

# OVERCOMING RACISM IN COMMUNITY ASSOCIATIONS: ATTORNEYS AS AGENTS OF CHANGE



**LEAH K. BURTON** is a Shareholder and soon-to-be Manager of the Dallas office of Roberts Markel Weinberg Butler Hailey PC. She serves as general counsel to property owners' associations in all aspects of corporate governance, including governing document creation, amendment and interpretation, contract review, collection of delinquent assessments, restrictive covenant enforcement, alternative dispute resolution and federal and state law compliance.

Leah is most passionate about her continued work to improve diversity within associations. Her work on the topic formed the basis of Community Associations Institute's (CAI) renowned Diversity and Inclusion Guide. Leah has presented on diversity in community associations to local CAI chapters across Texas, CAI national conferences and the State Bar of Texas. She has testified before the Texas House of Representatives on bills aimed at striking discriminatory language from deed restrictions in Texas communities, and routinely presents to association boards and management companies on addressing diversity in their communities.



**NOELLE G. HICKS** is an Associate in the Property Owners Association Law Section of Roberts Markel Weinberg Butler Hailey PC. Noelle assists single-family residential, townhome, condominium, and commercial associations with various aspects of property owners' association law including the collection of delinquent assessments, complex deed restriction enforcement issues, developing and interpreting governing documents and drafting and reviewing contracts. She also speaks statewide through the State Bar of Texas, local Community Associations Institute Chapters (CAI), and at national CAI conferences.

Noelle's efforts in the industry have been featured by CAI including forming the basis for CAI's Diverse and Inclusive Communities Guide. Noelle is a member of the Texas Bar College and was named to the National Black Lawyers Top 100 in 2020.

An earlier version of this article was presented at the Community Associations Institute 2021. The authors wish to thank Wil Washington, Chadwick, Washington, Moriarty, Elmore & Bunn, PC for his contributions to this article.

Racism exists in community associations. We all know it does. How many times have you been on the phone with a board of directors discussing a covenant violation when all of a sudden one of the board members chimes in with a comment about the race of the homeowner at issue? Before you even have a chance to bring up the Fair Housing Act and remind the board that it cannot discriminate against homeowners on the basis of race or national origin or selectively enforce its covenants and restrictions, the board member at issue will hastily exclaim that "race has nothing to do with it." A red flag goes up in your mind. You want to give the board member the benefit of the doubt and believe that the board member's actions are not motivated by implicit bias against people of color, but you know as an experienced professional and counselor of the law—not

to mention as a human—that racism is playing a role in the board member's decision-making on this particular issue.

So, what do you do? As counsel for the community association, you are obligated to advise on the law and make recommendations based on the state of the law as it exists at the time of the rendering of your opinions. Does this include educating boards and managers on addressing and overcoming racism in community associations? We believe it does.

Disclaimer: This topic will make you uncomfortable. It is a highly sensitive issue that carries the weight of centuries of hostility and pain. Rather than shy away from it, we encourage you to lean into the discomfort and consider how we as attorneys can become agents of change in overcoming racism in

community associations. We are not here to shame anyone, but rather to educate about belief systems and stereotypes that are oftentimes engrained in our psyches as a result of our experiences and environment rather than as a result of deliberate choice. We will also explore how we can become more mindful of the roles that lawyers and community association boards and managers play in unintentionally perpetuating racism in our communities.

This article will discuss the history of racism in community associations and the current state of the law as it pertains to discrimination on the basis of race. It will also discuss overcoming racism in community associations by acknowledging the existence of racial microaggressions and implicit bias; taking accountability for the roles we play in the perpetuation of those microaggressions and implicit biases; providing tools we can use to overcome and reduce racist behaviors and stereotypes; and adopting behaviors and policies that support equality in community associations.

## **HISTORY OF RACISM IN COMMUNITY ASSOCIATIONS**

Before we can hope to overcome racism in community associations, we must understand where and how it began. Of course, the practice of separating communities of people based on race can be traced back to the days of slavery. However, specific racial restrictions on the sale or occupancy of residential property began in earnest in the late nineteenth century as the country was going through a period of urbanization while, simultaneously, Blacks were moving out of the rural south into northern and midwestern industrial cities, a movement known as the Great Migration.

### **Evolution of Racially Restrictive Covenants**

In response to the increased presence of Black families during The Great Migration, many cities enacted ordinances that prohibited these families from owning, renting or occupying property except in designated areas of the city. These ordinances were challenged in courts, most notably in *Buchanan v. Warley*, in which the Supreme Court declared

municipally mandated racial zoning unconstitutional.<sup>1</sup> Yet, many cities continued to adopt racial zoning ordinances after *Buchanan*, trying to find other, indirect, ways to keep cities segregated. For instance, in 1924, Richmond, Virginia adopted an ordinance prohibiting residents from living on a street where they could not marry the majority of residents in accordance with Virginia's anti-miscegenation law. Although the city argued that the ordinance did not violate *Buchanan* because the zoning law was solely intended to prevent intermarriage, the law was overturned by the Supreme Court.<sup>2</sup>

After *Buchanan* invalidated race-based zoning restrictions, racially restrictive covenants became the primary means of perpetuating exclusion of minorities from developed urban areas, allowing property owners to use the law to enforce socially acceptable norms of segregation.<sup>3</sup> What is a racially restrictive covenant? The Civic Unity Committee, in a 1946 publication, defined racially restrictive covenants as: "agreements entered into by a group of property owners, sub-division developers, or real estate operators in a given neighborhood, binding them not to sell, lease, rent or otherwise convey their property to specified groups because of race, creed or color for a definite period unless all agree to the transaction."<sup>4</sup> When a restrictive covenant existed on a property deed or plat map, the owner was legally prohibited from selling to members of the specific minority group or groups listed in the covenant.<sup>5</sup> As a result, racial restrictions were rarely contested—which is a key reason they were so effective.

Legally, if a White property owner violated the covenant, other White property owners bound by the same covenant could file a lawsuit to enforce the covenant. Racial covenants also functioned as a social norm of segregation because they were written agreements that were recorded in the public records and disclosed to prospective buyers. Such covenants sent a message to prospective Black homebuyers that even if the covenant would not be enforced, they would be living in a hostile community where they would not likely be accepted.<sup>6</sup>

Racial segregation was not just perpetuated by laws and policy decisions at the local, state and federal level, but also by individual prejudices, income differences, and the actions of private institutions like banks and real estate agencies. As the business of urban real estate development became increasingly professionalized, institutions like the National Association of Real Estate Boards (NAREB) adopted their own methods to encourage segregated communities. In 1924, NAREB promulgated a “Realtors Code of Ethics” that included the directive that “A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood.”<sup>7</sup> Adoption of such policies was utilized by some organizations as a means to skirt Supreme Court rulings and promote racial separation under the guise of a supposed duty to their customers.

Then, in 1926, the Supreme Court considered the validity of private racially restrictive covenants. *Corrigan v. Buckley* was based on a restrictive covenant executed by a group of homeowners in Washington, DC that prohibited homeowners and their successors from selling to racial minorities.<sup>8</sup> When one homeowner violated the agreement by selling her home to a Black family, a neighboring homeowner subsequently sued to block the sale. The Supreme Court upheld the lower court’s ruling that none of the United States Constitution’s amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property. The Court held that the Fourteenth Amendment applied only to actions taken by states or government entities and did not apply to actions by individuals with respect to their property.<sup>9</sup> Essentially, the Court endorsed the legality of private restrictive covenants. Significantly, the Court did not decide whether judicial enforcement of racially restrictive covenants would constitute state action governed by the Fourteenth Amendment, although in dicta suggested that such an argument was “lacking in substance.”<sup>10</sup> *Corrigan* legitimized the widespread use of racially restricted covenants as a de

facto means of perpetuating racial segregation for the next 25 years.

### **Creation of Community Associations**

Following *Corrigan*, many subdivision developers created community associations before putting homes up for sale and made membership in the community association a condition of purchase.<sup>11</sup> This practice started in the 1920s when a certain developer initiated construction of a country club district in Kansas City. The developer required each purchaser of property to join the district’s association which not only prohibited sales or rentals to Black families, but further provided that the racial exclusion policy could not be modified without the assent of owners of a majority of the developer’s acreage.<sup>12</sup> Notably, the threshold for amendment of an association’s restrictions remains high to this day, thereby making removal of racially restrictive covenants from a community association’s governing documents especially challenging if the required percentage of owners do not agree with such removal.

Significantly, the most powerful endorsement of racially restrictive covenants actually came from the federal government. In 1926, the same year that the Supreme Court upheld exclusionary zoning, it also upheld the legality of restrictive covenants.<sup>13</sup> The Court found that restrictive covenants were voluntary private contracts. As a result, successive presidential administrations embraced racially restrictive covenants as a means of segregating the nation.

### **The Federal Housing Administration Systematizes Racism**

In 1934, the Federal Housing Administration (FHA) was created for the purpose of salvaging the home building and finance industries that had collapsed during the Great Depression. The FHA paved the way for post-World War II mass suburbanization by lowering home down payments, establishing minimum standards for home construction, and eliminating lending institutions’ risk in providing mortgage financing.<sup>14</sup> Thereafter, the FHA’s home building subsidies and subdivision regulations helped to

institutionalize residential racial segregation on a national scale by requiring the use of racially restrictive covenants on government-insured housing and refusing to insure mortgages for homes in predominantly minority areas of the inner city.<sup>15</sup>

The National Housing Act of 1934 (Housing Act) also played a part in popularizing these covenants by introducing the practice of “redlining,” or drawing lines on city maps delineating the ideal geographic areas for bank investment and the sale of mortgages. Areas blocked off by redlining—Black neighborhoods—were considered risky for mortgage support and lenders were discouraged from financing property in those areas.<sup>16</sup>

Portions of the Housing Act encouraged land developers, realtors, and community residents to write in racial restrictive covenants to prevent neighborhoods from being redlined thereby providing a financial justification for racial restrictive covenants and encouraging their use. Redlining made it exceedingly more difficult for non-Whites to purchase property because financing was refused in the only neighborhoods in which they could afford to live.<sup>17</sup>

The Underwriting Manual, which established the FHA’s mortgage lending requirements, considered Blacks to be “adverse influences” on property values and warned against the “infiltration of inharmonious racial or nationality groups” in racially homogeneous neighborhoods.<sup>18</sup> These discriminatory policies legitimized the notion that racial discrimination is a necessary and normal characteristic of all housing market transactions, housing appraisal, and mortgage lending.<sup>19</sup> After World War II, the newly established Veteran’s Administration (VA) also began to guarantee mortgages for returning servicemen. The VA adopted the FHA’s housing policies, and VA appraisers used the FHA’s Underwriting Manual. By 1950, the FHA and the VA worked together to insure half of all new mortgages nationwide.

Here’s an example of the harm done by the FHA: In the late 1930’s, as Detroit grew outward, White families began to settle near a Black enclave adjacent to

the area known as Eight Mile Road. By 1940, Blacks were surrounded, but neither they nor Whites could obtain FHA insurance because of the proximity of neighboring inharmonious racial groups. In 1941, an enterprising White developer built a concrete wall between the White and Black areas.<sup>20</sup> The FHA appraisers subsequently elected to approve the mortgages on the White properties. On one hand, the FHA was instrumental in alleviating the home ownership crisis. On the other hand, the enactment of the FHA had significant negative effects for non-Whites by incentivizing residential racial segregation.<sup>21</sup>

### **Levittown: A Legacy of Bias and Racial Exclusion**

In 1947, entrepreneur Abraham Levitt and his two sons, William and Alfred, developed Levittown, a planned community located in Nassau County, Long Island intended for returning World War II veterans. To effectuate their development, which was one of the first mass-produced suburbs in the country, the Levitts obtained FHA subsidies to finance 4,000 homes before clearing the land to build Levittown.<sup>22</sup>

Levittown’s covenants contained a number of restrictions that prevented certain demographics from buying homes in the area.<sup>23</sup> For instance, a clause in the original Levittown covenants prevented tenants from allowing non-Caucasians to use or occupy Levitt houses. The Levitts justified the clause by stating that the covenant would serve to maintain the value of the properties, since most Whites at the time preferred not to live in mixed communities.<sup>24</sup>

Significantly, the Levittown development plans reviewed by the FHA required approved construction materials, the design specifications, the proposed sale price, etc., and a commitment not to sell to Blacks. After the Supreme Court struck down these racially restrictive housing covenants as violations of the Fourteenth Amendment, the clause was subsequently eliminated from the Levittown plans. Even with this ruling, though, the area remained overwhelmingly segregated until 1954. Notably, the history of Levittown highlights the practices which

contributed to the country's perpetuation of systemic racism in community associations.

## **RESTRICTIVE COVENANT CASES AND KEY LEGISLATION**

### **Restrictive covenant cases**

We have already discussed the seminal 1917 case of *Buchanan v. Warley*, wherein the U.S. Supreme Court ruled racial zoning unconstitutional as well as the 1921 case of *Corrigan v. Buckley*, holding that racially restrictive covenants were voluntary private agreements over which it had no jurisdiction. Together, these cases effectively endorsed the widespread use of racially restrictive agreements in community associations.

In 1948, the Court decided the landmark case of *Shelley v. Kraemer*, a consolidation of appeals from two state supreme court decisions, *Shelley v. Kraemer* and *McGhee v. Sipes*.<sup>25</sup> A companion case, *Hurd v. Hodge*, consolidated with *Uricolo v. Hodge*, concerned properties located in the District of Columbia.<sup>26</sup> All four cases were referred to collectively as the Restrictive Covenant Cases and addressed the validity of court enforcement of restrictive covenants against Black property owners.<sup>27</sup>

*Shelley* arose out of the purchase of a parcel of property in St. Louis, Missouri in 1945 by Shelley and his wife who were Black. Incident to the sale of the property was the presence of a recorded agreement which restricted occupancy of the property to Whites. Neighbors who were also parties to the restrictive agreement brought suit to restrain the Shelleys from taking possession of the property. The Supreme Court of Missouri ultimately held that the restrictive agreement was effective, and its enforcement did not violate any rights guaranteed by the United States Constitution.<sup>28</sup>

*McGhee v. Sipes* involved similar facts. The Black defendants bought a parcel of property which was bound by and subject to a restrictive covenant prohibiting occupants who were not White. Neighbors filed suit to enforce the covenant. The trial court held in favor of the petitioners, ordered the

defendants to vacate the property within 90 days, and restrained them from using or occupying the property in the future. The Supreme Court of Michigan subsequently affirmed the ruling.<sup>29</sup>

In the companion cases, *Hurd v. Hodge* and *Uricolo v. Hodge*, Black families purchased properties in the District of Columbia. In both cases, the properties were purchased from White owners under deeds which contained covenants restricting rental or sale to "any Negro or colored person, under a penalty of Two Thousand Dollars."<sup>30</sup> As in the cases of *Shelley* and *McGhee*, neighbors who were parties to the covenant brought suit. The District Court then consolidated the two cases for trial purposes and eventually entered a judgment that nullified the defendants' deeds and enjoined the defendants and the White property owner from leasing, selling or conveying the properties to any person of color.<sup>31</sup>

The Supreme Court struck down the covenants, holding that although private parties could voluntarily abide by their terms, the Fourteenth Amendment prohibits judicial enforcement of racially restrictive covenants. The rulings in these consolidated cases were significant because the Court had finally rendered judicial enforcement of these racial restrictive covenants invalid, albeit for reasons that did not address the real issue. Interestingly, in the *Shelley* and *McGhee* cases, the Court held that the states at issue had denied the defendants the equal protection of the laws as guaranteed by the Fourteenth Amendment and declared that judicial action constitutes the kind of state action with the meaning of that clause.<sup>32</sup> In the *Hodge* cases, the Court applied the first section of the Civil Rights Act of 1866 and gave consideration of public policy in support of its decision.<sup>33</sup>

Notably, the Court did not actually address the validity of the actual racial restrictive covenants in any of the cases. In fact, the Court in *Shelley* emphasized that:

the restrictive covenants standing alone cannot be regarded as a violation of any rights guaranteed to the petitioners by the Fourteenth

Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear that there has been no action by the State and the provisions of the Amendment have not been violated.<sup>34</sup>

In *Hurd*, the Court likewise held that “the [Civil Rights Act of 1866] does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms.”<sup>35</sup> In sum, the restrictive covenants themselves were not nullified. Instead, judicial enforcement of the restrictive covenants was found to be in violation of the rights guaranteed by the Fourteenth Amendment.

Although the Court invalidated statutory racial segregation in *Buchanan*, it was not until *Shelley*—31 years later—that the Court declared its position on judicial enforcement of the covenants. During that time, racially restrictive covenants had become a tool to effectively bar almost all minority groups in the United States from predominately White urban neighborhoods. The impact of the Restrictive Covenant Cases was tremendous, but the practice of inserting racially restrictive covenants in governing documents or deeds remained commonplace. Additionally, minority groups still had to contend with the economic burden of buying into White neighborhoods as well as the social force of racial prejudice.

Following the Restrictive Covenant Cases, similar issues came before the Court in different ways. In *Barrows v. Jackson*, the owners of residential estates in a neighborhood in Los Angeles adopted a covenant which ran with the land and restricted the use and occupancy of property to persons of the White or Caucasian race. The covenant further obligated sellers to incorporate the restriction in all transfers of land.<sup>36</sup> White neighbors sued fellow White owners for damages after the owners disregarded the racial covenant and sold their home to Black purchasers. In reliance on the principles in *Shelley*, six members of the Court held that a restrictive covenant could not be enforced at law through a suit for

damages against a co-covenantor who broke the covenant.<sup>37</sup> The *Barrows* case solidified the idea that racially restrictive covenants could not be enforced indirectly, at least not through lawsuits seeking damages or injunctive relief, as such enforcement would violate the Fourteenth Amendment.

## The Fair Housing Act of 1968

Though cases like *Shelley* and *Barrows* held against the legal enforceability of racially restrictive covenants, the cases had little to no impact on racial covenants that were privately made by property owners and voluntarily accepted by purchasers of property. As a result, the use of the racially restrictive covenants continued into the late 1960’s.

The 1968 Fair Housing Act (Act) changed everything. Per the Act, which prohibits discrimination concerning the sale, rental and financing of housing based on race, religion, national origin, or sex, racially restrictive covenants were deemed illegal regardless of whether they were voluntarily accepted by purchasers of property.<sup>38</sup> The enactment of the Act marked the first time since 1883 that the United States government had endorsed the rights of Blacks to reside wherever they chose and could afford.

The Act had two main purposes: (1) to prevent discrimination and (2) to reverse housing segregation. The commitment to the reversal of segregation was necessary because decades of unjust government practices had led to a prevalence of housing segregation. Unfortunately, despite the Act’s best efforts, housing segregation continues in the United States even today.

Though the country has made progress since the enactment of the Act, many challenges to fair housing remain. Extreme racial disparities in homeownership and wealth continue to exist. In 1968, 65.9 percent of White families owned their homes. That rate was 25 percent higher than the 41.1 percent of Black families that owned their homes.<sup>39</sup> Shockingly, even today, Black homeownership rate has not changed but White homeownership has increased five percentage points to 71.1 percent.<sup>40</sup> These homeownership disparities in turn contribute to the racial

wealth gap in the United States. In 2017, the typical White family held ten times the amount of wealth as the typical Black family (\$171,000 for Whites to \$17,409 for Blacks, on average).<sup>41</sup> These numbers have worsened since 1968 and support the notion that housing discrimination may have a direct and oftentimes negative effect on life outcomes of the victims of such discrimination.<sup>42</sup>

### **Reeves v. Carrollsburg**

The lingering negative effects of racial discrimination in housing and racially-based harassment were felt as recently as the late 1990s seminal case of *Reeves v. Carrollsburg*.<sup>43</sup> Ms. Reeves, a Black administrative judge who had notably once served on the board of directors of her condominium association, was harassed, threatened, and accosted by her White neighbor (and self-described racist) Mr. Schongalla.<sup>44</sup> During the course of Ms. Reeves' occupancy, Schongalla engaged in a nonstop and aggressive campaign of racially and sexually motivated verbal assaults against Reeves, which included threats on Reeves' life.<sup>45</sup> Reeves repeatedly sought assistance from law enforcement.<sup>46</sup> Schongalla was ultimately arrested and found guilty of criminal violations and Reeves was awarded restraining orders.<sup>47</sup> Unfortunately, none of these actions stopped Schongalla from his continued harassment of Reeves.<sup>48</sup>

Reeves turned to the condominium association for help. In response, the board sent violation letters to Schongalla in which it demanded that he cease and desist his reprehensible misconduct. Unfortunately, the letters were no more effective in stopping Schongalla's misconduct than the criminal law sanctions that had been imposed against him.<sup>49</sup> Although the association's governing documents provided the board with legal authority to take action against Schongalla, the board took the position that Schongalla's actions were criminal in nature and were therefore not remediable or actionable as a civil matter, opting against the pursuit of an injunction to enforce its covenants.<sup>50</sup> Reeves subsequently sued the association for creating and failing to prevent a hostile housing environment in violation of her civil rights under the Act.<sup>51</sup> The court held

that the association's failure to do everything within its power to address and remedy the hostile housing environment was actionable under the Act.<sup>52</sup>

The ruling in the Reeves case changed the game for community associations. Where it was once thought that neighbor-to-neighbor disputes did not require association intervention, Reeves made it clear that associations do have a duty to intervene and protect residents from hostile housing environments when the association's governing documents authorize the association to take action.

## **EFFECTS OF THE REEVES CASE**

### **2016 HUD Update**

In the wake of the Reeves case, some courts continued to believe that the Act did not impose a duty on community associations to intervene in neighbor-to-neighbor disputes involving discrimination on the basis of an individual's race, color, religion, sex, national origin, familial status or disability.<sup>53</sup>

Per the Act, housing providers cannot:

1. make unavailable or deny a dwelling to any person because of a protected class;<sup>54</sup>
2. discriminate against individuals in the provision of services or facilities relating to their dwellings;<sup>55</sup>
3. make statements that indicate a preference or limitation or discrimination in the sale or rental of a dwelling because of a person's protected class;<sup>56</sup>
4. coerce, intimidate, threaten, or interfere with an individual for exercising or enjoying a right or protection granted by the Act;<sup>57</sup> or
5. coerce, intimidate, threaten, or interfere with an individual in the enjoyment of his or her dwelling because of the individual's protected class.<sup>58</sup>

Pursuant to these standards, it appeared that community associations and their boards could, in fact, be held liable if they failed to successfully address harassment of owners in their communities who

were part of a protected class. Clarification was needed.

In October 2016, the U.S. Department of Housing and Urban Development (HUD) answered the call by publishing new interpretive regulations regarding harassment claims under the FHA.<sup>59</sup> Under these regulations, HUD formalized standards for evaluating claims of “quid pro quo”<sup>60</sup> and “hostile environment”<sup>61</sup> harassment in the housing context, and “clarif[ied] when [respondents] may be held directly or vicariously liable under the Act for illegal harassment.”<sup>62</sup>

The new regulations unequivocally established HUD’s view that associations and managers, as well as their employees and agents, may be held liable for discrimination under the Act if they knew or should have known of discriminatory conduct occurring in their associations and failed to take action to address it. Under this regulation, a community association can be held liable under the Act for resident-on-resident harassment (based on a protected class) if the harassment violated the association’s restrictive covenants and the association opted against enforcement of the restrictions.<sup>63</sup>

The enactment of the 2016 HUD regulations effectively codified the finding in *Reeves*<sup>64</sup> and provide that if an association has the authority to take civil action against a person who is engaged in unlawful discriminatory conduct under its governing documents or applicable laws governing the association, it has a duty to exercise that authority on behalf of the aggrieved resident. Failure to do so now formally constitutes a violation by the association of that person’s civil rights under the Act.<sup>65</sup>

### **Progress: Laws Enacted to Nullify and Remove Racially Restrictive Covenants**

Encouragingly, many states have taken action to enact laws to nullify and/or remove racially restrictive covenants from their states’ real property records. In 2018, Washington State amended its discrimination laws to provide property owners a new way to strike racially restrictive covenants from documents affecting the title of their properties.<sup>66</sup>

An owner can now record a modification document with the county auditor where the property is located in order to remove a recorded racially restrictive covenant.

In 1990, Colorado passed a law which allowed attorneys, title insurance companies, and title insurance agents to remove any void or unenforceable restrictive covenant based upon race or religion contained in an instrument affecting the transfer or sale of, or any interest in, real property.<sup>67</sup>

In 1985, the Texas legislature introduced a bill that related to modification of covenants and land use restrictions applicable to certain real estate subdivisions, which included findings that “the existence of racial covenants in subdivisions, regardless of their unenforceability, is offensive, repugnant, and harmful to members of racial or ethnic minority groups, and public policy requires that these covenants be deleted.”<sup>68</sup> The bill intended to “provide for the removal of any restriction or other provision relating to race, religion, or national origin that is void and unenforceable under either the United States Constitution or Section 5.026 [of the Texas Property Code].”<sup>69</sup> Unfortunately, racially restrictive covenants do remain in Texas real property records but earlier this year, the Texas legislature passed The Senator Royce West Act, which allows property owners to remove discriminatory language from property conveyances simply by filing a notice with the county clerk.<sup>70</sup>

The California legislature is currently considering legislation to remove racist language from real estate covenants.<sup>71</sup> Various other states have ratified laws to allow for the removal of racially restrictive covenants (Arizona,<sup>72</sup> Delaware,<sup>73</sup> Kansas,<sup>74</sup> Maryland,<sup>75</sup> Missouri,<sup>76</sup> Nevada,<sup>77</sup> Ohio,<sup>78</sup> Virginia,<sup>79</sup> Oregon,<sup>80</sup> and Minnesota<sup>81</sup>) and surely others will follow. The positive effects of the enactment of such regulations are far-reaching. Unfortunately, the act of purging racially restrictive language from real estate documents on a nationwide scale is a massive undertaking and many states have not elected to take such action. As a result, discriminatory

language will continue to remain in governing documents, deeds and other real estate documents recorded prior to 1968.

## STILL A WAYS TO GO

### Condominium associations' right of first refusal

Following the enactment of the Act, the Supreme Court, in *Jones v. Alfred H. Mayer Co.*,<sup>82</sup> held that section 1982 of the Civil Rights Act of 1866 prohibited all racially motivated refusals to sell or rent, deeming the practice a "relic of slavery."<sup>83</sup> Unfortunately, such racially motivated practices continue even today through the practice of a condominium association's right of first refusal.

Generally, the right of first refusal in a condominium association's governing documents exists to enable a condominium to exercise some degree of control over the sale or leasing of apartments.<sup>84</sup> However, some condominium associations manipulate that right in order to prevent sales to persons of color. The good news is that while many condominiums possess the authority to exercise this right of first refusal, most rarely implement it.

If a condominium is considering exercising its right of first refusal as to sales of units in the condominium, it should make sure that the transaction follows a uniform set of guidelines and procedures adopted by the board so as to ensure that purchases are not made purely for discriminatory reasons. While a condominium can essentially exercise its right of first refusal for any reason, or for no reason, exercising it for discriminatory reasons would clearly be legally inappropriate.<sup>85</sup> In fact, any adopted policy should avoid consideration of subjective factors such as the applicant's appearance, demeanor, owner's estimate of his character or even personal dislike as those may be considered by a trier of fact as little more than racial discrimination in disguise.<sup>86</sup>

### Dealing with harassment complaints

When confronted with a harassment complaint in a community association, it is incumbent on us as attorneys to educate and advise our boards and

management companies on practical steps they can take to manage harassment issues:

### A. Training for Association Personnel and Agents

- Hold board training regarding FHA compliance.
- Recommend updating of the association's employee handbook and volunteer policies to prohibit discrimination and harassment against residents under the FHA.
- Conduct separate training for association's volunteers, employees, and agents on anti-harassment issues under the FHA.
- Require any contractors to agree in their contracts that the association has the right to terminate the contract if in the association's judgment the contractor unlawfully harasses a resident.
- Require that the contractor agree to comply with all applicable laws, including the FHA.
- Consider providing the contractor an educational pamphlet setting forth the contractor's anti-discrimination and anti-harassment obligations.
- When feasible, require the contractor to indemnify the association for any fair housing claims arising out of the contractor's (or its agent's) acts.

### B. Harassment-Reporting Policies and Resident Training

- Encourage boards to adopt a harassment-reporting policy for residents to report third-party harassment under the FHA. This decision should be made after much deliberation and consultation.
- If the association decides to adopt a harassment-reporting policy for third-party harassment claims, the association should provide annual training on what constitutes actionable harassment and how residents should comply with the policy.
- If authorized by state law, condominium associations should consider adopting rules requiring

landlord owners to comply with the FHA and ensure that their tenants do the same. Condominium associations should also consider adopting restrictions providing for the association's authority to step into the shoes of the landlord owner and terminate the lease if the tenant unlawfully harasses another resident.

- Evaluate current authority and advise on the association's authority to address harassment by a resident or third party.
- Develop a response plan. Community associations need to be prepared to address residents' harassment complaints. The association's response plan will likely depend on whether the alleged harasser is an association agent or employee, or a third party.

### **Unfortunate real-life examples of racism in community associations**

By way of transition into the second half of this paper, which will discuss overcoming racism in community associations, we would like to present you with some real-life examples which serve to demonstrate the fact that racism is still very much alive and well. While discriminatory incidents occur on a daily basis, few of them make it to the news. Here are just a few recent examples:

#### **Louisville, Kentucky (July 18, 2020)**

Michella Pineda, a Navy veteran, and Connie Pineda moved to a Lake Forest community in April 2019. The Pinedas' neighbor, Suzanne Craft, thereafter began verbally harassing the family with racial slurs in an attempt to force the Pinedas out of the neighborhood. Craft was caught on camera spray-painting racially offensive slurs on the Pinedas' driveway and front yard. Craft had vandalized the Pinedas' property three times in the past and painted a swastika sign on the property on two separate occasions. The Pinedas filed suit against Craft as well as the Lake Forest Community Association for "failing ... to promote the social welfare and common good of its members and ... failing to take prompt action to correct and end the harassment," which the victims claim has been occurring for months.<sup>87</sup> The Lake

Forest Community Association issued a statement, acknowledging it was "aware of an unacceptable racial slur being spray painted on a resident's driveway" and was "reviewing the matter with its Board of Directors and legal Counsel."<sup>88</sup> Investigation into this matter is ongoing.

#### **Winston-Salem, North Carolina (July 6, 2018)**

Community resident Jasmine Edwards and her baby attempted to enter her community pool in Winston-Salem. Pool Committee member Adam Bloom, a White man, stopped her and demanded that she produce identification to confirm she was a resident of the private Glenridge Homeowners Association. Edwards was the only Black person at the pool and Bloom only approached her. Bloom called the police. Edwards produced her electronic keycard. Bloom refused to apologize to Edwards. The Association published the following statement: "In confronting and calling the police on one of our neighbors, the pool chair escalated a situation in a way that does not reflect the inclusive values Glenridge seeks to uphold as a community."<sup>89</sup>

#### **North Little Rock, Arkansas (November 30, 2020)**

Chris Kennedy received an anonymous racist letter after he installed a Black Santa Claus in his front yard. The letter read as follows:

Please remove your negro Santa Claus yard decoration. You should try not to deceive children into believing that I am negro. I am a Caucasian (white man, to you) and have been for the past 600 years. Your being jealous of my race is no excuse for your dishonesty. Besides that, you are making yourself the laughingstock of the neighborhood. Obviously, your values are not that of the Lakewood area and maybe you should move to a neighborhood out east with the rest of your racist kind.

The letter contained an image of a white Santa with two thumbs down and a label affixed to the front of the envelope that resembled the Lakewood Property Owners Association's logo. In support of the Kennedy family, neighbors drove by and honked,

delivered cookies and dropped off a sign that said, “love your neighbor.” Many of the Kennedys’ neighbors then installed Black Santas on their own lawns in a show of support.<sup>90</sup> Additionally, the management company, on behalf of the board of directors, personally visited the Kennedys’ home and condemned the behavior of the racist neighbor.

### **THE FOUR A’S OF OVERCOMING RACISM IN COMMUNITY ASSOCIATIONS: AWARENESS, ACCOUNTABILITY, ACTION AND ADOPTION**

Picture this: Your firm has a high-paying community association client located in a rural area of the state who is embroiled in costly litigation involving a deed restriction violation. The firm assigns its top litigator—a woman of color—to the case. The litigator attends various hearings and obtains rulings in the association’s favor every time, except for one particular hearing where the association lost despite having the law on its side. Subsequent to the hearing, one of the board members calls the litigator’s supervising partner and tells him the board doesn’t want the litigator on the case anymore and requests a reassignment. The partner asks the reason. The board member says, “She just doesn’t look like the other attorneys here.”

Whoa, you think to yourself, that was a very racist comment. The board member is clearly allowing his implicit bias towards people of color in his rural community to be a deciding factor in what should otherwise be a business decision. So, what do you do? Do you agree to reassign the case because you want to keep the client happy? On the one hand, you need to honor the client’s wishes even if you think the litigator’s skills, experience, and success rate make her the best person for the job. On the other hand, you feel compelled to shine a light on the board member’s racial bias. But even a well-intentioned conversation could lead to defensiveness and hostility from the board member or even the loss of the client.<sup>91</sup> How do you proceed?

In this paper, we are advocating in favor of attorneys modeling the antiracist behavior they want others to emulate so the type of conversation above does

not even occur. How do we model antiracist behaviors? We do it through (1) educating our boards and managers on microaggressions and implicit bias and providing tools they can use to overcome racism in their communities; (2) supporting diversity in our firms by hiring and promoting attorneys of color; and (3) fostering a climate of inclusion and compassion in our firms so we set an example to other leaders in our industry of what it means to be an antiracist organization.

In the following sections, we will attempt to bring awareness to the form which racism takes in community associations; encourage our audience to take accountability for the role they play in perpetuating racist behaviors despite good intentions; and provide tools attorneys, community association boards, and managers can use to effect antiracist action and truly become agents of change.

### **Awareness: Racism exists in community associations through racial microaggressions and implicit bias**

#### **A. Racial Microaggressions— Making the Invisible Visible**

At this point, most of us have heard the term “microaggression” used in conjunction with discussions about racism. So, what are racial microaggressions? Racial microaggressions are everyday subtle insults or derogatory messages directed toward minorities and people of color, often from well-intentioned people who believe they’ve done nothing offensive and who consciously believe in and profess equality.<sup>92</sup> Perpetrators are often unaware that they engage in such communications when they interact with racial minorities. Microaggressions can be behavioral, but the vast majority are communicated through language. While they may seem harmless, microaggressions can cause great distress to those who experience them.

The reality is that you are the sender of a message through your words and actions, but the racism is experienced in the mind of the receiver—not you. You may not think there is anything wrong with

what you've said, but a person of color may nonetheless be highly offended. At extreme levels, it is easy to distinguish toxic behavior, e.g., yelling, verbal abuse, explicit threats, antagonism, violence, touching without permission, and sexual advances. However, microaggressions include a much broader range of behaviors that are equally toxic but more subtle and subjective. "Microaggressions hold their power because they are invisible, and therefore they don't allow us to see that our actions and attitudes may be discriminatory."<sup>93</sup>

To understand the range of these incidents, it is important to identify the different forms of microaggressions and how they can play out in everyday life. There are three recognized forms of racial transgressions:<sup>94</sup>

- **Microassaults:** These conscious, deliberate, and explicit racist attacks—both verbal and nonverbal—are meant to belittle or hurt the victim. Examples include name-calling, using racial slurs, avoiding or discouraging interracial interaction; displaying a swastika or confederate flag.
- **Microinsults:** While often unconscious and much more subtle, a microinsult demeans and belittles the victim through racial slights or comments that seem innocuous but are insulting to a person of color. Examples include mistaking a person of color for a service worker or clutching a purse when walking past a person of color.
- **Microinvalidations:** Comments and behaviors that subtly exclude or invalidate people's thoughts, feelings, or experiences and ignore the lived experiences of historically marginalized groups are called microinvalidations. Examples include asking a person of color where they are *really* from, implying that they are foreign simply because of their appearance, or dismissing the concept of microaggressions as "political correctness."

The first step in addressing and overcoming racial microaggressions is to recognize that the microaggression has occurred and acknowledge the message that it may be sending to the person of color. Below are the nine recognized categories of racial

microaggressions,<sup>95</sup> organized according to theme, microaggression example, and message that may be received by the person of color:

### 1. Alien in one's own land

- a. **Theme:** Assuming a person of color is foreign born
- b. **Microaggression:** "Where are you from?" "Where were you born?"
- c. **Message:** You are not American because you are not White. You are a foreigner.

### 2. Ascription of intelligence

- a. **Theme:** Assigning intelligence level to a person on basis of race
- b. **Microaggression:** "You are a credit to your race."
- c. **Message:** People of color are not as smart as Whites

### 3. Color blindness

- a. **Theme:** White person doesn't want to acknowledge race
- b. **Microaggression:** "When I look at you, I don't see color." "All lives matter."
- c. **Message:** Denial of a person of color's racial/ethnic experiences

### 4. Assumption of criminal status

- a. **Theme:** Presuming that people of color are criminals
- b. **Microaggression:** Clutching purse; store clerk following Black shopper
- c. **Message:** You are a criminal. You are dangerous.

### 5. Denial of individual racism

- a. **Theme:** Denial of racial biases
- b. **Microaggression:** "I'm not racist. I have Black friends." "As a woman, I know what you go through as a minority."

- c. **Message:** The speaker is immune to racism because they have friends who are persons of color.

## 6. Myth of meritocracy

- a. **Theme:** Race doesn't play a role in life successes
- b. **Microaggression:** "I believe the most qualified person should get the job."
- c. **Message:** People of color are given unfair advantages because of their race.

## 7. Pathologizing cultural values

- a. **Theme:** Notion that values and communication of Whites are ideal.
- b. **Microaggression:** "Why are you so loud? Just calm down."
- c. **Message:** Assimilate to White culture

## 8. Second class citizen

- a. **Theme:** White person given preferential treatment over person of color
- b. **Microaggression:** Mistaking Black person for service worker
- c. **Message:** People of color are second-class citizens

## 9. Environmental

- a. **Theme:** Systematic and environmental
- b. **Microaggression:** TV shows depicting mostly White key characters; colleges with buildings all named after White upper-class men.
- c. **Message:** People of color have no key place in society

The hope is that by recognizing and naming the above microaggressions, one can undercut their power and expose the nonverbal cues (tone of voice, body language, gestures, facial expression, etc.) that carry meaning behind them, thereby enabling one to recognize and cease from engaging in microaggressions moving forward.<sup>96</sup>

Practically speaking, how do you prevent your boards and managers from engaging in racial microaggressions? First, you must recognize that microaggressions are not automatic. People can control their unintended insensitivity.<sup>97</sup> "Because microaggressions are often communicated through language, it is very important to pay attention to how we talk, especially in the workplace and other social institutions like classrooms, courtrooms, and so on," says Christine Mallinson, professor of language, literacy, and culture at the University of Maryland.<sup>98</sup>

Below is a framework of behaviors that we as attorneys can use to identify and address our own unintentional use of microaggressions so we are better able to educate our boards and managers how to do the same in their own lives:<sup>99</sup>

- **Introspection:** Become aware that words matter to people in different ways. Be mindful of your own imperfections. Examine your beliefs. Do your own personal work.
- **Mindfulness:** Notice what you notice. When you meet someone new, you typically "size them up" and identify the differences between you. Ask yourself if you are making any stereotypical assumptions and, if so, refrain from making those assumptions. Also, watch others' body language that may signal your words were perceived in an unintended way. Practice being more mindful about how what you say and do might affect those around you. Acknowledge other people's feelings.
- **Perspective-taking:** Consider the stereotyped person's point of view. Embrace empathy. Put yourself in other people's shoes. By exploring another person's perspective, you can glean insight into your behaviors. If you've been called out for doing or saying something hurtful, resist getting defensive. Instead, embrace curiosity. Ask questions that can help you understand the person's point of view. Try not to downplay the situation and listen carefully as the person shares their experience. Remember, the person is taking a risk by allowing themselves to be vulnerable by sharing this information with you.

- **Learn to slow down/Check your messaging.** Before speaking, ask yourself if the recipient of your message may be offended by your words. If the answer is yes, put the thought aside momentarily and let time provide an opportunity for you to rephrase your message in a more productive way so your listener will be more receptive.
- **Individuation.** Evaluate people based on their personal characteristics rather than their race.
- **Institutionalize fairness.** Support a culture of diversity and inclusion in your organization. Publicly state that racist behavior is unacceptable. Include a disclaimer on the organization's website which conveys a viewpoint that the organization welcomes and encourages diversity and does not tolerate discrimination of any kind.
- **Take two.** Recognize that you will not be able to overcome your use of microaggressions overnight and neither will your boards and managers. Show yourself grace. Act with positive intention. If you slip, restart the process and look for ways to improve.

We all have a role to play in addressing and preventing microaggressions. By taking the time to learn, ask questions, and be accountable for our actions, real progress against racism can be made. Next, let's talk about implicit bias and the role it plays in the perpetuation of racism in community associations.

## B. Implicit Bias—Retraining the Brain

Implicit bias refers to the attitudes or stereotypes that affect our understanding, behaviors, actions and decisions in an unconscious manner.<sup>100</sup> Implicit bias is the brain's automatic processing of negative stereotypes that have become embedded in our brains over time about particular groups of people, oftentimes without our conscious awareness. We make associations based on a particular group's traits and make quick decisions about those people based on those associations. These associations develop over the course of a lifetime beginning at an early age through exposure to direct and indirect messaging received through life experiences and,

oftentimes, the media and news programming.<sup>101</sup> "Once lodged in our minds, hidden biases can influence our behavior towards members of particular social groups, but we remain oblivious to their influence."<sup>102</sup>

Simply put: Everyone has them and we act on them without intending to do so.

Although people are taught to be colorblind and further taught that they can be objective when evaluating people, science suggests that sometimes our values aren't sufficient for us to actually practice those pieces because our brains see race very quickly. "We develop, derive bias from just seeing certain pairings of words together over time. And those bits of information help us navigate our unconscious processes."<sup>103</sup> This means that in order to address people's implicit biases, a lot of fundamental processes in the brain have to be changed. People generally intend well and try to align their behavior with their intentions, but their implicit bias often gets in the way. By exploring and understanding implicit bias, we can help ourselves and our boards and managers better achieve alignment in behavior and intention.

- Implicit biases are bits of knowledge about social groups that are stored in our brains because we encounter them in our cultural environment.
- Implicit biases are pervasive. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
- Implicit and explicit biases are related but distinct mental constructs. They are not mutually exclusive and may even reinforce each other.
- The implicit associations we hold do not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse.
- We generally tend to hold implicit biases that favor our own ingroup, though research has shown that we can still hold implicit biases against our ingroup.
- Implicit biases are malleable. Our brains are incredibly complex, and the implicit associations

that we have formed can be gradually unlearned through a variety of debiasing techniques.”<sup>104</sup>

Harvard professor William James concluded over 130 years ago that “The body shapes the mind which shapes the brain.”<sup>105</sup> He argued that a person’s behavior influences their attitudes, thought processes, and feelings, and not the other way around. Thus, he concluded that people could change their attitudes (biases) by altering their behavior.<sup>106</sup>

So—how do you change your behavior, and therefore your attitudes and biases? We contend that you can retrain your brain to reduce and potentially eliminate your implicit bias by taking the following actions:

Practice the behavior that you want in order for it to become automatic.

Believe that you can do it.

Adopt the new behavior in all aspects of your life.

Stop all of the behaviors that are holding you back.<sup>107</sup> Slow down and make a shift so you are less likely to act on bias.

With these key concepts in mind, let’s move on to a brief discussion of the second “A” in overcoming racism: Accountability.

### Accountability

This will undoubtedly be the shortest section of this paper. What does it mean to take accountability for the role you play in perpetuating racism? It means that you should apologize when warranted and strive to do better moving forward. An apology goes a long way. Keep in mind that if you don’t address the issue in the moment, that doesn’t mean you can’t address it later. There is no statute of limitations on addressing microaggressions or implicit bias and taking accountability for certain actions—however well intended—that may have hurt or insulted a person of color.

### Take Action—Adopt Behaviors and Policies that Support Equality

To overcome racism in community associations, we as leaders must adopt and practice behaviors that eliminate bias and inequality in our own organizations, i.e., “lead by example,” and then educate our boards and manager leaders on how to adopt and practice those behaviors in their own communities. By being deliberate with these behaviors, our boards and managers will have the tools necessary to shape their minds and refine their character so they will be able to serve as role models for their communities in the pursuit of equality.

We encourage you to educate your boards and managers to adopt and foster the following leadership behaviors which support equality:<sup>108</sup>

- **Courage.** Have the courage to take actions and make decisions in the community which support equality.
- **Integrity.** Have the integrity to stand for equality as a core value in the community and never compromise in situational challenges and policymaking.
- **Intolerance.** Be an ally. Be intolerant of others who are not mindful of equality and call them out (gently and with tact) when they behave inappropriately. Sometimes your voice can be heard more powerfully than the voices of victims of microaggressions and implicit bias.
- **Self-awareness.** Be aware of your own biases and the effect that they have on equality. Take responsibility for increasing your understanding of your own privileges and prejudices.
- **Self-Regulation.** Maintain control over your own decisions and actions in the matter of equality.
- **Motivation.** Motivate to pursue equality with energy and persistence and relentlessly challenge its achievement in the community. Intentionally and deliberately engage in non-biasing activities. Educate yourself. Engage in conversations about race.

- **Empathy.** Have empathy. Understand how inequality affects community members emotionally; treat the victimized compassionately; and appreciate that people have unique mindsets that affect their perception of inequality.
- **Sociability.** Manage relationships to establish a common ground of equality in the community.

So, how would all of the above teachings play out when a community association board is confronted with an accusation of racist behavior in the community? Here are the steps we recommend that a board take in such a situation:

1. Acknowledge the aggrieved member's complaint.
2. Meet with the aggrieved member.
3. Engage in a healthy conversation with the member. Such a healthy conversation would involve being reflective and open to the member's feelings; seeking common ground; and listening with a sense of caring and understanding.
4. Investigate.
5. If appropriate and authorized by the association's governing documents, take enforcement action.

6. When in doubt, call the community association lawyer!

## FINAL TAKEAWAY IN ADDRESSING RACISM IN COMMUNITY ASSOCIATIONS

In closing, we want to acknowledge the fact that we all make mistakes. However, we don't always like to acknowledge mistakes when it comes to race because we equate perfection with being a good person. Just know that we're not supposed to be perfect when dealing with race. "Keep in mind that we are not good despite our imperfections. It is the connection we maintain between our imperfections that allows us to be good."<sup>109</sup>

The tackling and overcoming of racism in community associations will not happen overnight. The hope is that by utilizing the four "A's" of overcoming racism—awareness, accountability, action and adoption—first for ourselves and then through education of our community association boards and managers, we can do our part to make our communities more diverse and inclusive places to call home and can serve as true agents of change like the trailblazer attorneys that came before us and those that will seek to follow our example in the future. 📌

---

### Notes

- 1 245 U.S. 60 (1917).
- 2 *Richmond v. Deans*, 281 U.S. 704 (1930); see also Michael Paul Williams, *Richmond's segregation is by design*, *Richmond Times-Dispatch*, Apr. 20, 2015, available at [https://richmond.com/news/local/williams-richmonds-segregation-is-by-design/article\\_7539dea6-9142-515a-9d56-c0adcd5f3fd1.html](https://richmond.com/news/local/williams-richmonds-segregation-is-by-design/article_7539dea6-9142-515a-9d56-c0adcd5f3fd1.html).
- 3 *Confronting Racial Covenants: How They Segregated Monroe County and What To Do About Them*, City Roots and Yale Env't Protection Clinic (2020), available at [https://law.yale.edu/sites/default/files/area/clinic/document/2020.7.31\\_-\\_confronting\\_racial\\_covenants\\_-\\_yale.city\\_roots\\_guide.pdf](https://law.yale.edu/sites/default/files/area/clinic/document/2020.7.31_-_confronting_racial_covenants_-_yale.city_roots_guide.pdf); Jeremy Moule, *Report: Monroe County awash in racist land deeds*, Aug. 4, 2020, available at <https://www.wxnews.org/post/report-monroe-county-awash-racist-land-deeds>.
- 4 Katharine I. Grant Pankey, *Restrictive Covenants in Seattle: A Case Study in Race Relations, 1947*, CUC Collection, Box 17, Folder 19.
- 5 *Id.*
- 6 *Confronting Racial Covenants*, *supra* note 3, at 10.
- 7 Nat'l Assoc. of Realtors, 1924 Code of Ethics, art. 34, available at <http://nar.realtor/about-nar/history/1924-code-of-ethics>.
- 8 271 U.S. 323 (1926).
- 9 *Id.*
- 10 *Id.* at 331.
- 11 Richard Rothstein, *The Color of Law* 77-81 (Liveright Publishing Corp. 2017).
- 12 *Id.*
- 13 *Id.*
- 14 Kevin Fox Gotham, *Racialization and the State: The Housing Act of 1934 and the Creation of the Federal Housing Administration*, *Sociological Perspectives*, Vol. 43, No. 2, 291-317 (June 1, 2000).
- 15 *Id.*
- 16 *Id.*
- 17 *Id.*

- 18 *Id.*
- 19 *Id.*
- 20 *Id.*
- 21 *Id.*
- 22 Rothstein, *supra* note 11, 68-75.
- 23 Noah Sheidlower, *The Controversial History of Levittown, America's First Suburb*, Untapped New York, Jul. 31, 2020, available at <https://untappedcities.com/2020/07/31/the-controversial-history-of-levittown-americas-first-suburb/>.
- 24 *Id.*
- 25 334 U.S. 1 (1948).
- 26 334 U.S. 24 (1948).
- 27 Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 Wash. U.L. Q. 737 (1989).
- 28 Shelley, 334 U.S. at 6.
- 29 *Id.* at 7.
- 30 Hurd, 334 U.S. at 26.
- 31 *Id.* at 27; see also Yi-Seng Kiang, *Judicial Enforcement of Restrictive Covenants in the United States*, 24 Wash. L. Rev. & St. B.J. 1 (1949).
- 32 Shelley, 334 U.S. at 14-15.
- 33 Hurd, 334 U.S. at 33-34.
- 34 Shelley, 334 U.S. at 13.
- 35 Hurd, 334 U.S. at 31.
- 36 *Barrows v. Jackson*, 346 U.S. 249 (1953).
- 37 *Id.* at 258.
- 38 42 U.S.C. § 3604; see also *Historical Shift from Explicit to Implicit Policies Affecting Housing Segregation in Eastern Massachusetts*, The Fair Housing Center of Boston, available at <https://www.bostonfairhousing.org/timeline/index.html>.
- 39 *Fair Housing Act Overview and Challenges*, Nat' Low Income Housing Coalition, Oct. 23, 2018, available at <https://nlihc.org/resource/fair-housing-act-overview-and-challenges>.
- 40 *Id.*
- 41 *Id.*
- 42 *Id.*
- 43 *Reeves v. Carrollsburg Condo Unit Owners Ass'n*, No. 96-2495, 1997 WL 1877201 (D.D.C. Dec. 18, 1997).
- 44 *Id.* at \*1; see also Wil Washington, *HUD Says You Are Your Neighbor's Keeper*, available at <https://www.chadwickwashington.com/blog/hud-fair-housing-compliance/>.
- 45 Reeves alleged that commencing in 1989, Mr. Schongalla began a course of conduct which subjected her to racial and sexual harassment. She contends that Mr. Schongalla repeatedly yelled racist and sexist epithets at Ms. Reeves, prevented her from using the common areas of the condominium, physically intimidated her and threatened to rape, lynch and kill her. Reeves, 1997 WL 1877201 at \*1-2.
- 46 Washington, *supra* note 44.
- 47 *Id.*
- 48 *Id.*
- 49 *Id.*
- 50 *Id.*
- 51 *Id.*
- 52 *Id.*
- 53 See *Lawrence v. Courtyards at Deerwood Ass'n, Inc.*, 318 F.Supp.2d 1133 (S.D. Fla. 2004); 42 U.S.C. §§ 3604—06; 24 C.F.R. §§ 100.50—100.205.
- 54 42 U.S.C. § 3604(a); 24 C.F.R. §§ 100.50(b)(3), 100.60(b)(5).
- 55 24 C.F.R. § 100.65(b)(4).
- 56 42 U.S.C. § 3604(c) (prohibiting statements indicating a preference, limitation, or discrimination with respect to the sale or rental of a dwelling); 24 C.F.R. §§ 100.50(b)(4), 100.75(a) (same); see, e.g., *Yazdian v. Las Virgenes Vill. Cmty. Ass'n*, No. CV 11-07611 SJO (JCx), 2012 U.S. Dist. LEXIS 191221, at \*40—41 (C.D. Cal. 2012) (denying the defendant's motion for summary judgment on the plaintiff's § 3604(c) claim based on "No Playing" signs and a letter stating "there is no play area for children [in the subdivision]. Parents should take their children to the park to play").
- 57 42 U.S.C. § 3617; 24 C.F.R. § 100.400.
- 58 24 C.F.R. § 100.400(c)(2). In addition to the anti-discrimination requirements listed in the text, the Act also requires community associations to (1) permit reasonable modifications to existing premises (at the disabled resident's expense) to the extent necessary to afford the resident full enjoyment of the premises, and (2) make reasonable accommodations in rules, policies, practices, and services (at the association's expense) to the extent necessary to afford a disabled resident equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(A), (B); 24 C.F.R. §§ 100.203—04.
- 59 *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. 63,054 (Sept. 14, 2016) (to be codified at 24 C.F.R. ch. 100).
- 60 See *Honce v. Vigil*, 1 F.3d 1085, 1089—90 (10th Cir. 1993) (analyzing tenant's quid-pro-quo and hostile-environment harassment claims under the 42 U.S.C. § 3604(b)).
- 61 *Id.*; see also *Tagliaferri v. Winter Park Hous. Auth.*, 486 F. App'x 771, 774 (11th Cir. 2012) (analyzing tenant's hostile-environment sexual harassment claim under 42 U.S.C. § 3604(a)); *Quigley v. Winter*, 598 F.3d 938, 946 (8th Cir. 2010) (recognizing hostile-environment sexual-harassment claims under the Fair Housing Act, without citation to a specific provision of the Act); *Bloch v. Frischholz*, 587 F.3d 771, 782—83 (7th Cir. 2009) (recognizing a claim for invidiously motivated interference or harassment under 42 U.S.C. § 3617).
- 62 *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. at 63,054—55.
- 63 Washington, *supra* note 44.
- 64 *Id.*
- 65 *Id.*

- 66 Wash. Rev. Code § 49.60.224 et seq; see also Restrictive Covenant Modification, Spokane County Washington, available at <https://www.spokanecounty.org/4272/Restrictive-Covenant-Modification>.
- 67 Colo. Rev. Stat. § 38-30-169, 179.
- 68 Tex. Prop. Code Ann. § 201.002(a)(5).
- 69 Id. at § 201.002(b).
- 70 S.B. 30, 87th Leg., Reg. Sess. (Tex. 2021), available at <https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=SB30>. The new law, which will go into effect September 1, 2021, will be § 5.0261 of the Texas Property Code.
- 71 AB-1466, 2021-2022 Leg., Reg. Sess. (Cal. 2021), available at [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB1466](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1466).
- 72 See Ariz. Rev. Stat. § 32-2107.01.
- 73 9 Del. Code § 9628 (2019).
- 74 Kan. Stat. Ann. § 44-1017a.
- 75 Md. Real Prop. Code § 11B-113.3 (2019) (the governing body of a homeowners association shall delete any recorded covenant or restriction that restricts ownership based on race, religious belief, or national origin); Md. Real Prop. Code § 3-112 (2019) (A person may execute and record a restrictive covenant modification to an unlawfully restrictive covenant). In the 2020 session, the Maryland legislature passed an amendment to section 3-112 which waives the fee for modification of a racially restrictive covenants. See HB 1077, 2020 Reg. Sess. (Md. 2020), available at [http://mgaleg.maryland.gov/mgaweb/Legislation/Details/hb1077/?ys=2020rshttps://mgaleg.maryland.gov/2020RS/Chapters\\_noln/CH\\_421\\_hb1077t.pdf](http://mgaleg.maryland.gov/mgaweb/Legislation/Details/hb1077/?ys=2020rshttps://mgaleg.maryland.gov/2020RS/Chapters_noln/CH_421_hb1077t.pdf).
- 76 Mo. Rev. Stat. § 213.041.
- 77 Nev. Rev. Stat. § 111.237.
- 78 Ohio Rev. Code § 3953.29, § 5309.281.
- 79 Va. Code Ann. § 36-96.6, § 55.1-300.1.
- 80 Or. Rev. Stat. §§ 93.270-93.274.
- 81 Minn. Stat. § 507.18.
- 82 392 U.S. 409 (1968).
- 83 Id.
- 84 Stephanie Mannino, The Right of First Refusal: What Your Board Should Know, Cooperator News New York, July 2008, available at <https://cooperator.com/article/what-your-board-should-know/full#:~:text=%E2%80%9CA%20condominium%20can%20exercise%20its,legally%20inappropriate%2C%E2%80%9D%20says%20Shmulewitz>.
- 85 Id.
- 86 Elliot M. Stern, Condominiums and the Right of First Refusal, 4 St. John's. L. Rev. v. 48 (1974).
- 87 Valerie Chinn, Racial slurs found on Lake Forest driveway; neighbor faces charges, WDRB.com (Dec. 29, 2020), available at [https://www.wdrb.com/news/racial-slurs-found-on-lake-forest-driveway-neighbor-faces-charges/article\\_fb22ada0-c136-11ea-a57f-0bcec3c8a972.html](https://www.wdrb.com/news/racial-slurs-found-on-lake-forest-driveway-neighbor-faces-charges/article_fb22ada0-c136-11ea-a57f-0bcec3c8a972.html).
- 88 Recent Vandalism Alert, Lake Forest Community Association, available at <https://lakeforestky.com/page/42326~1031388/Recent-Vandalism-Alert>.
- 89 North Carolina mother alleges racism at private pool, BBC News, Jul. 6, 2018, available at <https://www.bbc.com/news/world-us-canada-44731122>.
- 90 Kelli Dugan, Black Santa brigade: Neighborhood rallies around Arkansas family targeted with racist rant, KIRO 7, Dec. 10, 2020, available at <https://www.kiro7.com/news/trending/black-santa-brigade-neighborhood-rallies-around-arkansas-family-targeted-with-racist-rant/HNWXPtT14VFSHDZPUCVLHO54RI/>.
- 91 Jay Smooth, How To Tell Someone They Sound Racist, available at <https://www.youtube.com/watch?v=b0TI-gkjiXc>
- 92 Derald Wing Sue et al., Racial microaggressions in everyday life: implications for clinical practice, *Am. Psychologist* 62:4, 271-286 (May-June 2007). The term "racial microaggression" was originally coined by psychiatrist Chester M. Pierce, MD in the 1970s after the Civil Rights era.
- 93 Id. at 276-277.
- 94 Id.
- 95 Id.
- 96 See Paulo Freire, *Pedagogy of the Oppressed* (Continuum 1968).
- 97 Al Bolea and Leanne Atwater, *Deepening the Leadership Journey: Nine Elements of Leadership Mastery* (Routledge forthcoming 2021).
- 98 Marguerite Ward and Rachel Premack, What is a microaggression? 14 things people think are fine to say at work—but are actually racist, sexist, or offensive, *Business Insider*, Mar. 1, 2021, available at <https://www.businessinsider.com/microaggression-unconscious-bias-at-work-2018-6>.
- 99 Bolea and Atwater, *supra* note 97.
- 100 Charlotte Ruhl, Implicit or unconscious bias, *Simply Psychology*, Jul 1, 2020, available at <https://www.simplypsychology.org/implicit-bias.html>.
- 101 Understanding Implicit Bias, The Kirwan Institute for the Study of Race and Ethnicity, May 29, 2012, available at <https://kirwaninstitute.osu.edu/article/understanding-implicit-bias>.
- 102 Mahzarin Banaji and Anthony Greenwald, *Blindspot: Hidden Biases of Good People* (Bantam Books 2013).
- 103 Ailsa Chang, A Lesson In How To Overcome Implicit Bias, Texas Public Radio, Apr. 19, 2018, available at <https://www.tpr.org/2018-04-19/a-lesson-in-how-to-overcome-implicit-bias>.
- 104 Understanding Implicit Bias, *supra* note 101.
- 105 Richard Wiseman, *Rip it Up: The Radically New Approach to Changing your Life*, (Macmillan 2012).
- 106 Id.
- 107 Bolea and Atwater, *supra*, note 97.
- 108 Al Bolea and Leanne Atwater, *Becoming a Leader: Nine Elements of Leadership Mastery* (Routledge 2021).

109 Jay Smooth, How I Learned to Stop Worrying and Love Discussing Race, TEDxHampshireCollect, available at <https://www.youtube.com/watch?v=MbdxeFcQtaU>.