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FAIR HOUSING ACT AT FIFTY

Sara Pratt *

I am a Virginian by birth; I grew up in Lynchburg, Virginia. You may be asking yourself how a civil rights advocate grew up in Lynchburg, Virginia. Living in Virginia provided formative experiences for me that brought me to a fair housing-oriented life, and career. I started out learning about civil rights in a Presbyterian youth camp, on the campus of Hampden-Sydney College. I was in high school and we were studying Will Campbell's book, *Race and the Renewal of the Church*. And they brought over two young black students from Prince Edward County who had never been to public schools.

My experience in life, how I address issues, how I think about civil rights, was formed in large part, at least initially, by my discussion with those two students. It seemed so unjust to me that there were these black kids my age, looking like me, having the same kinds of issues that I was having, and they hadn't ever attended a public school. Later on, I made such an annoyance of myself giving youth sermons on civil rights to the Presbyterians out at First Presbyterian Church that they gave me some money and said, "Go off and work in the inner city." That's what we called it then. Teaching bible school, I worked with seminary students and young, African American kids in Lynchburg—a highly segregated, very conservative town. And I experienced, as a white woman, the racism that often people of color experience because I was a young white woman walking around the city with my five-year-old kids; and I was subjected to harassment, name calling, racial slurs, and all the rest of it—throwing of cans out of trucks at us—because I was a white woman associating with black kids.

* Counsel, Relman, Dane and Colfax. This article was adapted from the Lunchtime Address that was delivered by the author at the 2018 *University of Richmond Law Review Symposium, The 50th Anniversary of the Fair Housing Act—Past, Present, and Future*, on October 5, 2018, at the University of Richmond School of Law.

I'm going to talk a little bit about why it is that the Fair Housing Act at fifty still is relevant. I mean, after all, should it really be relevant? How is it that a law that languished in Congress for years and then was abruptly passed when our country was in deep anger, grief, and disbelief at the assassination of Dr. Martin Luther King is still relevant?

There's virtually no legislative history around the passage of the law. It was going nowhere in Congress until Dr. King was assassinated. There was no time to build up to it in the national psyche in some ways. Although Congress had a bill pending for fair housing for several years, no one was talking about it—except for demonstrators who were calling for passage of a federal fair housing law. A fair housing law was not passed as part of a package of other civil rights law in 1964. It wasn't passed in 1965 when the Voting Rights Act was passed; it had to wait until 1968, in a huge national time of tragedy and despair for it to be enacted. But there was no legislative roll-out for it and no public discourse about it in advance. It's not like the government was ready to enforce the Fair Housing Act. Many of us believe that the Fair Housing Act was so hard to get passed because there was stronger opposition to having people of color living near white people than there was to employment discrimination or voting rights.

Administrative enforcement of the Fair Housing Act at HUD has always been underfunded and under-resourced. Its 1968 version had no effective vehicle for government enforcement, since HUD was only authorized to investigate and try to settle cases, and the Department of Justice was only authorized to bring cases involving a pattern and practice of discrimination, not to represent individuals. Periodically, federal efforts to strengthen enforcement of the Fair Housing Act have faltered and failed, interfered with by a whole series of barriers, including active opposition at every level, underfunding of private enforcement as well as government efforts, and a passive aggressive approach from the federal government and state and local governments alike that reported that they supported fair housing but did little or nothing to demonstrate that support.

You can start with the fact that our cities were built on racism and segregation, and if they weren't built on it at the very beginning, as Richmond was, they were built on it at the turn of the last century, when our communities passed laws barring blacks from

living or working in many towns across the country, began adopting racially restrictive covenants, and took other actions to create or preserve racial segregation. Towns became “sundown towns” where people of color were not allowed to be after sundown. There were signs that said, basically, “No n-words allowed after sundown.” These actions were evidence of a new wave of racism and segregation and discrimination in our country that was created by and embedded in government decision making.

When the Fair Housing Act was first passed, it was hard to see it as particularly relevant. Federal enforcement efforts from the very beginning had been undercut by a whole series of barriers. Internal fights within HUD, fights with governments—state and local governments—over whether or not the Fair Housing Act meant that you really had to stop discrimination or address segregation. Lack of funding. Focus on individual cases rather than systemic discrimination. And a kind of passive aggressive approach from people, elected officials or otherwise, that said, you know, “We are so opposed to housing discrimination, we support the Fair Housing Act in every way we can,” and then did absolutely nothing in their actions to support the Fair Housing Act. That was the pattern that was widespread across our country before, and certainly after, the enactment of the Fair Housing Act. A lot of lip service, not so much action.

So why is the Fair Housing Act relevant today? All the indications were of a law that should have failed, that should’ve been useless. Pretty on its face, and really a very well-crafted law, it turns out—mainly because it didn’t go through the amendment process in Congress that often limits legislation. And yet no national consensus on the underlying principles—how to address long-standing government-produced patterns of residential housing and municipal development that had to be undone—and a country that was not unified in commitment to the principles of the Fair Housing Act. The law should have failed. It didn’t. It’s so interesting to me why it does not. So why is it still relevant and working effectively?

First, housing integration and racial discrimination were at the heart of why the 1968 Act was needed. They were the issues that cried out for remedy in 1968, and sadly, they are still the issues that cry out the loudest for remedy today. They are still the issues that divide communities, that cause heartache and heartburn, that cause communities to be weaker than they should be, that cause

people to be excluded and divided by private action and by governmental action. So, for fifty years, even though we can say we have made meaningful change, and we're thinking about these issues in a different way, we know that working on these issues, although it has been the focus of fair housing enforcement and fair housing planning for fifty years, we have still not accomplished the purposes that the Act stood for. But that's why we still need it, isn't it? We still need this law as a tool.

Fair housing enforcement in the courts has generally been strong and successful over the fifty years of the Fair Housing Act because the Fair Housing Act and the cases that have been brought under the Fair Housing Act have been more resistant to judicial challenge. Beginning with the first Supreme Court case interpreting the Act which arose right here in Richmond, courts have supported sweeping enforcement of the Fair Housing Act—both procedurally and substantively. Standing to bring actions under the Act is as broad as Article III of the Constitution allows, the Supreme Court held in an important case that originated right here. Damages and attorneys fees have always been available to victims of housing discrimination. Recent regulations published by HUD take principled stands following long-standing court decisions to support the application of the disparate impact theory to fair housing cases, provide sound interpretations of the Act as applied to harassment, and institutionalize a process for ensuring that states and cities affirmatively further fair housing, an obligation that comes right from the Fair Housing Act.

The law has been interpreted expansively and has been applied and upheld, in comparison to other civil rights laws. Voting, employment, and public accommodation rights against discrimination, while important, have not survived unscathed. Voting rights are critically important, but fights over enforcement and rulings by the Supreme Court have reduced some of the effectiveness of the Voting Rights Act, passed by Congress in 1965. The employment discrimination provisions passed by Congress in 1964 have also been subject to strongly adverse and limiting rulings by the Supreme Court and other courts, requiring it to be amended several times. The public accommodations provisions still exist but are not frequently applied. In contrast, housing discrimination still exists, and the Fair Housing Act has gotten stronger, not weaker.

The Richmond case, *Coleman v. Havens Realty*, not only gave us broad concepts of standing in fair housing cases, it also recognized

that violations of the Fair Housing Act may occur over time and amount to a continuing violation. Those concepts are still there in judicial decisions and they are still relatively strong. Fair housing cases have applied tort principles, including broad vicarious liability concepts. So, liability applies not just to the discriminator on the ground who says, “We don’t rent to you people.” It’s also the absentee owner, it’s the corporate entity. It goes up the chain of command, even to the owner who lives far, far away and has told all his staff to take fair housing training and not to discriminate—that owner could still be held liable under the Fair Housing Act. And those vicarious liability principles, recently upheld by the Supreme Court in *Meyer v. Holly*, were discussed and finally put into regulatory form as part of HUD’s final rule prohibiting harassment under the Fair Housing Act. So, we have this body of robust case law under the Fair Housing Act.

I’ve been doing this work for forty-one plus years. The very first fair housing training I went to was in New York. It was sponsored by the NAACP Legal Defense Fund, and it was conducted by Ted Shaw, one of the icons of our civil rights movement. And there probably were thirty lawyers in the room, fewer than are in this room right now. There was only a small group of lawyers who took on Fair Housing Act cases across the country in the 1970s and 1980s, and I knew two-thirds of them back in the day. Now, I can’t say that I know fair housing lawyers, all of them, even in one city. We now have a well-educated and expansive bar to take on fair housing issues.

Courts can award actual damages in fair housing cases. I did a study when I was at the Kentucky Commission on Human Rights that evaluated how damages had been awarded under the Fair Housing Act. In 1983, the largest damage award in the history of the country under the Fair Housing Act was ten thousand dollars. And now we routinely settle cases for millions of dollars. HUD settled a case against the state of New Jersey for \$270 million of investment. HUD settled a redlining case against Associated Bank, a regional bank in the Midwest, for mortgage-lending redlining for about \$210 million of investment. HUD settled a case against Wells Fargo for maternity leave lending cases for \$5 million for victims of lending discrimination because they were pregnant.

When damages are awarded, it sends a message that changes conduct. In my experience, damage awards, and the remedial actions that they fund, can have a lasting effect.

My point here on why the Fair Housing Act is still relevant today is because it has survived fifty years in good health. There are good court decisions interpreting it. It supports damage awards that are meaningful. It has been used to authorize dramatic and important systemic changes in our communities, so it is still relevant.

The third reason why the Fair Housing Act remains relevant to us today is because of the new ways in which it is being applied. I never would have guessed when I started my fair housing work in 1976 that we would be applying the Fair Housing Act today in so many ways.

The Act is protecting the family that is expecting a new addition to their family and planning to buy a new house and move into it before the baby arrives so the nursery is ready when that baby comes home. The Fair Housing Act applies to discrimination based on familial status—which includes the status of being pregnant—to lenders who are telling women who were pregnant, “We can’t close on this loan until after you go back to work after the baby is born.” Never mess with a pregnant woman.

HUD took on over fifty of these cases. And several of them resulted in a settlement with Wells Fargo where there was a large settlement for victims of discrimination, which is part of the point here. Cases have sought remedies for additional victims beyond the people who filed complaints. HUD had four complaints against Wells Fargo, but HUD also believed, based on the evidence from investigations, that there were more people who had been turned away for loans because they were pregnant but had not filed complaints. And so the settlement required use of word-search technology to search the loan officers’ and the underwriters’ notes for words like “pregnant,” “baby,” “maternity leave,” “paternity leave.” HUD agreed to a settlement of \$3 million that could go to up to \$5 million if there were additional victims found. And we called for \$15,000 per victim. We thought we’d be lucky to find a hundred victims through this word-search process. The word search, came up with over 1100 victims, many more than were anticipated. The entire \$5 million fund went to victims of discrimination.

The point here is that the Fair Housing Act can be used in new and thoughtful ways to not just address the emerging patterns of discrimination, not just in individual situations, but also to change practices and get relief for others who have been injured. Using the Fair Housing Act in that way, without having a class action claim

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is really, it turns out, an important component of why the Act itself continues to be so relevant.

Let me give you a few more examples of how the Fair Housing Act is being used to address new forms of discrimination.

It's used to protect the innocent woman who was victimized by a perpetrator of domestic violence whose landlord says, "We're evicting you because an incident of crime occurred in your apartment." HUD issued a memo in 2011 that says the Fair Housing Act's rules against sex discrimination can be used to protect victims of domestic violence who are evicted without any wrongdoing on their part based on evidence that victims of domestic violence are disproportionately female. Evicting a victim of domestic violence because there has been a crime in her apartment does not have sufficient justification to permit the discriminatory effect of the policy. Not to mention the fact that if you investigated the matter further, you'd be likely to find that the property treated other innocent victims of crime at the property better than they treated a victim of domestic violence.

We now have a new, strong regulation from HUD describing prohibited harassment, including sexual harassment, in housing that has all the protections you would expect and none of the weaknesses that the Title VII employment discrimination harassment rules have. Why is that? Because there was a good body of caselaw under the Fair Housing Act that HUD could use to inform a final regulation that is very strong.

Recently, an appeals court upheld a fair housing case against a retirement community because other residents mercilessly attacked and bullied a resident in the retirement community because she was a lesbian. A court of appeals interprets the Fair Housing Act and says that this harassment amounted to discrimination based on sex in violation of the Fair Housing Act. Other courts are applying the sex discrimination provisions in the Act to landlords who engage in gender stereotyping or discrimination based on gender identity.

Today we apply the Fair Housing Act's prohibitions against discrimination based on national origin to protect people who don't speak or read English well or at all. We apply those rules, by the way, to landlords, to states, to cities, and to lenders—many of whom are not doing business with their clients and customers in their language when all of whom should be doing so already.

We talk about requirements for citizenship that are not applied to everyone but based on perceived national origin. We talk about discrimination against people by municipalities that require applicants for connections to utilities for their houses to show your social security card. Who does that discriminate against? In Alabama, it was discrimination against people who came to this country from another country, mostly lawful immigrants, who have an ITIN but not a social security card. We also think of people with disabilities, some of whom have never worked or may not have a social security card. HUD challenged these sorts of policies used by two utility companies in the state of Alabama, which passed an anti-immigration law. If you called up and said "I need to turn on the gas at my apartment," and your name was Gonzales, you were told you had to come in with your green card and evidence that you were lawfully in this country to sign up. And if I called, they took my information over the phone and I got the utilities hooked up. Stopping that practice was a new and interesting application of the Fair Housing Act.

We now observe discrimination when landlords refuse to accept Section 8 vouchers. In almost every community Section 8 voucher holders are disproportionately African American and, in some communities, disproportionately Latino. The refusal of landlords to accept a voucher when the voucher will cover the amount of the rent limits housing choices for people of color, helps perpetuate segregation because landlords who accept vouchers are still in the same segregated neighborhoods, and prevents the kind of housing choice that the Fair Housing Act is supposed to guarantee.

There are many amazing ways in which the Fair Housing Act is being applied today because it remains a robust law that can be applied to address housing discrimination in new ways. I tell you today something that I told the very first class of lawyers and investigators that I ever trained, in 1977. And that is this: never go for a novel application of the law until you have a well-investigated case, a well-thought out case, a well-researched case, a good theory of law, and evidence to back it up. That theory of asking only for a change in the law and expansion of the interpretation of the law when you have the most sympathetic and strongest case you can find is even more relevant today.

The Fair Housing Act is a resilient law and it was used in that way when the Fair Housing Act was used in a case brought by

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HOME of Richmond, represented by Tim Kaine, against the Nationwide Insurance company. When Tim Kaine argued the case before the Virginia Supreme Court, I heard him argue that Nationwide Insurance was redlining the City of Richmond in its insurance products by not making its products available in many neighborhoods. Nationwide was playing to race-based assumptions and stereotypes and saying, "Don't market to people who read Essence and Jet magazines. Don't market to people who like fried chicken." Stereotypes galore were inherent in Nationwide's marketing activities and all the stereotypes and assumptions favored white people and disfavored people of color.

There's one more reason why the Fair Housing Act remains so important and so relevant. With strong regulations, strong enforcement, generally good rulings by courts, and with HUD supporting new applications of the law, the Fair Housing Act can now be used to take on deeply entrenched patterns of discrimination. Using the law, we have the capacity to take on the big, institutionalized, deeply embedded segregation, racism, discriminatory decision making, whether in housing, in lending or insurance. We have the power, the tools, the lawyers, the remedies to take on the hard issues that resulted from long-standing discriminatory actions.

The Fair Housing Act has what it takes to empower you here locally to take on big challenges in your community. I have worked for the federal government. I have worked for the state government, and I did civil rights work for both. But local action remains critically important. Lawyers and advocates are now empowered to take on these issues locally.

Ed Brooke, a cosponsor of the Fair Housing Act and a Republican from Massachusetts, said this in 1968,

Today's federal housing official commonly inveighs against the evils of ghetto life, even as he pushes buttons that ratify the triumph of the ghetto life. Even as he okays public housing sites in the heart of negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivision from which negroes will be barred.

From my personal experience in the federal government, I can tell you that the federal government is not unified in favor of addressing patterns of segregation and disinvestment in communities of color. Local work, therefore, continues to be critically important.

Use the data, use the regulations, examine your own community and use all the Fair Housing Act knowledge and experience to empower yourselves to get involved in a neighborhood, in a community action group, with Ben Campbell, with any one of the number of groups that are working on these issues around this community.

Everybody who knows or cares about fair housing and civil rights should be one of the hands on deck. Every church, every person of good will, every law student, every lawyer, should be up to their elbows in organizing around addressing the redevelopment and support of communities of color, the new investment in those communities, and the making available of affordable housing across the Richmond and Henrico area outside of areas of segregation and poverty.

Communities are weak when they're divided by race or national origin. Communities are weak when they do not support diverse neighborhoods that can change the lives of their residents. Communities are weak when they knowingly have parts of their community that do not support the health or growth or educational needs of their residents. Richmond, like a lot of other cities, has a way to go before it is diverse, economically and racially, and where it supports every neighborhood within it. And until that happens, Richmond as a city, and Henrico as a county, will be weak. And so, I call on you, to roll up your sleeves, and get into the community planning and development work. Bring your pastors with you. Bring your schools with you. Bring your book clubs with you. Because we need all hands-on deck right now to use fair housing principles to strengthen our communities and bring equity to our country.