is subject to strict judicial scrutiny.⁸³

State and local legislation directed at excluding the poor is a barrier to the effective enforcement of federal civil rights law. Economic rationales, such as keeping property taxes low,⁸⁴ provide a very convenient wrapper for concealing impermissible discrimination. Professor John Calmore described the predictable outcome of judicial deference to wealth-determined distinctions in the following manner:

Although in absolute numbers there are more white poor than black poor, blacks carry a disproportionate burden of poverty, and thus many times their claims for substantive distributive justice are essentially race claims. Often, what begins as a claim concerning the effects of racial discrimination gets transformed in constitutional analysis into a complaint not of racial but economic injustice and then denied in the reformulated terms.⁸⁵

When our courts refuse to recognize economic class as a suspect category they protect legally prohibited racial discrimination, allowing those who discriminate to frustrate civil rights goals and block some of the limited steps American society has taken to eradicate poverty.

Opposition to the placement of subsidized housing in middle-class neighborhoods illustrates the clash of economic privilege and racial justice. Although a handful of federal programs have recognized the need for low income housing and provided funding, local resistance often thwarts their implementation.⁸⁶ Opponents of low income housing attempt to block it by protesting that the develop-

82. *Lindsay v. Normet*, 405 U.S. 56 (1972).

83. See RUSSELL W. GALLOWAY, *JUSTICE FOR ALL? THE RICH AND POOR IN SUPREME COURT HISTORY (1790 - 1990)* 155-58 (1991). Two important decisions of this era, *James v. Valtierra*, 402 U.S. 137 (1971), and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), applied rational basis analysis in cases that alleged discrimination against the poor in public housing and public education funding. Another area in which poverty has not been recognized as a suspect class is abortion rights. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977).

84. See, e.g., the discussion of the facts in *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (town's zoning ordinances exhibited economic discrimination to keep down local taxes on property without regard for non-fiscal considerations affecting people).

85. John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 235 (1982).

86. For illustrations of various low income housing programs and local opposition see *James v. Valtierra*, 402 U.S. 137 (1971) (discussed *infra* notes 87-89 and

ment will interfere with their property values. Courts consistently find preservation of this economic privilege more compelling than protecting the poor from exclusion. Such cases ignore the tendency of the American public to equate poverty with minority races. When legislators are able to label a concern as economic, examination of the law's racial impact is diverted and discriminatory legislation is permitted to escape exacting scrutiny. This dynamic is illustrated by *James v. Valtierra*,⁸⁷ in which the U.S. Supreme Court denied an equal protection challenge to a provision of the California State Constitution. This provision, enacted through the voter referendum process, required voter approval of low rent housing projects. Although the provision singles out housing for the poor for electoral approval, and subjects no other type of development to this requirement, the Court found the provision to embody democratic ideals, writing:

This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws."⁸⁸

James v. Valtierra epitomizes the exclusionary force of economic privilege. A popularly perceived entitlement to exclude the

accompanying text) and *U.S. v. Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986), *cert. denied*, 486 U.S. 1055 (1988).

87. 402 U.S. 137 (1971). Article XXXIV of the California Constitution provides in Section 1:

No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct or acquire the same, voting upon such issue, approve such project by voting in favor therefore at an election to be held for that purpose, or at any general or special election.

The provision defines, in telling terms, who it is the local citizenry must vote to admit:

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance to live in decent, safe and sanitary dwellings without overcrowding.

CAL. CONST. art. XXXIV, § 1.

California voters reaffirmed Article XXXIV in the 1993 election. *Final Election Returns*, L.A. TIMES, Nov. 4, 1993, at B6. The electorate rejected Proposition 168, which sought to rescind the voter approval requirement for the construction of low income housing that relies on public money for a least half its funding. *Id.*; see Greg Lucas, *November Ballot's Forgotten Measures*, S.F. CHRON., Oct. 25, 1993, at A17.

88. *James*, 402 U.S. at 143.

poor is transformed into a constitutional right. Although property owners feel that their ownership entitles them to many "rights" to limit inimical uses of neighboring property, subsidized housing is the only residential land use decision accorded the status of necessitating individual input from the local inhabitants. The *James* decision characterizes the right to exclude as the embodiment of democratic principles. The poor are forever excluded from the community without ever having a chance to participate in the democratic process that banishes them. The Court refused to examine the racial implications of California's constitutional provision, stating that it was "seemingly neutral on its face."⁸⁹

Court decisions in cases brought under the Fair Housing Act have not protected the poor as a class from discrimination any more effectively than have equal protection decisions. In *Boyd v. Lefrak Org.* prospective renters challenged as racially discriminatory the income requirements imposed by a management company that was already subject to a consent decree from a previous pattern and practice suit under the Fair Housing Act.⁹⁰ The landlord required that applicants have a weekly *net* income (deducting all taxes, fixed obligations and debts) that was at least 90 percent of the monthly rental (the 90 Percent Rule), or to have a guarantor whose weekly net income was 110 percent of the monthly rental.⁹¹ Expert testimony at trial indicated that the income requirements excluded 92.5 percent of local black and Puerto Rican households, and that white household eligibility would be four times as great as that of black households and ten times as great of as that of Puerto Rican households.⁹² The district court found that the defendant's income criteria violated the Fair Housing Act due to a "disproportionately high racially discriminatory impact" and that they did not establish a business necessity or other non-racial grounds for the rule.⁹³ In reversing the judgment of the district court the circuit court wrote:

While blacks and Puerto Ricans do not have the same access to Lefrak apartments as do whites, the reason for this inequality is not racial discrimination but rather the disparity in economic level among these groups A businessman's differential treatment of different economic groups is not necessarily racial discrimination and is not made so because minorities are statistically overrepresented in poorer economic groups. The fact that differentiation in eligibility rates for defendants' apart-

89. *Id.* at 141.

90. *Boyd v. Lefrak Org.*, 509 F.2d 1110 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975).

91. *Id.* at 1111.

92. *Id.* at 1117.

93. *Id.* at 1118.

ments is correlated with race proves merely that minorities tend to be poorer than is the general population.⁹⁴

The court noted that although a disparate impact analysis might be appropriate in a challenge to state action, it could ignore the racially exclusionary results of the defendant's policy because the policy applied uniform economic criteria to whites and minorities.⁹⁵ The majority in *Boyd* framed the issue as the ability of a landlord to use economic factors to judge prospective tenants.⁹⁶ An alternative characterization of the issues presented could focus on the exclusionary effects of the landlord's economic criteria to determine if they were designed to evade prohibitions against racial discrimination. The opinion instead accords the income requirements the presumption of neutrality, while failing to examine their contextual ramifications. The court ignored the fact that the 90 Percent Rule was devised by a management company while subject to a consent decree for previous violations of the Fair Housing Act.⁹⁷ These prior violations might have provided evidence that the requirements were intended to result in prohibited racial exclusion.

In *Boyd*, the right to engage in economic discrimination was more palpable in the eyes of the majority than the racial discrimination it advanced. The plaintiffs had a "right" to not be discriminated against on the basis of race, but were not protected against economic discrimination. Again, a court refused to even examine whether racial discrimination occurred because the defendant could present a theory of economic discrimination.

A state statute that the California courts have held to prohibit arbitrary discrimination in housing, California's Unruh Civil Rights Act,⁹⁸ has been limited judicially to exclude discrimination based on poverty. In *Harris v. Capital Growth Investors XIV*⁹⁹ the

94. *Id.* at 1113.

95. *Id.*

96. *Id.*

97. *Id.* at 1112.

98. CAL. CIV. CODE §§ 51-52 (1994). The Unruh Act has been held to prohibit all "arbitrary discrimination by a business enterprise." *In re Cox*, 474 P.2d 992, 995 (Cal. 1970) (including forms of discrimination that are not specifically mentioned in the Act). See, e.g., *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal.), *cert. denied*, 459 U.S. 858 (1982) (Unruh Act prohibits discrimination against families with children); *O'Connor v. Village Green Owners Ass'n*, 662 P.2d 427 (Cal. 1983) (Unruh Act prohibits age restrictions, other than in senior citizens complexes).

99. 805 P.2d 873 (Cal. 1991). In *Harris*, low income public aid recipients who could afford to pay the rent charged by the defendants were nonetheless denied apartments because their gross income was not equal to or greater than three times the amount of rent. *Id.* at 874. Although the plaintiff could demonstrate that she was paying a greater rate of rent for the premises that she occupied at the time of applying for defendant's apartment and had not defaulted, the landlord did not have to consider her individual characteristics. *Id.* at 874-75.

California Supreme Court refused to remedy economic exclusion that caused prohibited discriminatory impact, even when the insubstantial nature of the economic rationale indicated other non-economic motives. Income requirements that went beyond those necessary to protect the economic interests of a landlord were upheld even though these requirements disproportionately excluded female-headed households from the pool of applicants to whom the defendants would rent units.¹⁰⁰ Policies that limit the housing available to female-headed households also exclude a disproportionately high percentage of minorities.¹⁰¹

The court refused to examine the defendant's policy because it was applicable to all applicants regardless of race, color, sex, religion, etc.¹⁰² The justices found it unimportant that applying the policy to all people would result in excluding members of statutorily protected groups significantly more than it would exclude households headed by white males. Because the defendant cited economic status as the basis of the exclusion the court could shift its focus to the financial ramifications of the policy. When the balance focused on economic interests, protecting privilege was accorded more importance than the total exclusion of low income people, even those who in fact could pay market rate for the housing. Economic interest again served as a trump card, overriding all other considerations. The *Harris* court explicitly granted considerations of wealth primacy over actual discriminatory impact, even when the biased act was not necessary to protect financial interests.

Thus, the concept of economic privilege is used to justify and sustain the de facto residential segregation of the poor, and, thereby, of many people of color. It has resulted in concentrating low income minorities in center city neighborhoods throughout the United States. Because our society believes that anyone who can afford to live in an affluent suburb is entitled to leave the city and

100. *Id.* at 889-90. The court held that the landlord's policy could be found to minimize the transaction costs of tenant default, which the court related to maintaining the solvency of the landlord's business. *Id.* at 885-86. The landlord's economic considerations were considered enough to justify excluding the plaintiff despite a demonstrated ability to pay the amount of rent sought by the defendant. *Id.* at 889. Ironically, the woman's status as a poor person forced her to remain in a rental unit that cost a higher percentage of her limited resources than the defendant's apartment.

101. Although the plaintiffs in *Harris* alleged that the defendant's policies had a disparate impact on the protected class of women, African Americans would also be disparately affected by the defendant's policies. In 1991, 46 percent of black families had a female householder and no husband, compared with 13 percent of white families. Carrie Teegardin, *Census Says More Blacks Face Poverty: 1-Parent Families Key to Slippage*, ATLANTA J. & CONST., Sept. 25, 1992, at A1.

102. See *Harris*, 805 P.2d at 889.

its problems, and since the route to privilege can be achieved by some minorities, it is argued that the existence of urban ghettos is attributable to economic factors rather than to racial discrimination.¹⁰³ It is clear, however, that a person of color is much more likely to be excluded from the prospect of earning enough money to "buy" the privilege of escaping to the suburbs, and that income simply reinforces race as a means of keeping blacks in the inner city. Furthermore an African American and a white American with identical educational and financial backgrounds do not have an identical range of housing choices or employment opportunities.¹⁰⁴

Two problems accompany the great magnitude of judicial deference to economic privilege. One problem is that the deference allows prohibited residential racial discrimination to occur as long as a housing provider can attribute exclusion to economic factors. The second problem with the primacy of economic privilege is that it is distributed unjustly. Economic privilege is not allocated to all who might merit it¹⁰⁵ and is still disproportionately unavailable to African Americans.¹⁰⁶

2. *Protecting Racial Privilege*

The second prong of privilege is white racial privilege. White privilege involves advantages and options that are available merely because one is white. A white person need not be a bigot to benefit from racial privilege; simply having white skin will provide access to neighborhoods and jobs which are closed to people of color. Living in such neighborhoods is not, for every resident, an assertion of racial hostility, but many of these areas are sought out by whites because the environment is inhospitable to minorities.

Racial privilege is manifest in the divergent presumptions and perceptions accorded to individuals on the basis of their race.¹⁰⁷

103. See WILSON, *supra* note 21, at 121-22.

104. For an examination of discrimination against African Americans in hiring see MARGERY AUSTIN TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (Urban Institute Report 91-9, 1991).

105. See Mantsios, *supra* note 75, at 105 ("[S]ome are rich precisely because others are poor . . . one's privilege is predicated on the other's disenfranchisement.").

106. By almost all aggregate statistical measures—incomes and living standards; health and life expectancy; educational, occupational and residential opportunities . . . the well-being of both blacks and whites has advanced greatly over the past five decades. [However, by] almost all the same indicators, blacks remain substantially behind whites . . . Since the early 1970s, the economic status of blacks relative to whites has, on average, stagnated or deteriorated.

NATIONAL RESEARCH COUNCIL, A COMMON DESTINY, *supra* note 4, at 6.

107. Peggy McIntosh eloquently explores the concept of white privilege in *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* (Wellesley College Center for Research on Wo-

The influence of race as a barrier to better neighborhoods is discounted because the law no longer countenances explicit racial barriers in housing opportunities, therefore the obstacles to escaping ghetto neighborhoods are seen as economic and self-imposed.

Racial privilege tends to be advanced by whites who can work in concert as a community to reinforce exclusion. This is the form of privilege asserted by numerous ethnic groups of European origin who assert that they have the right to maintain segregated enclaves in order to preserve their ethnic or religious identity. Although individuals who are caught discriminating against other identified individuals are subject to state sanction, minorities are kept out of white neighborhoods by a series of factors more complex than individual denials of housing.¹⁰⁸ Punishable acts of discrimination are the exception, so minorities are excluded with legal impunity.

The facts and holding of *City of Memphis v. Greene*¹⁰⁹ present an example of this dynamic. In *Greene*, white residents of Hein Park, a Memphis community bordered to the north by a predominantly black area, requested the city to close a street (West Drive) that served as an artery between the two neighborhoods, ostensibly to reduce traffic and increase safety in Hein Park.¹¹⁰ The closure would be effectuated by the city's selling a twenty-five foot strip that ran across West Drive to the northernmost property owners in

men Working Paper No. 189, 1988). Ms. McIntosh describes white privilege as "an invisible package of unearned assets which I can count on cashing in each day, but about which I was 'meant' to remain oblivious." *Id.* at 1. She lists forty-six conditions which she can count on as a member of the white race that may or may not exist for people of color. *Id.* at 5-9. Her list is not exhaustive. See also Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM, July/August 1989, at 10.

Perhaps the most telling aspect of white privilege is that whites need not be conscious of their own race or of racial discrimination to survive in America.

To people of color, who are the victims of racism/white supremacy, race is a filter through which they see the world. Whites do not look at the world through this filter of racial awareness, even though they also comprise a race. This privilege to ignore their race gives whites a societal advantage distinct from any advantage received from the existence of discriminatory racism.

Trina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397, 398.

108. Fair housing law is structured and administered under a paradigm of individual rights. The search for individual victims and perpetrators enables the collective expression of privilege to escape legal scrutiny and allows community-based racial exclusion to become more real and enforced more effectively than the actual laws that prohibit discrimination. See Armstrong, *supra* note 11, at 916-22.

109. 451 U.S. 100 (1981).

110. *Id.* at 104. Originally the residents requested the closure of four streets that led into the subdivision. *Id.* at 103.

the white area.¹¹¹ Residents of the African American community to the north of Hein Park challenged the sale under the U.S. Constitution and 42 U.S.C. §§ 1982 and 1983.¹¹²

The United States Supreme Court upheld the closing despite Sixth Circuit findings that evidence presented to the district court showed the closing would benefit a white neighborhood, would adversely affect blacks¹¹³ and that the "barrier was to be erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them."¹¹⁴ Instead the Supreme Court found:

the critical facts established by the record are these: The city's decision to close West Drive was motivated by its interest in protecting the safety and tranquillity of a residential neighborhood The city has conferred a benefit on white property owners but there is no reason to believe that it would refuse to confer a comparable benefit on black property owners. The closing has not affected the value of property owned by black citizens, but it has caused some slight inconvenience to black motorists.¹¹⁵

The Supreme Court majority in *Greene* held that the closing was for traffic safety purposes, ignoring the fact that the closing of West Drive was the only time that the city of Memphis had ever closed a street for traffic control purposes.¹¹⁶ Although the city and the Supreme Court majority coated the actions of the Hein Park residents with a veneer of neutrality, the motives behind the decision to close West Drive remain apparent. As the dissent in *Greene* noted, "Respondents are being sent a clear, though sophisticated message that because of their race they are to stay out of the all-white enclave of Hein Park and should instead take the long way around in reaching their destinations to the south."¹¹⁷ *Greene* provided judicial support and legal enforcement for an extralegal white "right" to exclude minorities, even though such a "right" could not be explicitly acknowledged by a court.

Recent cases examining school desegregation and housing discrimination demonstrate that our highest courts are blind to racial segregation that can be attributed to economic privilege. In *Board of Educ. of Okla. City Pub. Sch. v. Dowell*, the Board argued that segregation in its schools was due to private decisionmaking and

111. *Id.* at 112-13.

112. *Id.* at 129.

113. There was evidence that the closing would cause an economic depreciation in the property values in the predominantly black area. *Id.* at 110.

114. *Id.* at 109.

115. *Id.* at 118.

116. *Id.* at 143 (Marshall, J., dissenting).

117. *Id.* at 147.

economics that created residential segregation.¹¹⁸ The U.S. Supreme Court picked up this theme, embracing without question a right to use financial privilege to resegregate. Again, in *Freeman v. Pitts*,¹¹⁹ the U.S. Supreme Court lent its imprimatur to racial segregation based on individual privilege and choice. The Court recognized as inevitable, and thus sanctioned, residential segregation based on the preferences of whites:

The effect of changing residential patterns on the racial composition of schools though not always fortunate is somewhat predictable. Studies show a high correlation between residential segregation and school segregation The District Court in this case heard evidence tending to show that racially stable neighborhoods are not likely to emerge because whites prefer a racial mix of 80% white and 20% black, while blacks prefer a 50% - 50% mix. Where resegregation is a product not of state action but of private choices, it does not have constitutional implications Residential housing choices and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.¹²⁰

Thus, Justice Kennedy decreed that when racial isolation is of societal proportions but results from the free market and individual choice, the Court should not intervene. Neither *Dowell* nor *Freeman* addresses the issue of which individuals get a chance to actively participate in the market and exercise choice. The law can absolve itself from further inquiry if a judge affixes the de facto label, even in cases where the court explicitly recognizes that segregation is occurring. Our courts' refusal to recognize the impact of segregation based on individual choice implicates the legal system as a force that sustains segregation. Even in the absence of de jure segregation, America still finds residential and educational segregation intractable. Racial separation will remain imbedded in our system because it relies on the unassailable concept of economic privilege to obscure deliberate segregation.

IV. Conclusion

As suburban America feels increasingly insecure about preserving its status and property, attempts to isolate the middle class from the unprivileged have increased accordingly. Tax revolts, suburban office parks, concrete traffic barriers and walled private neighborhoods and towns are all evidence of a desire to limit con-

118. Board of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 243 (1991).

119. 112 S. Ct. 1430 (1992).

120. *Id.* at 1448 (citations omitted).

tact with the less privileged.¹²¹ The tenet that one of the perquisites of money is to be able to isolate oneself from the unprivileged sustains a societal separation that is illusory and incendiary. Although the urge to reject the urban ghetto is real, the privileged can only pretend to sequester themselves from contact and connection with the unprivileged. The disintegration of the urban center city contributes to the deterioration of the ethical and physical quality of life in society as a whole.¹²² Attempts to maintain the illusion that poverty is not a problem for those better off simply magnify the glaring differences between life for the rich and poor and ensure that the inevitable contact of the polarized segments of our society will be explosive.

It is time for our law to recognize that economic discrimination creates a subrosa system of extralegal discriminatory "rights" that directly conflict with our express legal norms prohibiting discrimination. The fact that discrimination on the basis of race in housing transactions is no longer legal does not, by itself, create equal access to communities like Simi Valley. As long as there is no real chance for a family in inner city Los Angeles to choose to move to Ventura County, we cannot honestly say that our society provides equal opportunity at any level. No one believes that the education at a public school in South Central Los Angeles is equal to the education offered at a public school in Simi Valley.¹²³ Were there truly equal opportunity, many of the families of South Central Los Angeles would move to areas where they could send their kids to the schools that really provide a better chance for the better life.¹²⁴ These families do not remain in blighted neighborhoods from a lack

121. See discussion *supra* of *City of Memphis v. Greene* accompanying notes 109-117. See also Tim Schreiner, *Suburban Communities 'Forting Up'*, S.F. CHRON., Sept. 21, 1992, at A1, A12; John Woolfolk, *Charges of Elitism Fly in Traffic Battles*, S.F. CHRON., Aug. 2, 1993, at A15.

122. It becomes more difficult and expensive to keep out the unwanted, and the incursions on individual rights necessary to restrict the movement of "undesirables" threaten everyone's individual rights.

123. See Schreiner, *supra* note 18 (comparing the community of Simi Valley with its good schools, to the devastation of South Central Los Angeles). See generally Kozol, *supra* note 60 (describing the disparities between inner city and suburban public schools).

124. Discussing the options available to the low income plaintiffs in *Rodriguez v. San Antonio Sch. Dist.*, one commentator wrote:

[T]he Rodriguez majority might have replied, "citizens who value public education highly are free to vote with their feet—to relocate to communities where public schools are well financed and taxes are low. The response, of course, is that while this option may be available to some, it is foreclosed to poor people who are barred by zoning, land use controls, or other measures from securing residences in communities that provide the services they desire.

Taylor, *supra* note 25, at 1730.

of desire for better futures for their children. They simply have little opportunity to choose where they live.

It is also time for the law to stop shielding racial discrimination by labeling it "economic choice." Left to our own devices we Americans make the wrong choices—choices based on obtaining or maintaining privilege, with little thought to the corresponding exclusion of the least fortunate of the American community. A look at the demographics of housing in the United States reveals that many in our nation still choose residential segregation and, by doing so, deny choice to those who would opt for integration. The comparison between life in the neighborhoods of South Central Los Angeles and life for Ventura County residents illustrates that the choice to discriminate imposes burdens on the rest of society.

It is clear that America has never firmly resolved to eradicate residential racial segregation.¹²⁵ Thirty years ago Judge Loren Miller wrote "Resistance [to fair housing laws] will persist as long as there is hope that 'white' communities can be maintained at all price levels; it will diminish when the householder who fears Negro occupancy is convinced that he can run but cannot hide from Negro neighbors."¹²⁶ But until society genuinely works towards eliminating separate communities for black and white Americans our society will live in constant conflict. The conflict will arise both from our failure to uphold our laws that promise fairness in access and from the resentment of those excluded. The isolation of minority Americans is a barrier to our country's social and economic progress. Unless we move forward in eliminating segregation by recognizing how it is advanced by our protection of economic privilege, we are destined to remain standing still.

125. When our government determines that an issue is truly important it rarely leaves social responsibility to individual choice. The state has created powerful bureaucracies to support its military and income taxation policies. If citizens do not go along with the government's choices for us about the draft or income tax, we face the possibility of incarceration. Thus, when our country is honestly committed to its stated policies, the government is able to achieve a fair amount of success in reaching its goals. For example, the U.S. share of Operation Desert Storm was 7.4 billion dollars. *Nunn Says Congress Will Pass Moratorium on Nuclear Testing*, STAR TRIB. (MINNEAPOLIS), July 29, 1992, at 6A. Funds for Desert Storm were allocated quickly with a minimum amount of dissension because the resource of petroleum is prized much more highly than the human beings in our inner cities. Cf. Terry Spencer, *Schwarzkopf Says War Was About Oil*, L.A. TIMES, Feb. 14, 1992, at B2. The insincerity of our institutional commitment to desegregation is apparent when the Justice Department chooses to enforce the Fair Housing Act by challenging consent decrees in cases that use racial criteria to maintain integrated housing, yet fails to pursue the patterns and practices that lead to the preservation of thousands of Simi Valleys all over America. See, e.g., *U.S. v. Starrett Assocs.*, 840 F.2d 1096 (2d Cir. 1988). See also Armstrong, *supra* note 11, at 918 n.51.

126. Miller, *supra* note 34, at 71-72.

We cannot sequester the poor out of existence and we cannot maintain impermeable barriers between the different segments of society without defying basic principles of liberty and equal protection. If our society pretends that its component communities are separate and hostile spheres, the unavoidable interaction will be between angry and fearful factions, as demonstrated in the police beating of Rodney King, the acquittal of the officers, and the upheaval that followed.

As long as the poor do not have any realistic chance of escaping poverty or of leaving the ghetto, they are pinioned to the bottom of society by concepts of privilege that have arbitrarily excluded them from a better life. Although those of us with options that allow us to live where we choose may be more fortunate than meritorious, we erect insurmountable barriers between ourselves and the poor in order to maintain our privileged positions. However, even though the promise of equal access is far from being kept, it has been made and renewed.¹²⁷ The lesson our society must learn from the uprising that followed the Simi Valley acquittals is that those to whom the pledge of equality was made have not forgotten America's promises and refuse to allow themselves to be forgotten.

127. Recent renewals of the promise of equality include the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).