A Brief Comment on the Symposium Articles

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A BRIEF COMMENT ON THE SYMPOSIUM ARTICLES

Richard Sander† and Yana Kucheva††

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INTRODUCTION

We are very grateful to Professor Jonathan Entin and the editors of the Case Western Reserve Law Review. They not only conceived and hosted our November symposium with flawless logistics and brought together a wonderful group of scholars, but they have also given us the opportunity for both the first and last word in this symposium issue. We will not abuse this privilege and will limit ourselves to a few comments on our five colleagues’ articles.

I. PROFESSOR KRISTIN BARNES

Among all the published commentary on Moving Toward Integration, we most appreciated Professor Barnes’s piece, not because she uniformly agrees with us—she does not—but because she engages our work in a spirit of improving it. She likes our approaches of tackling housing segregation directly, and of trying to analyze and break apart the various reasons why segregation persists to understand how those factors causally interact. She also likes the specificity of our remedies and, we think, embraces the general methodology of coordinating remedies into an overall anti-segregation strategy. But Professor Barnes believes that we are minimizing, or at least overlooking, some of the

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current institutional structures that perpetuate both segregation and discrimination.

A good example is our treatment of the “banking problem.” In our book, we argue that the fair-lending performance of many conventional banking institutions has improved substantially, but that segregation produces types of market failure—such as an “underbanked” inner city—that perpetuates lending disparities.1 Our proposed remedy is to generate, through private–public partnerships, a new breed of community-based lenders that have an explicit mission of bringing more African-American and Hispanic households into the conventional banking and credit system, and of coordinating their work with other partners to foster specific community-development goals.2 Barnes approves of much of this, but also believes that this strategy lets bad actors like Wells Fargo off the hook too easily and underestimates the power of conventional players to stymie real progress. In all of this, she is probably right. It certainly makes sense that, in any specific metropolitan area where desegregation reform efforts are underway, the reformers should closely scrutinize the individual performance of major financial institutions. Her critique got us thinking that if a team of reformers (including city officials) examined the comparative performance of the big banks and found a poor-performing outlier, then litigation similar to the Miami–Wells Fargo lawsuit3 could serve several helpful ends. If successful, the suit might provide much-needed funding for the community-banking capitalization. It would serve as a mechanism for improving accountability among poor performers and it would announce the city’s interest in promoting partnerships and cooperation with the good performers.

This is just one of several instances where we think Professor Barnes’s criticisms are not only sound but highly constructive and could, through the sort of collaborative brainstorming we discuss in the final section of this article, materially improve and make more tangible our proposed solutions. This is true of her comments on “mobility grants,” and it is true of her extended and insightful discussion of disparate-impact liability, which we discuss further below.4

1. We return to banking issues in our comments on Professor Mansfield’s Article, infra Part III. In Moving Toward Integration, we discuss fair-lending issues in chapters four, eleven, and eighteen. Sander et al., Moving Toward Integration: The Past and Future of Fair Housing (2018).
2. Id. at 433–35.
4. On disparate impact, Professors Barnes and Schwemm cover fairly similar ground, and both improve considerably upon the discussion of this issue in our book. We summarize and comment on this issue in our response to Professor Schwemm’s comment, infra Part IV.A–B.
In keeping with her general theme that *Moving Toward Integration* err on the side of optimism, Professor Barnes expresses some skepticism, and raises some questions, about our claim that Anglos (i.e., non-Hispanic whites) are increasingly receptive to racial integration. Here we take exception. Barnes suggests that our findings rely “heavily” on the work of Ingrid Gould Ellen; but while we are in debt to Ellen’s pioneering research on this issue in the late 1990s, (and her continuing important contributions since then) our work goes beyond Ellen’s in many ways and draws primarily upon data sources not available to Ellen. We show that the proportion of Anglo movers who choose to live in racially integrated neighborhoods has more than doubled over the past generation. We show that the vast majority of these moves are not precipitating the sort of reverse tipping one associates with gentrification. And we show that in most of those metropolitan areas where segregation has fallen substantially, neighborhood racial “tipping” has disappeared, and many neighborhoods have been stably integrated for many decades. The evolution of white behavior has been dramatic and does justify some optimism for the future.

**II. Professor John Logan**

Although probably not well known to most law-review readers, Professor Logan is by many measures the most influential social scientist writing about housing segregation today. He led a team of scholars to create the first geographically detailed database on racial residential patterns in late-nineteenth- and early-twentieth-century American cities, and then used that data to test sophisticated theories about the drivers of early segregation. He has also changed the way sociologists see contemporary housing segregation through the work on “global neighborhoods” that he discusses here.

As we noted in our introduction, and as Logan explains in his article, legal scholars of fair housing do not take adequate account of the findings of social scientists or of how economic and demographic forces shape segregation outcomes. Logan observes:

> [T]he patterns of change and persistence of segregation are unlikely to be influenced as much by public policy as by more

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6. We discuss Ellen’s work on “white avoidance” in chapter eight, but present our original research on patterns of white demand in chapters five, twelve, seventeen, and eighteen. *Sander et al., supra* note 1.
7. See, for example, the remarkable article Logan co-authored with Weiwei Zhang and Miao David Chunyu: Logan et al., *Emergent Ghettos: Black Neighborhoods in New York and Chicago, 1880–1940*, 120 AM. J. SOC. 1055 (2015).
profound structural changes in the white and minority populations. We are not arguing against fair housing efforts, and we suspect that these have played an indirect role in creating the conditions for neighborhood diversity. Instead we wish to make the case that fair housing advocates need to be aware of and seek to leverage the underlying population shifts that create new potential for reducing segregation.

We agree with Logan in criticizing the tunnel vision of legal scholars. In many, if not most, accounts by legal scholars, there are really only three forces of interest: corporate greed, racial hostility of whites, and the public sector, which sometimes aligns with greed and racism and sometimes fights the good fight. The evolution of urban segregation is largely cast in terms of the interplay among these three forces. Logan’s example of the rise of global neighborhoods is just one example of why this is far too narrow a view.

But we think that a similar criticism can be laid against sociologists, who are guilty of a reverse tunnel vision that fails to take seriously the effects of public policy. While long-term demographic trends are vitally important—and in Moving Toward Integration, we document several of these and show why they mattered—twice in the twentieth century, patterns of African-American urban mobility changed quickly and dramatically. The first started in 1948, when the U.S. Supreme Court sharply limited the enforceability of racially restrictive covenants; the second around 1970, when the federal Fair Housing Act went into full effect. In both instances, African Americans began to buy homes and rent apartments in different neighborhoods than they had before, and the specific new places they entered were those we would expect given the specific legal ramifications of each policy change. Yet we are aware of no sociologist who makes a serious effort to incorporate these policy changes into his or her models of changing patterns of segregation.

The problem of disciplinary “silos,” in other words, operates in both directions.

III. Professor Cathy Mansfield

A different type of “silo” is an ideological one, and such silos are common in the world of fair-housing research. In the literature on race and banking, there is a good deal of scholarship (generally written by


9. In addition to discussion here and in our book, we noted some examples of tunnel-vision among sociologists in our introductory article. See Richard Sander & Yana Kucheva, *Why We Wrote Moving Toward Integration*, 70 Case W. Res. L. Rev. 665, 668–69 (2020).

scholars on the left side of the political spectrum) documenting various forms of predatory lending that disproportionately harm African-American households. This literature generally argues for much more aggressive action against bankers through tougher regulatory oversight, fair-lending litigation, or both. Coming from the ranks of economists is a smaller but equally insistent body of research showing that there is little evidence that conventional lenders discriminate against minority neighborhoods, for instance in the volume of type of credit provided, when one carefully controls for borrowers’ characteristics. These economists argue that the bigger problems are poor credit histories and correspondingly high rates of mortgage default by African-American and Hispanic borrowers. Many commentators on either end of the political spectrum seem to pay attention only to the scholarship that fits with their preconceived views. A good deal of literature on the left simply points to the undoubted racial disparities that exist, and demands a remedy.

In Moving Toward Integration, we tried hard to absorb, understand, and take account of the full range of scholarship on fair lending. We brought some new types of data into the discussion, and introduced new terms to identify different types of lending discrimination. Our book has separate sections on the problem of African-American credit access in the pre-fair-housing (1930–1968), post-fair-housing (1968–1990s), and modern (late 1990s–2010s) eras. For each era, we have offered interpretations that reconcile the opposing “silos” of research, explain some puzzles, and put the focus on the puzzles that remain.

There are very strong studies, done by very credible scholars using high-quality data, that conventional lenders in the modern era have not generally engaged in reverse redlining.11 In other words, when one controls for borrowers’ characteristics, including their financial strength and credit history, most conventional banks offer loans in African-American, Hispanic, and moderate-income neighborhoods on terms similar to those they offer in middle-class white neighborhoods. There is still an unfavorable disparity in the approval rates and credit terms that African-Americans (for example) experience from these banks, but those usually (not always—see the earlier discussion of Wells Fargo12)


12. As Professor Barnes points out, Wells Fargo is an exemplar of a large bank that has engaged in a variety of harmful behaviors, especially toward minority communities. Is Wells Fargo an exception, or the tip of the iceberg? A reading of the many empirical studies on conventional banks before and after the financial crisis suggests to us that Wells Fargo was, among mainstream lenders, closer to being an exception than a prototype.
reflect differences in credit-worthiness and likelihood of mortgage default. A much bigger source of disparity for African-Americans, however, is that they are much more likely to deal with non-conventional institutions, such as mortgage brokers, who often offer less favorable terms and more exploitative loans. Why does this happen, and why does it happen most in our most segregated cities?

We think that at least part of the problem is market failure. Segregated, minority communities tend to be “underbanked,” with a dearth of conventional banks and bank branches. This underbanking occurs, for starters, because bank branches are more expensive to operate in dense urban communities, and partly because there are fewer promising customers for the banks in these communities. Minority residents consequently turn to payday lenders and currency exchanges for their banking needs, and they are much less likely than whites with comparable incomes to have checking accounts, all of which hurts their ability to build appealing credit histories. Minority households end up operating in a kind of shadow financial system that then reinforces the difficulty for banks in obtaining a foothold in minority neighborhoods. One solution to this problem, as we describe in the book, is to foster more “community banking”, by creating public–private partnerships to expand the presence of community-oriented banks in underbanked areas.13

Professor Mansfield finds this whole argument unconvincing, we think, because she does not accept the validity of our starting point. She seems skeptical of, and unfamiliar with, the studies we cite that show minimal “reverse redlining” by conventional institutions. This is reminiscent of the silo effect: it is important to consider seriously the research that contradicts our own position, or that uses methodologies we have not considered. One of the authors of this research, Stephen Ross, is very sympathetic to the plight of minority borrowers and was an early leader of work documenting discrimination and bringing attention to redlining. In his more recent work, Ross has pointed out that many forms of housing discrimination have declined, and we need to develop paradigms that do not reflexively assume that discriminatory conduct is behind every racial disparity.14

Professor Mansfield observes that “expensive loans create their own risk,” as though this is an insight lenders have not been able to come up with on their own. High-interest loans are a poor solution to the problem of risk, and this is a reason that conventional lenders—who are

But as I note in my discussion of Professor Barnes’s article, we should put the full range of these institutions to the test.

generally very averse to foreclosing on loans—will rarely make even “subprime” loans that are more than a couple of points above conventional rates. This is another reason that higher-risk applicants often find themselves dealing with less-principled operators. Mansfield suggests that lenders need to develop more creative ways of providing financing, and gives the example of Beatrice Troup. This seems to us a weak example, because there is no evidence that Troup would not have defaulted, and might have even defaulted sooner, under some of the alternate financing arrangements Mansfield suggests.

We think that ultimately, however, Professor Mansfield’s argument should lead her in the same direction that we follow. Creating community-development banks that have as their mission increasing the utilization of banking services in low- and moderate-income communities, and finding ways to adapt standard underwriting techniques to the special conditions that exist in these communities, is a good solution. It addresses the market failure we identify, and can help connect minority borrowers to the mainstream banking system. We agree with Mansfield that more research and investigation is needed, but we think sensible constructive solutions are in sight, and reform should leave intact the portions of our current banking system that are working well.

IV. Professor Robert Schwemm

Most of Professor Schwemm’s article is devoted to an analysis of “disparate impact” in fair-housing law. Schwemm has long been regarded by us, and by many others, as the nation’s most proficient interpreter of fair-housing law, and his contribution here is no exception. Our book noted the importance of disparate-impact litigation as part of a coordinated strategy to address housing segregation. But our discussion of the Supreme Court’s engagement with this issue15 is glib and oversimplified. As Schwemm properly points out, Justice Kennedy’s decision in Inclusive Communities is muddled in places and, while it recognized that “disparate impact” is a cognizable basis for bringing suit under the Fair Housing Act, his opinion made it harder to bring far-reaching claims. The Trump Administration has sought to revise HUD’s guidance on disparate impact in ways that will make bringing those claims even more difficult. Schwemm’s analysis of this problem is characteristically careful and sound. A good deal of Professor Barnes’s article in this issue covers similar ground, and is similarly insightful.

The opening section of Professor Schwemm’s article discusses our book, generously praises much of what we did, and offers a few criticisms. Our quibble with his discussion is that at times he seems to

take our arguments to mean something very different from what we intended. We think we were clear in the book, but we welcome this chance to emphasize our views on two key questions.

A. Is housing integration inevitable?

The central policy problem tackled in our book is how to move our large, “high-segregation” metropolitan areas onto the path of steady and more rapid desegregation that exists (as we document) in “moderate segregation” metro areas. Schwemm points out what strikes him as an apparent contradiction in our prognosis. On the one hand, we argue that, under current conditions, it will take many generations for high-segregation urban areas like New York and Chicago to achieve the more moderate levels of housing segregation (i.e., a black–white index of dissimilarity below .65) that exists today in areas like Seattle, San Diego, and San Antonio. On the other hand, we argue that “remarkably favorable conditions prevail in most high-segregation areas today—conditions that tend to insure that increased integration will be stable and self-reinforcing.”


The apparent contradiction does not exist, because the second quote is not referring to the general level of segregation in metro areas, but whether integrated neighborhoods in the twenty-first century will remain integrated for very long. To put it differently, two things need to happen for housing segregation to decline: neighborhoods where integration arises must remain integrated (at least more often than not), and the number of integrated neighborhoods must greatly increase. We think that great progress has been made on the first condition, but progress on the second has only happened in some metro areas and not others.

17. Our introduction to Part V of the book lays out this distinction in some detail and frames the policy discussion that follows. Id. at 409–21. It also lays out what we see as the promising demographic trends. Id.
At the same time, however, the conditions for stable housing integration at the neighborhood level had sharply improved in these metro areas. This is partly because of the rise of the “global neighborhoods” discussed by Professor Logan. It is also because of a broader tendency of many whites to seek out more integrated neighborhoods—not just “gentrifiers,” but even working- and middle-class whites choosing neighborhoods in integrated suburbs. In the 1970s in Chicago or New York, the few integrated neighborhoods that existed almost always experienced much more housing demand from black movers than other groups; in the 2010s, that was no longer true.

To us, this means that if we can develop proactive policies to encourage mobility among all racial groups, and specifically to foster and even subsidize “pro-integrative” moves, those moves will not set off new patterns of resegregation, but instead will be highly productive of integration. In other words, the ground is now fertile to support integration, and we must find ways to plant the seeds.

This is, of course, a greatly simplified version of an argument we lay out in detail in the book, and one which we try to show is consistent with a wide array of social science evidence and data. The upshot is that, if fair-housing policies remain unaltered (or change for the worse), then high-segregation metro areas will remain highly segregated for generations to come. But with thoughtful policies well-grounded in an understanding of demographic patterns (we provide a detailed, sample road map in Part V of our book), we can lower segregation in these urban areas dramatically, and at relatively modest cost, in less than a generation.

B. Does fair-housing enforcement continue to be vitally important?

In his concluding paragraphs, Professor Schwemm suggests that we believe “effective [fair-housing] enforcement is now less important because the pro-integration forces unleashed in earlier decades now virtually ensure future desegregation.” He, on the other hand, believes that “vigorous enforcement of the FHA continues to be important.” But as we have just explained, we do not believe desegregation is “ensured”—far from it. We believe housing segregation continues to be an enormous problem, and we devote many chapters to detailing possible solutions, precisely because we believe segregation in many major urban areas is durable and incredibly harmful. We also do not believe that fair-housing enforcement is incidental to the fight against segregation. Indeed, six of the twelve strategies we describe in detail for combating segregation are either anti-discrimination strategies or

19. Id. At 712.
methods for making those strategies better targeted. If all of our recommendations were implemented, the nation would be spending somewhat more on fair-housing enforcement than it does today.

What we do believe is that our nation’s fair-housing strategies are badly in need of an overhaul. Most fair-housing dollars in the United States currently support agencies that typically wait for discrimination complaints to come through the door (or over the phone line), and then (at best) investigate those complaints by sending out “application testers” who inquire about the availability of housing. A wide range of national testing data suggests that the sort of discrimination that can be rooted out through such methods is now comparatively rare. We believe that a new generation of fair-housing tools are needed, such as source-of-income protection, full-application testing, and better data on the actual housing-search process undertaken by urban households. Our book describes these ideas in detail and explains how to interweave them with a broader housing-desegregation strategy.

We do believe that housing discrimination has declined dramatically from the pre-1970 era, when it was routine and nearly universal. But even if it has fallen 90%, that would still imply hundreds of thousands of incidents of discrimination each year—not enough to prevent anyone from living in the sort of community they choose, but certainly enough to discourage many people from trying. That, and the importance of protecting human dignity, are reasons enough to combat housing discrimination.

In the final analysis, housing discrimination is likely to persist to some degree as long as housing segregation is high. The better data we argue for would help to verify something we suspect to be true: that in our more integrated metro areas and neighborhoods, the frequency of housing discrimination substantially declines. Race-based housing discrimination should fall when race no longer reliably predicts where someone lives. That is yet another reason why, in our view, the greatest focus of fair-housing policy should be upon segregation itself.

On two other matters Professor Schwemm expresses disagreement with the book’s findings, but we think in one case certainly, and in the other to some extent, he is misunderstanding our argument. First, we contend that Shelley v. Kraemer had big, on-the-ground consequences for African Americans’ access to neighborhoods near existing ghettos that had restrictive covenants. Schwemm finds this argument “unpersuasive” because African-American segregation levels remained high in the 1950s and 1960s. But this misses our point. Shelley did nothing to reduce the ability of individuals and institutions to discriminate. It was no easier for an African American to move to a suburb after Shelley than before. But Shelley made it much more

20. Sander et al., supra note 1, at 435–44; see also id. at 421 (summarizing the three central policy steps that we believe are important; two of these involve fair-housing enforcement).
difficult for white neighborhoods to act collectively to prevent any of their residents from selling to African Americans, and consequently many white owners who lived near black ghettos started to sell their homes to black buyers—usually at higher prices than whites were willing to pay. This shift “broke” the static boundaries that had surrounded ghettos from 1930 until 1948, and ushered in an era of rapid racial transition around black neighborhoods and steady falls in housing prices inside the ghetto. It did not much reduce segregation itself; rather, it changed the nature of segregation from a condition of static black ghettos to expanding black districts. The empirical evidence on this point is overwhelming, but Schwemm does not discuss it.21

Professor Schwemm argues, more persuasively, that we overstate the importance of the Justice Department in the landscape of fair-housing enforcement during the 1970s. In his view, DOJ hit fair-housing softballs while non-profit fair-housing groups developed the home-run cases that won expansive interpretations of fair-housing law in the federal appellate courts. These groups did play an heroic role—which we celebrate in the book22—and Schwemm was in the thick of their efforts at the legendary Leadership Council in Chicago. But the DOJ was important as well, and we base that on more than our interviews with former officials. The U.S. Commission on Civil Rights noted that DOJ brought some 300 cases during its first nine years—cases in which the USCCR found “the quality of relief . . . has generally been high.”23 We also conducted case studies of a few jurisdictions (e.g., Los Angeles) using primary historical materials to observe what forces seemed to matter in changing the behavior of landlords and real-estate brokers.24 Again and again, we found evidence that major institutional players in the real-estate market were feeling the heat from DOJ investigations and lawsuits. Schwemm is right, we think, that the DOJ did not do much to litigate cases that would push the boundaries of fair-housing law; it did not pursue issues like exclusionary zoning or redlining. But there is abundant evidence that the DOJ did succeed in making major institutions back away from discriminatory practices, and that shift was highly consequential.


22. Sander et al., supra note 1, at 156–57.


V. PROFESSOR LIND

Kermit Lind’s article, like John Logan’s, has little to say about Moving Toward Integration, so our response to it is commensurately brief. Lind’s main purpose is to articulate his vision of healthy and sustainable urban communities. This vision is not limited to the goal of fostering integration or reducing racial inequality, but embraces a sweeping reordering of society to rid America of unjust hierarchies of power and the myriad mechanisms in society that, in Lind’s view, foster those hierarchies and hinder more worthy goals, such as ecological sustainability.

What Professor Lind describes would be, for at least some readers, a kind of utopia. Missing from the article, however, is a clear roadmap for how to get from where we are now to his desired destination, and it is hard to see how his vision could be brought about without a broad social and perhaps political revolution. For us, this highlights our very different approach in Moving Toward Integration. At first glance, it might seem that our vision—of a society where housing segregation has been greatly reduced, and racial disparities substantially narrowed—is also utopian. But we argue that if you drill down and identify the basic causal mechanisms driving these problems, there are solutions that do not require either vast sums of money or a fundamental reordering of American politics. Obviously, our program is not going to be embraced by a Trump administration. But we believe it is a program that is much more modest in cost than many of the initiatives proposed by Democratic presidential candidates in the 2020 race which purport to be, at least partially, in the name of racial justice. We believe that the program we propose is much better tailored than many of these proposals to achieve substantive and measurable progress. In our view, our proposals are consistent with, and take into account, market and demographic forces already operating in our cities. We do not propose to reinvent human nature, but to make our urban areas much better places without anyone’s life being disrupted, anyone’s freedom of choice constrained, or anyone’s heart suddenly remade. We propose a rather quiet revolution.

CONCLUSION: INTO THE FUTURE

Academic discussion aside, what is the prospect that our diagnoses and policies might actually have a real-world effect?

We think the prospects are good, or at least tangible. In the fall of 2018, one of us (Sander) started conversations with a number of scholars and activists around the country about the idea of meeting and brainstorming about a “big picture” approach to the problem of housing segregation. We informally called the effort the “Moonshot,” and we had three very productive “national” meetings in 2019: in New York in March, in Washington, D.C. in June, and in Philadelphia in October.
No magical consensus arose, but there was broad agreement that it was important and worthwhile to approach the segregation issue comprehensively and to be particularly mindful of interconnected ways to increase housing opportunities. A number of the Moonshot participants participated in a collaborative proposal to the MacArthur Foundation’s “100&Change” competition in 2019. Ultimately, that proposal was not funded, but we succeeded in bringing together coalitions of scholars, think tanks, and community groups to develop concrete plans, translating general ideas about desegregation into five-year strategies to desegregate metropolitan Chicago and Greater Richmond, Virginia.

As the Moonshot conversations were getting underway in March 2019, one of us (Sander) received a call from Bruce Cordingley, the founder and CEO of the Pedcor Companies, one of the nation’s largest developers of affordable housing. Cordingley had read our book and was interested in starting some sort of effort to address housing segregation and related problems of housing access. We started a conversation, which soon included Alison Birge, a senior vice-president at Pedcor, and Carol Brown, a fair-housing scholar and Moonshot participant. The upshot of these conversations was the creation of the Inclusivity Institute, a non-profit that as of this writing (in early 2020) has three talented full-time staffers and a research intern. The Institute is, to a degree, a way of “institutionalizing” the Moonshot; it collaborates with community groups and local officials to develop both specific, practical interventions and overarching strategies, all aimed at improving household mobility, housing stability and affordability, and undermining patterns of segregation. We encourage readers interested in these issues and intrigued by these articles to get in touch.