



THE JOHN MARSHALL LAW SCHOOL
FAIR & AFFORDABLE HOUSING
COMMENTARY

**WHY DO LANDLORDS STILL DISCRIMINATE
(AND WHAT CAN BE DONE ABOUT IT)?**

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Abstract

The John Marshall Law Review originally published this article in its Winter 2007 edition. Please cite this article as 40 J. Marshall L. Rev. 455. This article contains page numbers from that edition so the John Marshall Law Review may be properly cited, i.e., *455.

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WHY DO LANDLORDS STILL DISCRIMINATE (AND WHAT CAN BE DONE ABOUT IT)?

By
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1968: “It is the policy of the United States . . . to provide for fair housing throughout the United States.”¹

2003: “Irrational prejudice is still encountered in real estate markets . . .”²

Introduction: A Medical Analogy

Let's say you have a serious, though not life-threatening, medical condition, such as a non-malignant growth in your back that causes considerable pain and impairs your ability to walk. At first, your doctor tells you there is no cure, but then one day, a new drug specifically designed to eliminate this kind of problem is approved. You take this drug, but notice no change. With your doctor's encouragement, you continue to take the drug, hoping that its cumulative effect will achieve the desired result. Twenty years go by with no relief. Then, your doctor tells you that a much stronger version of this drug has been approved, so you begin to take it as directed. You are now in the nineteenth year of taking this “improved” version of the drug, but there is still no relief.

Would you change doctors, get a second opinion, insist on some new approach, or at least stop taking the drug? Or, would you continue with the same course of action indefinitely? If the latter, would your friends and family be justified in believing that you have no hope of a cure and are just going through the motions without really wanting or expecting to get well?

Now, substitute in this story the United States for the patient, the problem of racial discrimination in rental housing for the painful and debilitating ailment,³

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¹ Fair Housing Act, 42 U.S.C. § 3601 (2000); see also *infra* note 4.

² *Gratz v. Bollinger*, 539 U.S. 244, 300 (2003) (Ginsburg, J., dissenting) (citing HUD's 2000 national testing study, *infra* note 6).

³ Others have also analogized racial discrimination to medical disorders. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 321 (1987) (describing racial discrimination as “a disease” and arguing that “the illness of racism infects almost everyone” in the United States and “[a]cknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure”).

and enforcement of the 1968 *456 Fair Housing Act (“FHA”),⁴ as amended in 1988, for the supposedly helpful drug. The analogy is apt because both problems have gone on essentially unchanged for the past forty years, despite the administration of a supposed “cure.” By now, it is clear not just that the treatment has failed, but also that there has been a failure of imagination on the part of both “patient” and “doctor.” Something new must be tried. If we simply go on using the failed treatment, one has to wonder if we really want to get better--or deserve to.

This Article is an attempt to start a new conversation about this issue. It begins with a review of the evidence for the “disease” of ongoing rental discrimination in Part I. Part II surveys the record of the legal “cure” (i.e., enforcement of the FHA), particularly in the two decades since the FHA's 1988 amendments strengthened its enforcement provisions. Part III provides an overview of the rental housing market in the United States, and Part IV reviews what we know--and do not know--about race discrimination in this market. Part V then tries to identify some lessons from other fields, such as economics and psychology, that might help guide the effort to achieve better FHA compliance in rental opportunities for racial and ethnic minorities.

I. The Disease

A. *Rental Discrimination and Its Role in the Overall Racial Discrimination Problem*

The FHA has prohibited racial and national origin discrimination in housing for nearly forty years. Most states and scores of localities have substantially equivalent laws that mirror the FHA's prohibitions.⁵ Still, landlords continue to violate these prohibitions at an astonishing rate.

The most recent nationwide study by the Department of Housing and Urban Development (“HUD”), based on thousands of paired tests in dozens of metropolitan areas in 2000, showed that, in rental tests, whites were favored over blacks 21.6% of the time *457 and over Hispanics 25.7% of the time.⁶ The rate of

⁴ Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-19 (2000)).

⁵ For a list of the states and localities that currently have such laws, see Robert G. Schwemm, *Housing Discrimination: Law and Litigation* app. C (2006). Most of these states and localities have had fair housing laws that banned race and national origin discrimination since at least the 1980s. See *id.* at C-3-6 (listing state and local fair housing laws that were substantially equivalent to the FHA in 1988).

⁶ Margery Austin Turner et al., *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000 i-iv* (2002) [hereinafter 2000-I Study]. Additional phases of this study found similar rates of rental discrimination against other ethnic minorities. See Margery Austin Turner & Stephen Ross, *Discrimination in Metropolitan Housing Markets: Phase 2-Asians and Pacific Islanders iv* (2003) [hereinafter 2000-II Study] (reporting that Asians and Pacific Islanders experienced adverse treatment compared to whites in 21.5% of rental tests); Margery

rental discrimination against Hispanics was actually higher than had been shown in a similar study in 1989, and the 2000 figure for blacks was down only a few percentage points compared to its 1989 counterpart.⁷ Furthermore, the 1989 figures were not significantly different from those revealed in the first of these nationwide studies, which was done in 1977.⁸ A co-author of the 1977 study, Professor John Simonson, determined that the 2000 study shows that, annually, rental discrimination against blacks occurs over 1.6 million times and against Hispanics over 1.1 million times.⁹

Comparable figures are not available for the late 1960s when the FHA first went into effect,¹⁰ but presumably rental *458 discrimination rates were even higher then (i.e., some reduction in discrimination probably occurred in the immediate aftermath of the FHA's passage). In any event, the HUD studies show that the rate of illegal race and national origin discrimination in housing rentals has remained virtually constant in the three decades after this initial adjustment.

Rental discrimination is, of course, only one part of the overall housing discrimination picture, although it seems to be the most intractable part.¹¹ For

Austin Turner & Stephen Ross, *Discrimination in Metropolitan Housing Markets: Phase 3-Native Americans iii* (2003) (reporting that Native Americans experienced consistently unfavorable treatment compared to whites in 28.5% of rental tests).

⁷ 2000-I Study, *supra* note 6, at iii-iv. The 1989 study found that whites were favored over blacks in 26.4% of rental tests and that whites were favored over Hispanics in just under 25% of such tests. *Id.* The 1989 study is summarized in Margery Austin Turner, Raymond Struyk & John Yinger, *Housing Discrimination Study: Synthesis* (1991) [hereinafter 1989 Study].

⁸ 1989 Study, *supra* note 7. The 1977 study is reported in Ron Wienk et al., *Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey* (1979).

⁹ National Fair Housing Alliance, *2004 Fair Housing Trends Report 2-3* (2004) [hereinafter 2004 Trends] (on file with author). Professor Simonson estimated that, annually, there are 1,626,000 instances of rental discrimination against African Americans (498,000 involving the availability of apartments, 1,068,000 involving the inspection of apartments, and 60,000 involving agent encouragement), while the total annual figure for sales discrimination is 193,000. *Id.* at 3. The comparable figures for Hispanics are 1,178,315 instances of rental discrimination (542,022 involving the availability of apartments, 381,724 involving the inspection of apartments, 164,399 involving agent encouragement, and 90,170 involving overall cost), while the total for sales discrimination is 101,258. *Id.* These totals, added to the some 422,000 instances of housing discrimination against Asian Americans and Pacific Islanders and the 181,000 instances against Native Americans, produce a total figure of more than 3,700,000 instances of rental and sales discrimination per year. *Id.* at 4.

¹⁰ Enacted on April 11, 1968, the 1968 FHA's substantive prohibitions went into effect immediately for some government-assisted housing, but did not generally apply to private housing until after December 31, 1968. 42 U.S.C. § 3603(a)(2) (2000).

¹¹ In addition to rental discrimination being more common than sales discrimination, see *supra* note 9 and *infra* notes 12, 48 and accompanying text, and text accompanying *infra* notes 69, 80, most people who feel they have been victimized by housing discrimination cite their experiences in rental situations. See Martin D. Abravanel, *Do We Know More Now? Trends in Public Knowledge, Support and Use of Fair Housing Law* 32 (U.S. Department of Housing & Urban Development 2006) (reporting, based on a 2005 national survey, that about seventy percent of those who thought they had been victims of housing discrimination “were looking to rent at the time”).

example, sales testing was also done in HUD's 2000 study, and, although high levels of sales discrimination were shown, these levels were not as high as those for rental discrimination and were substantially lower than the comparable figures for sales discrimination revealed in the 1989 study.¹² There is also evidence of substantial race and national origin discrimination in mortgage lending, home insurance, and other housing-related practices covered by the FHA.¹³ But, unlike the rental and sales studies, no effort has been made to calculate national levels for discrimination rates in these areas, and thus there is no way to gauge the size or trends over time of such rates.

The continuing high degree of noncompliance with the FHA¹⁴ stands in sharp contrast to the experience in other areas of American life governed by federal civil rights laws. For example, with respect to public accommodations, it is rare--and therefore a cause for public outrage--when a hotel or restaurant denies

¹² See 2000-I Study, *supra* note 6, at iv (reporting that, in sales tests, whites were favored over blacks 17.0% of the time (vs. 29.0% in 1989) and over Hispanics 19.7% of the time (vs. 26.8% in 1989)); 2000-II Study, *supra* note 6, at iv (reporting that, in sales tests, whites were favored over Asians and Pacific Islanders 20.4% of the time).

¹³ See, e.g., Fair Housing Center of Greater Boston, *The Gap Persists: A Report on Racial and Ethnic Discrimination in the Greater Boston Home Mortgage Lending Market 2* (2006) (finding that minority homebuyers were disadvantaged in forty-five percent of paired tests relating to mortgages in the greater Boston area in 2005-2006); Press Release, National Community Reinvestment Coalition, *NCRC Files Discrimination Complaint Against Allied Home Mortgage Capital Corporation Based on National Mystery Shopping Audit of Mortgage Brokers* (June 15, 2006) (reporting that over one hundred mortgage tests in six metropolitan areas "illustrate widespread and blatant policies of racially discriminatory lending practices"); Margery Austin Turner et al., *All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions* iii (2002) (concluding, based on a paired testing study in Chicago and Los Angeles, that "African American and Hispanic homebuyers face a significant risk of receiving less favorable treatment than comparable whites when they visit mortgage lending institutions to inquire about financing options"); *Mortgage Lending Discrimination: A Review of Existing Evidence 2* (Margery Austin Turner & Felicity Skidmore, eds., 1999) (concluding, based on a review of existing research evidence, that "minority homebuyers in the United States do face discrimination from mortgage lending institutions"); John Yinger, *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination* 63-85 (1995) (recounting evidence of home mortgage and insurance discrimination); *Insurance Redlining, Disinvestment, Reinvestment, and the Evolving Role of Financial Institutions* (Gregory D. Squires, ed., 1997) (dealing with home insurance discrimination).

¹⁴ Based on the 1977 study's figures, HUD estimated that at least 2,000,000 instances of illegal sales and rental discrimination based on race or national origin were occurring every year. See Testimony of HUD General Counsel John J. Knapp, in 2 U.S. Commission on Civil Rights, *Issues in Housing Discrimination* 107 (1985). Based on the 2000 study's figures, it is now estimated that at least 3,700,000 instances of such discrimination occur every year. See *supra* note 9; see also Abravanel, *supra* note 11, at ii (reporting that about seventeen percent of adults in the United States - over 33,000,000 people, based on a total U.S. over twenty-one population of 197,000,000--"claims to have suffered discrimination at some point when trying to buy or rent a house or apartment"). See also U.S. Dep't. Of Commerce, *Profiles of General Demographic Characteristics: 2000 1* (2001), available at <http://www.census.gov/prod/cen2000/dp1/2kh00.pdf> (profiling the general demographic characteristics for the United States in 2000).

service to customers on the basis of their race or national origin.¹⁵ Similarly, in employment, intentional racial discrimination is now generally seen as indefensible and worthy of immediate corrective measures.¹⁶ As a result, America's hotels, restaurants, and workplaces have become far more integrated since the 1960s than have our residential communities. Housing is the civil rights area “where the possibility for real change is viewed as most remote.”¹⁷

*460 In sum, we know that housing discrimination, and particularly rental discrimination, is uniquely intractable. We also know that the economic harm caused by housing discrimination is massive, with an estimated cost running into the billions of dollars.¹⁸ We know, too, that housing discrimination continues to be a significant cause of residential segregation,¹⁹ and that residential segregation is a major national problem, both in its own right²⁰ and because it frustrates efforts to integrate schools, expand job opportunities, reduce urban sprawl, increase minority homeownership rates, and reduce the huge gaps in wealth

¹⁵ See, e.g., Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 *How. L. J.* 841, 905 (2005) (noting that “Blacks' access to public accommodations--restaurants, hotels, theaters--is remarkably greater than it was in 1964”).

¹⁶ See, e.g., David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 *Geo. L. J.* 1619, 1619 (1991) (arguing that, by the mid-1970s, the consensus against racial discrimination in employment had become so strong that “anyone who would not publicly condemn [such] racial discrimination was outside the boundary of acceptable political debate,” and that the “widespread, overt discrimination” that was the principal target of Title VII “does not exist today”).

¹⁷ John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 *U. Miami L. Rev.* 1067, 1071 (1998); see also Rubinowitz & Alsheik, *supra* note 15, at 905-07 (noting that “[h]ousing discrimination seems to remain a largely intractable fact of America social life” and concluding that “[i]n the end, housing discrimination is different from other civil rights issues”); Sheryll Cashin, *The Failures of Integration: How Race and Class Are Undermining the American Dream* 3 (2004) (“Housing was the last plank in the civil rights revolution, and it is the realm in which we have experienced the fewest integration gains.”); Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 *Harv. C.R.-C.L. L. Rev.* 289, 289 (2002) (“Using the law to promote diversity in residential communities is probably more difficult than promoting it in any other public policy domain.”).

¹⁸ See Yinger, *supra* note 13, at 89-103.

¹⁹ See, e.g., *id.* at 110-24 (discussing the extent of residential segregation and identifying its causes); Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 83-114 (1993) (discussing the continuing causes of residential segregation).

²⁰ Racial integration was important to the Congress that passed the 1968 FHA. Proponents in both the Senate and the House repeatedly argued that this law was intended not only to expand housing opportunities for individual minorities, but also to foster residential integration for the benefit of all Americans. See, e.g., 114 *Cong. Rec.* 2275, 3422 (1968) (remarks of Senator Mondale, the FHA's principal sponsor). Senator Mondale noted the alienation of whites and blacks is caused by the “lack of experience in actually living next” to each other and contended that the FHA's purpose was to replace the ghettos “by truly integrated and balanced living patterns.” *Id.* Senator Javits noted that the law's intended beneficiaries were not only blacks and other minorities, but “the whole community.” *Id.* at 2706. See generally Schwemm, *supra* note 5, at § 7:3 (discussing the FHA's goal of integration).

between whites and minorities.²¹ Finding a “cure” for rental discrimination, therefore, should be a major national priority.

II. The “Cure” of the Fair Housing Act

The cure was supposed to have been the 1968 Fair Housing Act, whose initial provision boldly declares that “it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”²² Throughout the 461 FHA's tenure, the Supreme Court has affirmed that it carries out a “policy that Congress considered to be of the highest priority.”²³

B. *The FHA's Basic Prohibitions and Enforcement Techniques* ← --- Formatted: Bullets and Numbering

The FHA's most important substantive provision makes it unlawful, inter alia, to “refuse to . . . rent after the making of a bona fide offer, or to refuse to negotiate for the . . . rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color . . . or national origin.”²⁴ The FHA also bans such discrimination in “the terms, conditions, or privileges of . . . rental of a dwelling, or in the provision of services or facilities in connection therewith”²⁵ and makes it unlawful to represent to anyone because of race, color, or national origin “that any dwelling is not available for inspection . . . or rental when such dwelling is in fact so available.”²⁶ All of the quoted provisions have been a part of the law since the FHA was first enacted in 1968.

The FHA does exempt certain dwellings from its coverage, most notably “Mrs. Murphy” landlords who live on the premises and whose buildings have four or fewer units and certain single-family homes that are sold or rented by their owners without the use of advertising or a real estate agent.²⁷ As a practical matter, however, these exemptions do not protect even the smallest of landlords

²¹ See, e.g., Cashin, *supra* note 17, at 125-260 (examining the problems facing blacks in the middle class in housing and education); Yinger, *supra* note 13, at 135-58 (contrasting the education system and labor market available to whites with that open to minorities); Massey & Denton, *supra* note 19, at 148-85 (detailing how segregation creates an underclass of minorities, placing them at a great disadvantage for socioeconomic success).

²² 42 U.S.C. § 3601 (2000).

²³ *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972); see also *Meyer v. Holley*, 537 U.S. 280, 290 (2003) (recognizing that the FHA's objective is an “overriding societal priority”).

²⁴ 42 U.S.C. § 3604(a) (2000). The “bona fide offer” requirement in the first phrase of this provision has not proved to be a significant limitation, because it does not apply to the other phrases of § 3604(a) and the concluding phrase banning “otherwise make unavailable” techniques has been interpreted to cover discrimination against even those who have not made a bona fide offer. Schwemm, *supra* note 5, at §§ 13:3 to -4.

²⁵ 42 U.S.C. § 3604(b).

²⁶ *Id.* § 3604(d).

²⁷ *Id.* § 3603(b)(1)-(2).

from claims of race or national origin discrimination. This is because, within weeks of the FHA's enactment, the Supreme Court held that another federal statute--the 1866 Civil Rights Act²⁸--also bans racial discrimination in housing,²⁹ and this law, whose prohibition of "racial" discrimination covers Hispanics and virtually all dark-skinned persons as well as blacks,³⁰ is not subject to the FHA's exemptions (e.g., a "Mrs. Murphy" landlord who discriminates against a Hispanic thereby *462 violates the 1866 Act even though her apartment is exempt from the FHA).³¹

As the 1977 HUD testing study showed, however, the FHA and other relevant laws did not eliminate housing discrimination against racial and ethnic minorities.³² Congress' response was to consider ways to strengthen the FHA, which was seen as "ineffective because it lacks an effective enforcement mechanism."³³ The result was the 1988 Fair Housing Amendments Act ("FHAA"),³⁴ in which Congress sought to provide the FHA with "an effective enforcement system" in order to make its promise of nondiscrimination "a reality."³⁵ The FHAA strengthened all three of the FHA's enforcement techniques by: (1) eliminating the punitive damage cap, lengthening the statute of limitations, and making attorney's fees awards easier to obtain in private litigation; (2) establishing an expedited administrative complaint procedure that could result in injunctive relief, damages, and civil penalties; and (3) authorizing the Department of Justice to collect monetary damages for aggrieved persons in its "pattern or practice" and "general public importance" cases.³⁶ The result was a civil rights law whose enforcement procedures are second to none.³⁷

²⁸ Id. § 1982.

²⁹ Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

³⁰ Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987). Cf. Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (interpreting § 1982's companion provision, 42 U.S.C. § 1981).

³¹ See, e.g., Schwemm, supra note 5, at § 27:2, n.6.

³² Wienk et al., supra note 8.

³³ H.R. Rep. No. 100-711, at 16 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2177 [hereinafter House Report].

³⁴ Pub. L. No. 100-430, 102 Stat. 1619 (1988).

³⁵ House Report, supra note 33, at 13.

³⁶ 42 U.S.C. §§ 3610-14. The 1988 amendments also added handicap and familial status to the types of discrimination outlawed by the FHA and broadened the statute's prohibition against discrimination in home financing. See 42 U.S.C. §§ 3604-06, 3617; Schwemm, supra note 5, at § 5:3.

³⁷ See, e.g., 42 U.S.C. § 2000a-3 (providing for only equitable relief in public accommodations cases under Title II of the 1964 Civil Rights Act); 42 U.S.C. § 1981a(b) (providing caps for monetary relief in employment cases under Title VII of the same law); Barnes v. Gorman, 536 U.S. 181 (2002) (holding that punitive damages may not be awarded under Title II of the Americans with Disabilities Act or § 504 of the Rehabilitation Act, as is also true under Title VI of the 1964 Act).

C. Experience Under the FHAA's "New and Improved" Approach

1. The 1989-2000 Period

HUD's second national testing study in 1989 was timed to provide a picture of rental and sales discrimination when the FHAA first became effective.³⁸ As noted above, that study showed levels of rental discrimination against blacks and Hispanics that *463 were similar to those found in 1977.³⁹ Based on the FHAA, however, expectations for change were high,⁴⁰ and the FHAA-enhanced enforcement procedures did yield thousands of new FHA claims.

One measure of this activity is the total number of FHA administrative complaints filed with HUD and substantially equivalent state and local agencies,⁴¹ which rose from 4,422 in 1988 to 7,174 in 1989.⁴² To be sure, many of these claims were based on familial status and handicap-- the two new protected classes added by the FHAA⁴³--but the number of race and national origin claims also rose substantially in the new law's first year.⁴⁴ The post-FHAA complaint levels continued to rise in the next few years, with totals of: 7,675 in 1990; 9,192 in 1991; 9,461 in 1992; and 10,184 in 1993; before falling back slightly to 9,670 in 1994.⁴⁵

These figures included an increased number of race-based complaints, the total of which rose from a low of 3,722 in 1989 to a high of 5,062 in 1992, before

³⁸ 1989 Study, *supra* note 7. The 1988 FHAA became effective one hundred and eighty days after its passage on March 12, 1989. 42 U.S.C. § 3601, n.(a).

³⁹ See notes 7-8 and accompanying text.

⁴⁰ *Supra* notes 34-35 and accompanying text.

⁴¹ The FHAA requires that an administrative complaint to HUD filed in a state or locality with a fair housing law that is substantially equivalent to the federal statute be referred to the appropriate state or local agency for processing. See 42 U.S.C. § 3610(f); Schwemm, *supra* note 5, § 24:8.

⁴² See U.S. Dept of Hous. & Urban Dev., 1989: The State of Fair Housing: Report to the Congress Pursuant to Section 808(e)(2) of the Fair Housing Act 13 (1990) [hereinafter 1989 Report]. All but five percent of the 1989 complaints were filed after the FHAA became effective on March 12, 1989. *Id.*

By way of contrast, and to illustrate the pre-FHAA situation during the 1970s, an average of about 3,000 FHA administrative complaints were filed annually, about ten percent of which were conciliated by HUD (there being no other administrative remedy). U.S. Commission on Civil Rights, *The Federal Fair Housing Enforcement Effort* 29-31 (1979).

⁴³ See 1989 Report, *supra* note 42, at 14 (reporting that in the first year the FHAA became effective, familial status and handicap were, respectively, the first and third most frequently alleged bases of discrimination in FHA complaints filed with HUD, with race ranking second).

⁴⁴ See *id.* at 14 (reporting that the average monthly number of FHA complaints to HUD based on race and national origin rose to 135 and 17, respectively, in 1989, compared with 91 and 8 in the previous year).

⁴⁵ Office of Program Standards & Evaluation, U.S. Dept of Hous. & Urban Dev., 1994 Annual Report to Congress on Fair Housing Programs 12 (1996) [hereinafter 1994 Report].

settling back to 4,807 in 1993 and 4,645 in 1994.⁴⁶ The number of national origin complaints also *464 increased substantially during this period, rising from a low of 620 in 1989 to levels regularly exceeding 1,000 in the years from 1990 to 1994.⁴⁷ Rental claims accounted for a large portion of the 1989-1994 complaints.⁴⁸

HUD stopped reporting such figures after 1994, but information from other sources shows that the total number of FHA administrative complaints fell in the mid-1990s (to 5,818 in 1998) before beginning another steady rise in 1999.⁴⁹ During the second half of the 1990s, the portion of these totals that involved race and national origin remained fairly steady, at about forty-three and eleven percent, respectively.⁵⁰ The portion of complaints based on refusals to rent and on discriminatory terms and conditions in rentals and sales also remained fairly steady, at about thirty percent and sixty percent, respectively.⁵¹ Thus, even in this period of somewhat reduced complaint levels, the number *465 of rental

⁴⁶ 1989 Report, *supra* note 42, at 14, 19; 1994 Report, *supra* note 45, at 14; U.S. Dept of Hous. & Urban Dev., 1990: *The State of Fair Housing: Report to the Congress Pursuant to Section 808(e)(2) of the Fair Housing Act 5 (1991)* [hereinafter 1990 Report]; U.S. Dept of Hous. & Urban Dev., 1991: *The State of Fair Housing: Report to the Congress Pursuant to Section 808(e)(2) of the Fair Housing Act 5 (1992)* [hereinafter 1991 Report]. Race-based claims accounted for 40.4% of the total 1991-1994 administrative complaint load. Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 U.C.L.A. L. Rev. 1401, 1408 tbl.1 (1998).

⁴⁷ See HUD sources cited *supra* note 46. National origin claims accounted for 9.4% of the total 1991-1994 administrative complaint load. Selmi, *supra* note 46, at 1408 tbl.1.

⁴⁸ HUD identifies the number of complaints by the type of issues raised, such as refusal to rent, refusal to sell, and discriminatory terms and conditions in rentals or sales (the latter category does not distinguish between rentals and sales). The largest category in the 1989-1994 period was "terms and conditions," which accounted for, respectively, 38%, 32%, 35%, 41%, 36%, and 30% of the total number of complaints; refusals to rent accounted for, respectively, 33%, 24%, 24% 27%, 22%, and 17%; and refusals to sell accounted for, respectively, 6%, 2%, 2%, 1%, 1%, and 1%. 1990 Report, *supra* note 46, at 6; 1991 Report, *supra* note 46, at 6; 1994 Report, *supra* note 45, at 14.

⁴⁹ See U.S. Commission on Civil Rights, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume IV: An Evaluation of the Departments of Education, Health and Human Services, and Housing and Urban Development, and the Equal Employment Opportunity Commission 121 (2004)* (identifying the totals as 5,818 in 1998; 6,139 in 1999; 6,973 in 2000; 7,010 in 2001; and 7,649 in 2002); U.S. General Accounting Office, *Fair Housing: Opportunities to Improve HUD's Oversight and Management of the Enforcement Process 25 (2004)* (reporting that the total number of complaints declined slightly from 1996 until 1998, but then began increasing steadily to over 8,000 in 2003) [hereinafter GAO Report].

⁵⁰ See GAO Report, *supra* note 49, at 28 (reporting that, for the total number of complaints during the four years 1996-1999, race accounted for 43.5%, 43.6%, 45.4%, and 40.0%, and national origin accounted for 12.9%, 11.8%, 11.4%, and 9.1%).

⁵¹ See *id.* at 30 (reporting that, for the total number of complaints during the four years 1996-1999, refusals to rent accounted for 36.3%, 30.2%, 24.4%, and 27.7%, and discriminatory terms and conditions accounted for 62.7%, 64.2%, 60.9%, and 58.4%).

complaints based on race and national origin was well above what it had been prior to enactment of the FHAA.⁵²

Some sense of the overall results achieved by these complaints is provided by HUD's last yearly report in the 1990s, which was for 1994. Of all the complaints filed with HUD that year, forty percent were settled; twenty-five percent resulted in a "no cause" determination; seven percent resulted in a "cause" determination; and the rest were either administratively closed or referred to the Justice Department.⁵³ "Cause" was found in four percent of both race-based and national origin complaints, in ten percent of refusal-to-rent complaints, and in six percent of discriminatory-terms-and-conditions complaints. [FN54][FN54]⁵⁴ Total monetary relief from all HUD, state, and local administrative claims was \$3,785,750, which amounted to an average of \$2,781 per case resolved by settlement or adjudication, and "housing relief" was obtained in 830 (twenty-six percent) of these cases.⁵⁵

Data with respect to privately initiated FHA lawsuits and those brought by the Justice Department in the 1990s are harder to come by. One group that tracks FHA litigation assisted by private fair housing organizations estimates that over \$166 million was recovered from 1,330 privately initiated lawsuits closed by settlements or judgments in the 1990 to 1999 period.⁵⁶ The overall *466 lawsuit-

⁵² For example, in the low-complaint year of 1998 when the total number of complaints was 5,818, race accounted for 45.5% of the total or about 2,500 complaints, and national origin accounted for 11.4% of the total or about 660 complaints, both well above the comparable figures for 1988. 1989 Report, *supra* note 42, at 14. Also in 1998, refusals to rent and discriminatory terms and conditions accounted for, respectively, 24.4% and 60.9% of the total, similar to what they had been in 1988. *Id.*

⁵³ 1994 Report, *supra* note 45, at 16-17. In the four-year period from 1991 through 1994, forty-three percent were settled; twenty percent resulted in a "no cause" determination; four percent resulted in a "cause" determination; and the rest were either administratively closed or referred to the Justice Department. *Selmi*, *supra* note 46, at 1412 tbl.2.

⁵⁴ See 1994 Report, *supra* note 45, at 19 (reporting that, for complaints to HUD, a "cause" determination was made in 93 of the 2,276 race complaints, 25 of the 591 national origin complaints, 156 of the 1,600 refusal-to-rent complaints, and 184 of the 2,931 discriminatory-terms-and-conditions complaints).

⁵⁵ *Id.* at 17. "Of the [HUD] claims that were conciliated in 1991, the median settlement was \$600. Comparable figures for 1992 and 1993 were \$750 and \$775, respectively.... [T]he average [HUD] ALJ award for race-based housing discrimination in 1993 was \$39,214." Kathleen C. Engel, *Moving Up the Residential Hierarchy: A New Remedy for an Old Injury Arising from Housing Discrimination*, 77 *Wash. U. L. Q.* 1153, 1186-87 (1999) (citing U.S. Comm'n on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report* 37, 62-63 (1994)).

⁵⁶ Fair Housing Center of Metropolitan Detroit, \$225,000,000 and Counting 10, 26-27 (2006) [hereinafter *Counting*] (on file with author). This report claims to capture "a very significant portion (probably the vast majority) of the housing discrimination lawsuits filed...in the United States" beginning January 1, 1990. *Id.* at 7.

The average per-case recovery of over \$125,000 yielded by these figures does not represent a "typical" FHA case, because the figures include three unusual cases in which settlements of over \$10 million each were obtained. *Id.* at 10.; see also Engel, *supra* note 55, at 1187 (citing one source as placing the average court award in 1993 fair housing cases at \$28,378 and another as

filing pace during this period averaged 156 cases per year, with ninety-three percent of the cases resulting in some recovery for the plaintiffs and with race-based claims accounting for just under half of the cases and over fifty-five percent of the monetary relief recovered.⁵⁷

Meanwhile, in 1994, the Justice Department filed twenty-three “pattern or practice” cases under the FHA (fourteen involving race and four involving national origin), along with 150 individual cases that had been “elected” out of the HUD administrative process (thirty-eight based on race and one based on national origin).⁵⁸ During this year, Justice resolved fifteen pattern-or-practice cases (eleven involving race and two involving national origin) in which monetary relief of over \$14,000,000 was obtained, mostly for the persons aggrieved by the defendants' discrimination.⁵⁹ At the same time, the Justice Department resolved ninety-eight election cases (sixteen involving race and four involving national origin), collecting a total of \$1,446,310 in monetary relief for an average recovery of almost \$15,000.⁶⁰

Overall, therefore, while the number of complaints filed during the FHAA's first decade continued “to represent only a *467 small percentage of likely violations,”⁶¹ the litigation achievements, both in terms of complaints filed and results achieved, were significantly greater than in the pre-FHAA period. However, this litigation seemed to have virtually no impact on rental discrimination rates nationwide. As described above, HUD's 2000 national testing study showed that these rates remained every bit as high for Hispanics and almost as high for blacks as they had been in 1989.⁶² Thus, the enhanced enforcement techniques provided by the FHAA--and eight years of a Democratic administration that professed to have a strong commitment to civil rights

placing the median trial verdict in such cases in 1992-1995 at \$41,829) (citing, respectively, U.S. Comm'n on Civil Rights, *supra* note 55, at 62-63, and Selmi, *supra* note 46, at 1419 tbl.4).

⁵⁷ Counting, *supra* note 56, at 9-10.

⁵⁸ 1994 Report, *supra* note 45, at 28-30. This report does not identify what portion of these Justice Department cases involved rental situations. The overall totals for 1994 were then a record number of FHA filings by the Justice Department. *Id.* at 28. In subsequent years, the rate of FHA “pattern or practice” filings remained fairly steady, but election case filings fell substantially. See John P. Relman, *Federal Fair Housing Enforcement: The Second Clinton Administration at Mid-Term*, in Citizens' Commission on Civil Rights, *The Test of our Progress: The Clinton Record on Civil Rights 237* (reporting that Justice filed 34 new FHA “pattern or practice” cases in 1995-1996 and 39 more in 1997-1998, while election case filings for these two periods fell to 149 and 57), available at <http://www.cccr.org/images/progress.pdf>.

For a description of the process by which the Department of Justice files suit on behalf of a complainant whose administrative complaint has been charged by HUD and “elected” by one of the parties to federal court, see Schwemm, *supra* note 5, at §§ 24:15 to -:16.

⁵⁹ 1994 Report, *supra* note 45, at 29.

⁶⁰ *Id.* at 30; see also Selmi, *supra* note 46, at 1419 tbl.4, 1420 n.76 (identifying the Department of Justice's median fair housing award as \$25,500 in 1992-1995 and its median awards in “election” cases as \$7,500 in 1995 and \$9,500 in 1996).

⁶¹ 1994 Report, *supra* note 45, at 9; see also *supra* note 14 and text accompanying notes 42-45, 49 (providing FHA complaint levels and overall number of violations).

⁶² See *supra* note 7 and accompanying text.

enforcement⁶³--had apparently made little difference in the levels of rental discrimination.

2. The Post-2000 Period

In the years after the 2000 study, FHA litigation levels have continued at a fairly steady pace. With respect to FHA administrative complaints, the total number filed with HUD and substantially equivalent state and local agencies declined slightly in the 1996-1998 period and then began a steady rise, with totals of: 6,140 in 1999; 6,970 in 2000; 6,973 in 2001; 7,557 in 2002; 8,097 in 2003; 9,187 in 2004; 9,254 in 2005; and 10,328 in 2006.⁶⁴ Thus, the 2005-2006 levels were similar to those common in the early 1990s.⁶⁵

*468 During the 2000-2006 period, the portion of administrative complaints that involved race and national origin remained fairly steady at, respectively, about thirty-nine percent and thirteen percent,⁶⁶ a slight dip for race and a slight increase for national origin compared with these rates in the late 1990s.⁶⁷ Also, during 2000-2006, the portion of these complaints based on refusals to rent and on discriminatory terms and conditions in rental and sales

⁶³ See, e.g., U.S. Dept of Hous. & Urban Dev., 1993 Consolidated Annual Report to Congress on Fair Housing Programs 2 (1995). This report states:

1993 is likely to be remembered as a watershed year in the struggle to achieve fair housing in the United States [because of] the renewed Federal commitment to combating every manifestation of housing discrimination and racial segregation. Under the dynamic new leadership provided by President Bill Clinton and HUD Secretary Henry G. Cisneros, fair housing has been restored to a prominent place on the Nation's housing agenda.

Id. But see *supra* note 49 and accompanying text (showing a decline in HUD enforcement levels during President Clinton's second term); Selmi, *supra* note 46, at 1403, 1427, 1458-59 (arguing toward the end of the Clinton Administration that the federal "government has failed to play a strong role as an enforcement agency" in Democratic as well as Republican administrations, that "the federal government's efforts [to enforce the FHA and Title VII] have been inadequate throughout both Republican and Democratic administrations," and that "the government has demonstrated repeatedly that it will not adopt such a [vigorous enforcement] role").

⁶⁴ See U.S. Department of Housing and Urban Development, *The State of Fair Housing: FY 2006 Annual Report on Fair Housing 3* (2007) [hereinafter 2006 Report].

⁶⁵ See *supra* text accompanying notes 42-45.

⁶⁶ See 2006 Report, *supra* note 64, at 4 (reporting that during the 2003-2006 years, the portion of race-based complaints accounted for 39% of the total (based on 3,185 race-based complaints) in 2003, 38% (3,512 complaints) in 2004, 38% (3,472 complaints) in 2005, and 39% (4,043 complaints) in 2006, while the comparable figures for national origin were 13% (1,043 complaints) in 2003, 14% (1,268 complaints) in 2004, 13% (1,225 complaints) in 2005, and 14% (1,427 complaints) in 2006); GAO Report, *supra* note 49, at 28 (reporting that the portion of race-based complaints accounted for 40.2% of the total in 2000, 39.2% in 2001, and 39.3% in 2002, while the comparable figures for national origin were 11.7% in 2000, 12.9% in 2001, and 12.2% in 2002).

⁶⁷ See *supra* text accompanying note 50.

remained fairly steady at, respectively, about twenty-five percent and fifty-seven percent,⁶⁸ a slight reduction for both categories compared with the late 1990s.⁶⁹

As for the results achieved by administrative complaints, in 2006 (the most recent year reported) HUD closed 2,578 complaints: thirty-six percent were settled; forty percent resulted in “no cause” determinations; one percent resulted in “cause” determinations; and the rest were either administratively closed (twenty-two percent) or referred to the Justice Department (one percent).⁷⁰ During the same year, state and local agencies closed 6,951 complaints: thirty-three percent were settled; forty-nine percent resulted in “no cause” determinations; six percent resulted in “cause” determinations; and twelve percent were administratively closed.⁷¹ Of the thirty-three cases in which a HUD charge was pending in 2006, over half (seventeen) were elected to federal court for prosecution by the Justice Department, and most of the rest were resolved by settlements (nine); one resulted in a favorable administrative decision.⁷² Of the nine HUD settlements, three involved race (which produced a total of \$22,500 for the complainants), and none involved national origin.⁷³ Thus, administrative cases achieved substantially less overall relief in 2006 than they did in 1994.⁷⁴

⁶⁸ See 2006 Report, *supra* note 64, at 5 (reporting that from 2003-2006, the portion of refusal-to-rent complaints accounted for 23% of the total in 2003, 24% in 2004, 25% in 2005, and 26% in 2006, while the comparable figures for terms-and-conditions complaints were 55% in 2003, 57% in 2004, 57% in 2005, and 58% in 2006); GAO Report, *supra* note 49, at 30 (reporting that the portion of refusal-to-rent complaints accounted for 28.1% of the total in 2000, 28.4% in 2001, and 26.3% in 2002, while terms-and-conditions complaints accounted for 56.8% of the total in 2000, 57.2% in 2001, and 55.1% in 2002).

⁶⁹ See *supra* text accompanying note 51.

⁷⁰ 2006 Report, *supra* note 64, at 30-31. Comparable figures for the three prior years were: in 2005, HUD closed 2,580 complaints, 39% of which were settled, 37% resulted in “no cause” determinations, 2% resulted in “cause” determinations, and the rest were either administratively closed (21%) or referred to the Justice Department (1%); in 2004, HUD closed 2,884 complaints, 37% of which were settled, 46% resulted in “no cause” determinations, 2% resulted in “cause” determinations, and the rest were either administratively closed (15%) or referred to the Justice Department (2%); and in 2003, HUD closed 2,818 complaints, 38% of which were settled, 41% resulted in “no cause” determinations, 1% resulted in “cause” determinations, and the rest were either administratively closed (18%) or referred to the Justice Department (2%). *Id.*

⁷¹ *Id.* at 53, 55. Comparable figures for the prior three years were: in 2005, these agencies closed 6,649 complaints, 31% of which were settled, 51% resulted in “no cause” determinations, 6% resulted in “cause” determinations, and 11% were administratively closed; in 2004, these agencies closed 6,547 complaints, 33% of which were settled, 51% resulted in “no cause” determinations, 6% resulted in “cause” determination, and 10% were administratively closed; and in 2003, these agencies closed 5,670 complaints, 33% of which were settled, 52% resulted in “no cause” determinations, 6% resulted in “cause” determination, and 9% were administratively closed. *Id.*

⁷² *Id.* at 34. The one charged case that resulted in an administrative decision in 2006 was initially dismissed by the HUD ALJ, but this decision was ultimately reversed by the HUD Secretary in an opinion favorable to the complainant. *Id.* at 36.

⁷³ *Id.* at 36.

⁷⁴ See *supra* text accompanying notes 53-55.

Complaints to private fair housing organizations averaged over 17,000 per year after 2000.⁷⁵ During the 2000-2005 period, private lawsuits resulting from such complaints recovered over \$63,000,000 from 882 concluded cases,⁷⁶ which meant that filings per-year and recoveries per-case were somewhat down from the 1990s.⁷⁷ The overall lawsuit-filing pace during this period averaged 147 cases per year, with ninety-four percent of the cases resulting in some recovery for the plaintiffs. Race-based claims accounted for a smaller portion of the total number of cases (thirty-three percent) but still over half of the overall monetary relief recovered (fifty-three percent).⁷⁸ National origin accounted for four percent of the cases.⁷⁹ Rental transactions were involved *470 in more than seventy-seven percent of the cases.⁸⁰

The pace of Justice Department litigation involving FHA race and national origin charges has slowed somewhat in the post-2000 period. From the beginning of 2001 through August of 2006, Justice filed 198 FHA cases, including 59 based on race and 19 based on national origin.⁸¹ In early 2006, however, the Department announced a program to increase the number of its paired-test investigations so as to achieve an all time high in Department of Justice testing since 1991, when this testing program began.⁸²

Overall, therefore, the post-2000 levels of FHA litigation have been similar to or slightly lower than those of the prior decade.⁸³ *471 As the 1989-

⁷⁵ See National Fair Housing Alliance, 2006 Fair Housing Trends Report 17 (2006) [hereinafter 2006 Trends] (on file with author) (giving the figures of 16,789 for 2005; 18,094 for 2004; 17,022 for 2003; and 17,543 for 2002); See 2004 Trends, supra note 9, at 5 (providing the figure of 16,500 for 2001).

⁷⁶ Counting, supra note 56, at 14. When this period's recoveries are added to those of the 1990s, the total amount generated by post-FHAA private lawsuits exceeds \$225,000,000. Id. at 4.

⁷⁷ See supra text accompanying notes 56-57.

⁷⁸ See Counting, supra note 56, at 10.

⁷⁹ Id. at 15.

⁸⁰ Id.

⁸¹ Press Release, U.S. Department of Justice, Justice Department Sues Los Angeles Landlord for Engaging in Discrimination on the Basis of Race, National Origin, and Familial Status (Aug. 7, 2006), available at http://www.usdoj.gov/crt/housing/documents/sterling_pr.pdf. These totals include both "pattern or practice" and "election" cases; the former accounted for about 100 cases (29 involving race and 10 involving national origin), and the latter accounted for about 100 cases (29 involving race and 10 involving national origin). With respect to individual years, the National Fair Housing Alliance puts the Justice case filings at 42 in 2005; 38 in 2004; 29 or 35 in 2003; 49 or 63 in 2002; and 49 in 2001. See 2004 Trends, supra note 9, at 5-6; 2006 Trends, supra note 75, at 17, 19. These sources state that, of Justice's 42 filed cases in 2005, 23% involved race and 10% involved national origin; and of its 35 filed cases in 2003, 29% involved race and 10% involved national origin).

⁸² Press Release, U.S. Department of Justice, Fact Sheet: Department of Justice Initiative to Combat Housing Discrimination "Operation Home Sweet Home" (Feb. 15, 2006), available at http://www.usdoj.gov/opa/pr/2006/February/06_opa_079.html.

⁸³ It is not my purpose here to attempt an evaluation of the Bush Administration's record of fair housing enforcement or to compare it to that of prior administrations. Others have criticized the Bush civil rights enforcement record. See, e.g., Letter from the Lawyers' Committee for Civil Rights Under Law to the Senate Judiciary Committee Chair and Ranking Member (Oct. 5, 2005),

2000 period shows, however, even if more litigation had occurred in recent years, there is no guarantee that this would have reduced the levels of illegal discrimination by landlords. And while no recent national study exists to determine whether the post-2000 litigation has had as little impact as that of the 1990s,⁸⁴ there is substantial evidence that rental discrimination against racial and ethnic minorities continues unabated.⁸⁵ Thus, there is no reason to believe that the

available at <http://www.civilrights.org/issues/enforcement/remote-page.jsp?itemID=28310175>. Such criticisms, while distressing, are not relevant to my main point, which is that, even if a more FHA-aggressive administration had been in power in recent years, this might not have succeeded in changing landlords' illegal behavior to any significant degree.

One part of the Bush Administration's record that is relevant here is its selection of federal judges whose support for civil rights laws is tepid at best. See, e.g., Press Release, Leadership Conference on Civil Rights, Second Hearing on Controversial Nominee Focuses on Civil Rights (Feb. 8, 2002), available at http://www.civilrights.org/press_room/buzz_clips/second-hearing-on-controversial-nominee-focuses-on-civil-rights.html (criticizing Charles Pickering, a Bush appointee to the Fifth Circuit, for his "extreme" record on civil rights); Press Release, Leadership Conference on Civil Rights, African-American Leaders Voice Opposition to Janice Rogers Brown (Nov. 5, 2003), available at http://www.civilrights.org/press_room/buzz_clips/african-american-leaders-voice-opposition-to-janice-rogers-brown.html (calling Bush's nomination of Janice Rogers Brown "cynical" for her hostility towards civil rights). This is relevant, because, to the extent FHA enforcement has proved ineffective in reducing rental discrimination through 2000 when the federal judiciary was at least modestly supportive of civil rights, a continued reliance on such enforcement in a future era that will likely be characterized by a less supportive federal judiciary is even harder to justify.

⁸⁴ The FHA directs HUD to "make studies with respect to the nature and extent of discriminatory housing practices in representative communities... throughout the United States," but it does not mandate how frequently such studies should be conducted. 42 U.S.C. § 3608(e)(1); see also Yinger, *supra* note 13, at 224 (suggesting that "a national audit study of the rental housing market should be conducted by HUD at least every 5 years").

⁸⁵ See, e.g., Greater New Orleans Fair Housing Action Center, *For Rent, Unless You're Black: An Audit Report and Study on Race Discrimination in the Greater New Orleans Metropolitan Rental Housing Market* (2007), available at <http://www.gnofairhousing.org/pdfs/GNOFHAC%20Rental%20Audit.pdf> (reporting, based on paired tests of forty rental properties conducted throughout the New Orleans metropolitan area between September 2006 and April 2007, that blacks encountered less favorable treatment than whites 57.5% of the time); Adrian G. Carpusor & William E. Loges, Rental Discrimination and Ethnicity in Names, 36 *J. Applied Soc. Psychol.* 934, 941 (2006) (reporting, based on 1,115 email inquiries sent to Los Angeles County landlords in 2003, that the responses favored those sent from a white-sounding name ("Patrick McDougall") over those from an Arab-sounding name ("Said Al-Rahman") and a black-sounding name ("Tyrell Jackson")); National Fair Housing Alliance, *No Home for the Holidays: Report on Housing Discrimination Against Hurricane Katrina Survivors* (2005), available at http://www.nationalfairhousing.org/resources/newsArchive/resource_07824627156408113400.pdf (reporting, based on sixty-six paired telephone rental tests in 2005 in five southern states, that whites were favored over blacks in sixty-six percent of the tests); Fair Housing Council of Suburban Philadelphia, *An Audit of Race Discrimination in the Suburban Philadelphia Rental Market in 2001* (2002), available at http://www.fhcsf.com/Laws/rental_audit_2002.htm (reporting, based on sixty-four paired tests in 2001, that black renters "face discriminatory treatment in 41% of the time in the Suburban Philadelphia area"); Fair Housing Center of Greater Boston, "We Don't Want Your Kind Living Here:" *A Report on Discrimination in the Greater Boston Rental Market* (2001), available at

“cure” for this problem offered by the FHA has fared any better in recent years than in the FHAA's early years. Moreover, as Part III will show, this problem may actually *472 get worse in the coming decade, as minority groups come to comprise an ever larger portion of the nation's renters.

III. Overview of the Rental Housing Market

Some 34,000,000 United States households--about one-third of the nation's total--live in rental housing.⁸⁶ This number has changed little over the past decade, although a slight increase did occur in 2005, with a corresponding decline in the national rental vacancy rate.⁸⁷

As a group, renters “tend to be younger, have lower incomes, [and] are more likely to be minorities or immigrants.”⁸⁸ The share of renter households made up of racial and ethnic minorities has risen dramatically over the past quarter century to stand at forty-three percent in 2004, as millions more minority households became renters and offset a comparable decline in the number of white renters.⁸⁹ Half of all minority households are renters, *473 compared to

http://www.bostonfairhousing.org/rental_audit_2001.pdf (reporting, based on a paired testing study in 2001, that black renters were discriminated against in at least half of their attempts to find apartments in the greater Boston area); see also sources cited *infra* note 119.

⁸⁶ Joint Center for Housing Studies of Harvard University, *America's Rental Housing: Homes for a Diverse Nation 1* (2006) [hereinafter *Rental Housing*], available at http://www.jchs.harvard.edu/publications/rental/rh06_americas_rental_housing.pdf.

⁸⁷ Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing: 2006*, 20 (2006) [hereinafter *2006 Housing*], available at <http://www.jchs.harvard.edu/publications/markets/son2006/index.htm>; see also Eduardo Porter, *Rents Are Rising Rapidly After Boston Lull*, N.Y. Times, Aug. 19, 2006, at C1 (reporting that the national rental vacancy rate had declined to 9.6% in the second quarter of 2006). Among the factors underlying the recent tightening in the rental market were a slowdown in multifamily rental construction (to 195,000 units in 2005 from 275,000 in 2002), an increasing number of condominium conversions (involving over 63,000 apartments in 2004 and another 203,000 in 2005), and the first decline in the national homeownership rate in ten years. *2006 Housing*, *supra*, at 20, 35. However, in the coming decade, overall housing production is expected to set new records in response to a substantial growth in the number of households. *Id.* at 2.

⁸⁸ William Apgar, *Rethinking Rental Housing: Expanding the Ability of Rental Housing to Serve as a Pathway to Economic and Social Opportunity 3* (2004), available at <http://www.jchs.harvard.edu/publications/markets/w04-11.pdf>. Renters also move more frequently than home buyers. *Id.* at 23. Fifty-eight percent of “the more than 23 million households changing residence in 2001 moved into a rental unit.” *Id.* at 23-24.

⁸⁹ See *2006 Housing*, *supra* note 87, at 21 (reporting that the minority share of renter households was 27% in 1980, 31% in 1990, and 43% in 2004); *Rental Housing*, *supra* note 86, at 5 (reporting that, in the 1994-2004 period, minority renters rose by nearly three million households, while the number of white renters underwent a comparable decline).

A large part of the increase in minority renters has been fueled by immigration. In 2003, immigrants headed 16% of all renter households, nearly 30% of all minority renter households, and 54% of Hispanic renter households. Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing: 2005 21* (2005) [hereinafter *2005 Housing*], available at <http://www.jchs.harvard.edu/publications/markets/son2005/index.html>.

only a quarter of white households.⁹⁰ In the coming decade, the number of rental households is expected to increase by nearly 2,000,000, fueled primarily by the continued strength of immigration and growth in the number of young minority households; the number of white renters is expected to continue to decline, so that minorities will make up over half of all renters by 2015.⁹¹

Although many well-to-do people choose to rent rather than buy their homes, affordability is a serious problem for many renters. Low-income households make up a large and rapidly growing segment of the rental market, and for many of these people, renting is not a matter of choice.⁹² Rental costs have increased faster than inflation over the past decade and now stand at an all-time high.⁹³ One in five renter households pays at least half of their income for housing.⁹⁴

The inventory of rental units stood at 37.2 million in 2003.⁹⁵ The vast majority of these (nearly 27 million) are unsubsidized and privately owned, and seventy percent of these units (almost 19 million) are in single-family or small (two-to-nine-unit) multifamily structures.⁹⁶ More than one third of renters live in single family homes.⁹⁷ As for the remaining two thirds who live in *474 multifamily structures, the rental stock is becoming more weighted toward larger properties, as new multifamily construction has shifted away from two-to-four-unit buildings in favor of much bigger structures.⁹⁸

⁹⁰ Apgar, *supra* note 88, at 23. “This difference reflects, in part, that minorities are younger, have lower incomes, and are less likely to be married—all characteristics associated with a greater tendency to rent.” *Id.*

⁹¹ Rental Housing, *supra* note 86, at 5, 7.

⁹² *Id.* at 1, 7.

⁹³ *Id.* at 16. Average gross monthly rent (rent plus utility costs) moved up steadily in constant dollars from 1996 to 2004, when it reached \$711. *Id.* at 16, 26. In the 1993-2003 period, 2,000,000 low-cost units were razed and/or withdrawn from the market, reducing by thirteen percent the number of units renting for less than \$400 in inflation-adjusted terms. *Id.* at 2. Most of the new units built during this period were targeted toward the high end of the market. *Id.* In 2004, the average monthly rent for newly constructed, privately owned, unsubsidized apartments had risen to \$974 (at least thirty seven percent above the median for all units), up from \$734 in 1994 (only ten percent more than the median for all units). *Id.* at 11. The rise in rental rates has continued through 2006. See, e.g., Porter, *supra* note 87, at C1 (reporting on government data showing that average rents nationally were 3.5% higher in mid-2006 than a year earlier).

⁹⁴ Apgar, *supra* note 88, at 3.

⁹⁵ See Rental Housing, *supra* note 86, at 8, 30. This represents an increase of one million units in the preceding decade. *Id.* This does not include the more than three million owner-occupied manufactured homes that are placed on leased land. See Apgar, *supra* note 88, at 14.

⁹⁶ Apgar, *supra* note 88, at 26. According to a HUD survey completed in the mid-1990s, nearly 1.1 million rental units were located in two-unit to four-unit structures with a resident owner. *Id.* (citing U.S. Department of Housing and Urban Development, *The Property Owners and Managers Survey (POMS)* (1996)).

⁹⁷ *Id.* The share of renters living in single-family homes peaked at 37.5% in the late 1990s. 2005 Housing, *supra* note 89, at 21.

⁹⁸ See 2006 Housing, *supra* note 87, at 22-23. Between 1999 and 2004, the share of multifamily rental units completed in structures with at least fifty units increased from thirteen to twenty-four

Rental housing is a huge industry in the United States,⁹⁹ but many landlords are small owners who easily enter and leave the market and who are generally not subject to any training or licensing requirements.¹⁰⁰ Individuals own more than half of all rental units.¹⁰¹ Some 4.3 million households earn rental income from a second property, and most of these (nearly eighty percent) have only one rental property.¹⁰² Half of individual rental property owners are fifty-five years old or over.¹⁰³ These older owners--and, for that matter, small property owners in general--tend to run their own properties without employing outside agents.¹⁰⁴

This overview of the United States rental market has a number of fair housing implications. Clearly, the FHA's goal of eliminating racial and national origin discrimination in rental housing will be increasingly challenged in the next decade, as minorities come to represent an ever larger share of renter households. This is true even without considering potential problems in the home-sale market¹⁰⁵ or rental discrimination *475 issues involving income and immigration status, factors which, while not directly addressed by the FHA, often impact minorities far more than whites.¹⁰⁶ On the supply side, the growing number of

percent, while the share of such units in structures with two to four apartments dropped from nine to five percent. *Id.*

⁹⁹ “[R]enter households pay nearly \$250 billion...annually to rental property owners [who] spend approximately \$50 billion each year to maintain and improve a rental housing inventory that is now valued at over \$2.5 trillion.” Apgar, *supra* note 88, at 22.

¹⁰⁰ See, e.g., *id.* at 26 (noting that for “many property owners, operating rental housing is a part time business”); Yinger, *supra* note 13, at 224 (noting that “[t]he rental market contains many small sellers who are largely unregulated”).

¹⁰¹ 2006 Housing, *supra* note 87, at 23 (reporting ownership of the U.S. rental stock in 2005 was made up of 56% individuals, 24% partnerships, 11% corporations, and 9% other categories).

¹⁰² *Id.* at 23-24 (reporting that 3.4 million of the 4.3 million households that have rental income own only one such property). Furthermore, at least one third of these one-property owners have only a single-family rental. *Id.* at 24. Five out of six single-family rentals are owned by individuals or married couples. 2005 Housing, *supra* note 89, at 21.

¹⁰³ 2006 Housing, *supra* note 87, at 24.

¹⁰⁴ *Id.*

¹⁰⁵ Predatory lending and foreclosure techniques in the home-sale market have been focused on minority groups. These practices may result in a disproportionate share of minorities being forced to give up their houses and seek rental units in the coming years. See Harold L. Bruce et al., *Subprime Foreclosures: The Smoking Gun of Predatory Lending?*, 67-68, available at <http://www.huduser.org/publications/pdf/brd/12Bunce.pdf> (discussing the high levels of foreclosure by predatory or subprime lenders and the concentration of such lenders in minority and low-income neighborhoods); Les Christie, *Subprime Foreclosures Spike: Many Vulnerable Americans Will Lose Their Homes During the Next Few Years*, CNNMoney.com, Dec. 20, 2006, http://money.com/2006/12/20/real_estate/subprime_mortgage_foreclosures/index.htm (discussing the increase in foreclosures due to subprime loans).

¹⁰⁶ See, e.g., *Lozano v. City of Hazelton*, 459 F. Supp. 2d 332, 337 (M.D. Pa. 2006) (issuing temporary restraining order enjoining enforcement of defendant's local ordinances restricting rentals to non-U.S. citizens on the ground that plaintiffs, whose claims were based in part on the FHA, had “a reasonable probability of success on the merits”); Michelle Chen, *As Predatory Lending Adapts to Weak Regulations, the Poor Pay, The New Standard* (July 2006),

large apartment complexes suggests that professional rental agents will account for a greater share of those people who must decide on a daily basis whether or not to obey the FHA. At the same time, individual owners who personally manage one or a few units and who tend to be older and richer--and therefore are statistically likely to be of a different racial or ethnic background than their prospective tenants--will continue to play a major role in this market.

IV. More on What's Known and Not Known About Rental Discrimination

As noted above, HUD's three national testing studies have provided overall measures of rental discrimination against blacks and Hispanics,¹⁰⁷ but they and related studies also include a good deal of additional information about this topic. This part reviews the methodology used in the HUD studies and some analyses that have been done of their testing results to determine more precisely what is and is not known about rental discrimination.

D. The HUD Testing Studies' Methodology and Its Limits in Measuring Rental Discrimination

The basic methodology for HUD's three national testing studies was the same.¹⁰⁸ In the 2000 study, twenty metropolitan areas with significant black and/or Hispanic populations were chosen as sites for testing from the twenty-five sites covered in the 1989 study.¹⁰⁹ The agents targeted for these tests were randomly *476 selected based on housing ads appearing in the metropolitan area's major Sunday newspaper.¹¹⁰ Only ads for certain types of rental housing were considered (e.g., for non-luxury, non-subsidized units intended for year-round occupancy).¹¹¹ Another requirement was that the ads must have been placed by a real estate agency, rental property management company, or locator service,¹¹² which had the effect of eliminating most FHA-exempt units.¹¹³

<http://newstandardnews.net/content/index.cfm/items/3432> (highlighting the impact of financial predators on underrepresented minority groups, particularly Latino immigrants).

¹⁰⁷ See supra notes 6-9 and accompanying text.

¹⁰⁸ See 2000-I Study, supra note 6, at 2-1 to -3.

¹⁰⁹ Id. at 2-1 to -2. In the twenty sites chosen for the 2000 study, both black and Hispanic testing was done in six (Los Angeles, New York, Chicago, Houston, Denver, and Austin), black-only testing was done in ten (Atlanta, Philadelphia, Detroit, Washington, D.C., New Orleans, Pittsburgh, Dayton-Springfield, Orlando, Macon/Warner/Robins, and Birmingham), and Hispanic-only testing was done in four (San Antonio, Pueblo, San Diego, and Tucson). Id. at 2-2. In each of these twenty metro areas, at least seventy-two paired tests were conducted, with each tester trying to inspect at least three units in the test. Id. at 2-6, 2-13.

¹¹⁰ Id. at 2-3 to -4.

¹¹¹ Id. at 2-4.

¹¹² Id.

¹¹³ See supra note 27 and accompanying text (discussing the FHA's "single-family-house" and "Mrs. Murphy" exemptions). The 2000 study's focus on agency ads guaranteed the exclusion of units covered by the single-family-house exemption, because this exemption is lost when the

For every rental test, a call was made in advance to obtain certain information about the advertised unit, such as its date of availability.¹¹⁴ After their tests, all testers filled out detailed report forms describing their interaction with the landlord or rental agent.

To determine whether a paired test showed differential treatment, four key aspects of the interaction were considered: (1) availability of the advertised unit and other units; (2) ability to inspect the advertised unit and other units; (3) quoted rent and other costs (e.g., security deposits and application fees); and (4) degree of agent encouragement (e.g., asking the tester to fill out an application, saying the tester was qualified, and follow-up contacts).¹¹⁵ Based on an evaluation of these factors, each paired test was classified in one of three categories: white-favored; *477 minority-favored; or equal treatment.¹¹⁶ Finally, an overall statistical analysis was done to calculate rates of black-white and Hispanic-white discrimination for each metropolitan area and the nation as a whole.¹¹⁷

By focusing only on certain parts of the rental process, the HUD testing studies have almost certainly undercounted the amount of discrimination that actually exists in rental housing. For example, these studies fail to capture discrimination that occurs in: (1) owner-occupied units and other small structures that do not employ rental agents, which comprise a significant portion of the rental market;¹¹⁸ (2) the preliminary telephone-contact stage, where discrimination is a frequent phenomenon in today's housing markets;¹¹⁹ (3) the

owner uses “the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or...such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person.” 42 U.S.C. § 3603(b)(1)(A). The ad-selection criteria did not guarantee exclusion of “Mrs. Murphy” units, see § 3603(b)(2), but probably did exclude the vast majority of these units as a practical matter, because most “Mrs. Murphy” landlords do not use agents. See *supra* text accompanying note 104. In any event, as noted above, neither exemption allows landlords to discriminate against blacks or Hispanics under the 1866 Civil Rights Act (42 U.S.C. § 1982). Thus, as the 2000 study put it: “By advertising in a widely available outlet, a housing agent is explicitly inviting inquiries from the general public and is implicitly declaring his or her compliance with the federal fair housing laws.” 2000-I Study, *supra* note 6, at 2-5.

¹¹⁴ 2000-I Study, *supra* note 6, at 2-10. If the advertised unit was no longer available, the caller asked about other units that might be coming available. *Id.*

¹¹⁵ *Id.* at 2-16 to -17, 2-21.

¹¹⁶ *Id.* at 2-14, 2-19 to -20.

¹¹⁷ *Id.* at 3-1 to -9.

¹¹⁸ See *supra* notes 102-04 and accompanying text.

¹¹⁹ See, e.g., Fair Housing of Marin, *Accents Speak Louder Than Words: National Origin Discrimination in Rental Housing 1*, 14 (2005), available at <http://www.fairhousingmarin.com/news/FinalVoiceIDAuditRepjs.pdf> (reporting, based on sixty telephone tests in three northern California counties in 2005-2006, that home-seekers with an identifiable Latino voice encountered discrimination in rental housing sixty-eight percent of the time); National Fair Housing Alliance, *supra* note 85 (reporting a sixty-six percent rate of discrimination against black renters in paired telephone tests in 2005); Fair Housing Council of Suburban Philadelphia, *supra* note 85 (reporting various examples of discrimination against black testers based on telephone inquiries); Fair Housing Center of Greater Boston, *Access Denied:*

pre-rental phase after a prospective tenant submits an application; and (4) post-rental terms and conditions, such as discriminatory services, harassment, and eviction procedures, even though such post-acquisition terms-and-conditions discrimination is frequently cited as a basis for FHA complaints.¹²⁰ In addition, the 2000 study's exclusive use of *478 Sunday newspaper ads to identify testing targets may not reflect how many, if not most, people are now searching for apartments (e.g., by computer);¹²¹ and to the extent that modern rental searches do rely on internet ads and other electronic methods, there is substantial evidence of widespread discrimination in this area.¹²²

Discrimination Against Latinos in the Greater Boston Rental Market (2002), available at <http://www.bostonfairhousing.org/publications.htm> (reporting, based on fifty paired telephone tests in the Boston area in 2002, that Latino home-seekers were discriminated against in fifty-two percent of the tests); Douglas S. Massey & Garvey Lundy, Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings, 36 Urban Affairs Rev. 461 (2001) (finding, based on 474 telephone tests inquiring about rental units in the Philadelphia area in 1999, that housing providers frequently favored white-sounding callers over black-sounding callers); Press Release, U.S. Department of Housing and Urban Development, HUD Charges the Hillebold Family Trust with Violating the Fair Housing Act (Oct. 2006), available at <http://www.hud.gov/offices/ftheo/enforcement/Stover-media-adv.pdf> (reporting that landlord-respondent in HUD-charged case said she would quote higher security deposits to African-American callers whom she could identify over the phone by "something in their speech").

¹²⁰ See *supra* notes 48, 68 (identifying the high percentage of FHA administrative complaint made up of "terms and conditions" complaints, although not distinguishing within this category between pre-rental and post-rental complaints). For recent examples of cases dealing with discrimination against minority tenants, see Press Release, U.S. Department of Justice, Justice Department Settles Allegations of Race Discrimination Against Minneapolis Landlord (Aug. 17, 2006), available at http://www.usdoj.gov/crt/housing/documents/kreisler_pr.pdf (reporting settlement of case alleging, *inter alia*, that defendant-landlords failed to provide necessary maintenance to and sought to evict black tenants in two large apartment complexes); *Housing Rights Center v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320738 (C.D. Cal., Nov. 1, 2005) (awarding attorneys' fees after settlement of case alleging various forms of discrimination against black and Hispanic tenants in defendant's apartment buildings).

¹²¹ See, e.g., Yinger, *supra* note 13, at 185 ("[A]n exclusive focus on advertised units will miss a great deal of discrimination."). For a detailed examination of how housing search differs by race showing that minorities tend to use newspaper ads less than whites, see Harriet Newberger, Sources of Difference in Information Used by Black and White Housing Seekers: An Exploratory Analysis, 32 Urb. Studies 445 (1995).

¹²² See, e.g., Carpusor & Loges, *supra* note 85; see also Mike Hughlett, Craigslist Suit Faces Speech Hurdle, Chi. Trib., Mar. 26, 2006, at B1 (reporting on: (1) suit against a national website that allegedly ran some 100 discriminatory housing ads in a six-month period, including those that read "No Minorities" and "African Americans and Arabians tend to clash with me so that won't work out"; (2) Justice Department's 2003 settlement of a similar suit in New Jersey; and (3) the fact that HUD is "currently investigating about a dozen [such] complaints"); *Fair Housing Council of San Fernando Valley v. Roommate.com*, No. CV 03-09386PA(RZX), 2004 WL 3799488 (C.D. Cal., Sept. 30, 2004), on appeal, No. 04-56916 (9th Cir. 2007) (dismissing FHA complaint alleging that defendant's website carried numerous discriminatory housing ads based on immunity provided by the 2004 Communications Decency Act). For more on the Justice Department's case, see Consent Order, *United States v. Spider Web Enterprises LLC*, No. 03-1509(DMC) (D. N.J. 2003), available at <http://www.usdoj.gov/crt/housing/documents/spydersettle.htm>.

These omissions suggest that the actual rates of rental discrimination against blacks and Hispanics are higher than the 21.6% and 25.7% figures reported in the 2000 study.¹²³ However, because we are concerned here primarily with how such discrimination has changed over time, this realization, while troubling, is a tangential point. In other words, while blacks and Hispanics may well face rental discrimination more frequently than the 2000 study suggests, there is no way to know if these higher rates have gone up or down over the life of the FHA, because prior studies also failed to capture these additional areas of potential discrimination.

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E. Other Information About Rental Discrimination from Prior Studies

Some other useful information has been revealed by the test data produced by HUD's three national studies. One is that, as shown by both the 1989 and 2000 studies, rental discrimination rates vary among metropolitan areas. Thus, for example, rental discrimination against blacks in 2000 was worse in Atlanta than Chicago, and was worse against Hispanics in New York than Denver.¹²⁴

An “obvious factor” underlying rental agents' prejudice, according to Professor John Yinger, a co-author of the 1989 HUD study, “is the agent's own race or ethnicity. Compared to white agents, black agents are less likely to be prejudiced against black customers and Hispanic agents are less likely to be prejudiced against Hispanic customers.”¹²⁵ Based on the 1989 test data, Professor Yinger also found that a neighborhood's minority composition influences

¹²³ See supra text accompanying note 6 (noting the rates of discrimination in the 2000 HUD study).

¹²⁴ 2000-I Study, supra note 6, at iv, 4-2 to -7, 8-6. However, according to two authors of the 2000 study: “Although patterns of differential treatment vary across metropolitan areas, overall levels of treatment favoring whites are generally not significantly different from the national average.” Margery Austin Turner & Stephen L. Ross, *How Racial Discrimination Affects the Search for Housing*, in *The Geography of Opportunity: Race and Housing Choice in Metropolitan America* 93 (Xavier de Souza Briggs, ed., 2005).

¹²⁵ Yinger, supra note 13, at 168; see also *id.* at 182 (noting that a large rental testing study in the Detroit area during the 1980s found that “discrimination in inspections is lower when the agent is black than when the agent is white” (citing Canopy Roychoudhury & Allen C. Goodman, *An Ordered Probit Model for Estimating Racial Discrimination Through Fair Housing Audits*, 2 *J. Hous. Econ.* 358 (1992))); 2000-I Study, supra note 6, at 8-10 (finding, in certain aspects of rental tests, that “Hispanic agents discriminate less against Hispanic renters than do white agents”).

Minority agents, however, often do favor whites. See *id.* 7-8 (finding that Hispanic agents are more likely to discriminate against blacks in many aspects of rental tests than are white or black agents); Jan Ondrich et al., *Do Landlords Discriminate? The Incidence and Causes of Racial Discrimination in Rental Housing Markets*, 8 *J. Hous. Econ.* 185, 197 (1999) (finding, based on an analysis of the data from HUD's 1989 study, that “[i]f the agent is black, there is a greater chance of favorable treatment of the white [tester]” in black-white tests and that “when the agent is Hispanic, the white [tester] is more likely to receive favorable treatment than the black teammate”).

discrimination in the rental market.¹²⁶ Discrimination rates might also rise with the age of the rental agent, although studies focusing on this factor have reached somewhat different results.¹²⁷

*480 Discrimination rates may also be affected by an apartment-seeker's nonracial demographics (e.g., sex, age, family composition). For example, a study based on HUD's 1977 test data showed that "black males encounter more [rental] discrimination than black females,"¹²⁸ but the 2000 HUD study did not confirm this,¹²⁹ and indeed showed that discrimination in providing information about apartment-application fees was higher for female than male Hispanics.¹³⁰ The 1977-based study also found that older testers and those purporting to have children encountered less discrimination,¹³¹ although the latter finding conflicts with a 1980s rental study.¹³² This later study also found that rental "discrimination declines when the [tester's] assigned role includes a college education."¹³³

F. Speculation on the Causes of Rental Discrimination

Commentators on the data produced by HUD's three national testing studies have tried to identify the causes of housing discrimination. In the decade

¹²⁶ Yinger, *supra* note 13, at 174; see also *id.* at 182 (citing a large Detroit rental testing study that found "less discrimination when the advertised unit is in a black or integrated area than when it is in a white area").

¹²⁷ Compare *id.* at 345 n.54 (noting that a study based on the 1977 test results concluded that "both the oldest and youngest [rental] agents discriminated less than the middle-aged agents"), with *id.* at 182 (noting that a Detroit-area rental study in the 1980s concluded that "older agents discriminate more than younger agents"), and Ondrich, *supra* note 125, at 197, 201 (concluding, based on the data from HUD's 1989 study, that "the agent's age is positively related to the difference in treatment" of both blacks and Hispanics). Cf. 2000-I Study, *supra* note 6, at 7-7 to 7-8 (finding generally that "[o]lder agents are consistently more likely than younger agents to discriminate on housing availability and inspections" for both blacks and Hispanics, but that "older agents are less likely than younger agents to discriminate [against Hispanics] about whether an application fee is required").

With respect to the agent's sex, the 2000 study found that female agents were more likely to discriminate on housing inspections in rental tests involving Hispanics, but that this factor was not significant in black/white rental tests. *Id.*

¹²⁸ Yinger, *supra* note 13, at 180 (citing Clifford E. Reid, *An Analysis of Racial Discrimination in Rental Housing Markets* (1987) (unpublished manuscript, on file with Grinnell College)).

¹²⁹ 2000-I Study, *supra* note 6, at 7-8.

¹³⁰ *Id.*

¹³¹ Yinger, *supra* note 13, at 345 n.54. There was also some evidence in HUD's 1989 study that discrimination was less likely in Hispanic rental tests if the testers were older. Ondrich, *supra* note 125, at 201-02.

¹³² Yinger, *supra* note 13, at 182 (citing Roychoudhury & Goodman, *supra* note 125, as finding that discrimination is higher when rental testers purport to have school-aged children); see also Ondrich, *supra* note 125, at 201-02 (finding, based on the 1989 HUD study, that "[t]he presence of children led to greater discrimination" against Hispanics in rental tests).

¹³³ Yinger, *supra* note 13, at 182; see also Ondrich, *supra* note 125, at 201-02 (finding, based on the 1989 HUD study, that rental discrimination against Hispanics falls as family income increases).

after HUD's 1977 study, John Yinger, George Galster, and other social scientists suggested that the causes included, along with housing agents' personal prejudices, economic incentives such as catering to white *481 customers' prejudices.¹³⁴ In his 1995 book reviewing HUD's 1989 data and various other studies on both sales and rental discrimination, Professor Yinger reiterated the view that housing discrimination has multiple causes and concluded that the available evidence supports:

the view that some agents discriminate because of their own personal prejudice against minorities [Also] the evidence strongly supports the view that many . . . agents tend to protect their current and potential business with prejudiced whites. The evidence also suggests that some agents avoid investing time in minority customers who are unlikely to complete a transaction or act on the perceptions that whites do not want to live in integrated areas and that minorities do not want to be pioneers in all-white areas.¹³⁵ These three factors--agents' personal prejudice against minorities; agents' perception that their white customers are prejudiced against minorities; and agents' stereotypes about what minority and white customers want or can afford--were also identified in other analyses of the 1989 study, including one that specifically addressed discrimination by landlords.¹³⁶

Based on this earlier work, the authors of the 2000 HUD study analyzed their data to determine whether sales and rental discrimination could be attributed to these three sources. They determined that, for both sales and rentals, "discrimination varies with several factors likely to be associated with agent prejudice,"¹³⁷ but found the 2000 evidence mixed about the latter two factors.¹³⁸

¹³⁴ See, e.g., George C. Galster, *The Ecology of Racial Discrimination in Housing*, 23 *Urb. Aff. Q.* 84, 87 (1987) (citing, *inter alia*, John Yinger, *Prejudice and Discrimination in the Urban Housing Market*, in *Current Issues in Urban Economics* 430 (P. Mieszkowski & M. Straszheim, eds., 1987) (discussing the various theories that attempt to explain racial discrimination in the housing market)); see also John Yinger, *Measuring Discrimination With Fair Housing Audits: Caught in the Act*, 76 *Am. Econ. Rev.* 881, 881 (1986) ("Housing agents cater to the racial prejudice of current or potential white customers.").

¹³⁵ Yinger, *supra* note 13, at 184.

¹³⁶ See Ondrich, *supra* note 125, at 185 (concluding that for both black and Hispanic testers, "landlords discriminate both out of personal prejudice and in response to the prejudice of present and future white clients" and that "rental housing agents continue to discriminate both because of economic incentives that flow from the prejudice of their white customers and because of their own prejudice"). Cf. Jan Ondrich et al., *Do Real Estate Brokers Choose to Discriminate? Evidence from the 1989 Housing Discrimination Study*, 64 *S. Econ. J.* 880, 890 (1998) (reaching similar conclusions with respect to housing sales); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *Harv. L. Rev.* 817, 841-42 (1991) (identifying similar factors as causing race and national origin discrimination in new car pricing).

¹³⁷ 2000-I Study, *supra* note 6, at 7-6.

Nevertheless, the 2000 study authors concluded that these results *482 confirmed the view of previous commentators that “discrimination can have several different causes.”¹³⁹

G. More on the Causation Issue in Light of the FHA

But why have these “causes”—particularly agent-prejudice—not faded over time or been curbed more by the Nation’s fair housing laws? To put the question another way, why do landlords continue to discriminate—even assuming they are inclined to do so by personal or perceived customer prejudice—by acting on these prejudices rather than complying with the law? As to this issue, we know very little.

Twice in recent years, HUD has conducted national surveys designed to find out what people know about fair housing laws.¹⁴⁰ This question may be somewhat related to the question of why people discriminate,¹⁴¹ but the two questions are not the same, and indeed their relationship is not easy to gauge.¹⁴² Furthermore, the HUD studies dealing with what people know— which asked randomly selected persons to opine on the legality of housing providers’ behavior in ten hypothetical scenarios—did not deal with rental discrimination based on race or national origin,¹⁴³ suggesting that the study designers thought the illegality of this type of discrimination so obvious as not to be worth asking about. After nearly four decades of experience with the FHA, it does seem justified to assume that landlords know race-based rental discrimination is illegal, although, given the ease of entry into this business,¹⁴⁴ some lack of awareness about discrimination laws may well exist among current landlords and their agents.¹⁴⁵ In any *483

¹³⁸ Id.

¹³⁹ Id. at 7-13.

¹⁴⁰ See Abravanel, supra note 11 (reporting on a 2005 survey); Martin D. Abravanel & Mary K. Cunningham, How Much Do We Know? Public Awareness of the Nation’s Fair Housing Laws (2002), available at <http://www.huduser.org/Publications/pdf/hmwk.pdf> (reporting on a 2000-2001 survey).

¹⁴¹ See Abravanel, supra note 11, at 3 n.5 (“[I]t is logical that the more home sellers, landlords, and others involved in housing transactions know about fair housing law, the more they can be expected to comply with it.”).

¹⁴² See infra Part V.

¹⁴³ See Abravanel, supra note 11, at 8-9 (describing the ten scenarios, none of which involved such discrimination). Five scenarios did involve apartments, but the bases of discrimination were, respectively, familial status (#1), disability (#2 and #4), and religion (#3 and #5). Id. at 9. The two scenarios that did involve race and/or national origin dealt with sales situations: one (#6) where home sales were restricted to whites; and the other (#7) where a sales agent limits a client’s search to white neighborhoods. Id.

¹⁴⁴ See supra notes 100-104 and accompanying text.

¹⁴⁵ Cf. Abravanel, supra note 11, at 9, 14 (reporting that, as for the general public’s knowledge in 2005 of two race-based sales discrimination scenarios, only fifty-eight percent correctly answered that one was illegal, while eighty-one percent correctly answered that the other was illegal). It certainly seems possible that some “Mrs. Murphy” -type landlords, see supra note 27 and accompanying text, might mistakenly believe that their exemption from the FHA allows them to

event, the HUD studies on what people know about the FHA offer little help in explaining why rental discrimination based on race and national origin continues at such high levels.

Because we know so little about why landlords discriminate on the basis of race and national origin, we cannot know what policies will be effective in reducing such discrimination. For decades, fair housing enforcement professionals have assumed that heightened compliance with the FHA would eventually be achieved through increased litigation and similar enforcement techniques.¹⁴⁶ In the 1990s, two distinguished law professors wrote separate commentaries on the continuing nature of housing discrimination, but their proposals for remedying this problem (i.e., more private litigation and/or enhanced FHA damage awards) have not caught on.¹⁴⁷ Meanwhile, government officials and private FHA litigants continue to proclaim that their latest lawsuit will “send a strong message” to potential discriminators.¹⁴⁸ *484 But, as described above, rental discrimination rates have remained pretty much the same over time regardless of how many FHA

discriminate against blacks and Hispanics, even though such behavior is barred by the 1866 Civil Rights Act. See supra text accompanying notes 29-31.

¹⁴⁶ See, e.g., *infra* note 148 and accompanying text. This was also Congress's assumption when it strengthened the enforcement mechanisms of the FHA in the 1988 Fair Housing Amendments Act. See supra text accompanying notes 33-35.

¹⁴⁷ In her 1999 article, Professor Engel suggested that “we can increase compliance with the fair housing laws” by recognizing a new type of compensable injury in FHA cases that she called “lost access to community” damages. Engel, *supra* note 55, at 1168, 1198. Two years earlier, Professor Selmi concluded that “government's enforcement efforts have largely failed,” and he advocated “legislative efforts ensuring that [FHA] cases are sufficiently lucrative to attract private counsel” (e.g., by providing treble damage awards, as is done in antitrust cases). Selmi, *supra* note 46, at 1438, 1452-56, 1459. Cf. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 *Geo. L.J.* 489, 540 (2006) (suggesting a bounty system for better enforcement of employment discrimination laws).

¹⁴⁸ See, e.g., Press Release, U.S. Department of Justice, *Justice Department Reaches Settlement with Mississippi Landlords for Housing Discrimination Against African Americans* (May 23, 2002), available at http://www.usdoj.gov/opa/pr/2002/May/02_crt_310.htm (quoting Assistant Attorney General for Civil Rights Ralph F. Boyd, Jr., as saying: “This settlement sends the message that landlords who discriminate on the basis of race will pay a heavy price.”); Press Release, U.S. Department of Justice, *Riverside, California Landlords pay \$390,000 to Settle Justice Department Housing Bias Lawsuit* (Aug. 1, 2002), available at http://www.usdoj.gov/opa/pr/2002/August/02_crt_451.htm (quoting Assistant Attorney General for Civil Rights Ralph F. Boyd, Jr., as saying: “This agreement makes clear that individuals who engage in unlawful housing discrimination, and the people who employ them, will be held accountable for the harm they cause.”); Press Release, U.S. Department of Justice, *Justice Department Sues Three Parsippany Apartment Complexes for Allegedly Discriminating Against African Americans* (June 21, 1999), available at <http://www.usdoj.gov/opa/pr/1999/June/264cr.htm> (quoting Acting Assistant Attorney General for Civil Rights Bill Lann Lee as saying: “Today's actions should warn all housing providers that housing discrimination is no longer immune to detection.”); see also Otto J. Hetzel, *Remediation Techniques for Racial Housing Discrimination - An Introduction to the Symposium*, 51 *Wayne L. Rev.* 1461, 1463 (2005) (“Substantial monetary judgments... provide a significant deterrent effect... in the enforcement of the Fair Housing laws.”).

suits are brought.¹⁴⁹ In other words, there is no evidence that such lawsuits change discriminatory rental practices; in fact, real-life experience suggests that they do not.

We simply do not know what might best encourage landlords to behave in nondiscriminatory ways. Until more is known about what actually motivates landlords to obey or disobey the FHA, the compliance rationale for further FHA litigation against such housing providers is just wishful thinking.¹⁵⁰

The rest of this Article explores lessons from other fields that might provide some insight into these issues. The goal is to examine how laws generally, and fair housing laws in particular, induce their targets to change behavior and what other factors⁴⁸⁵ might affect racial and national origin discrimination in housing rentals.

V. Lessons From Other Fields About Why People (such as Landlords) Obey Laws (such as the Fair Housing Act)

In this Part, I seek to draw lessons from psychology, economics, and other social sciences that might provide clues as to why people in the United States choose to obey or not obey laws. As such, this is an effort by one not trained in these fields--and therefore admittedly rudimentary--to see if other disciplines might offer useful insights into how landlords' behavior could be more effectively influenced to comply with the race-based commands of the Nation's fair housing laws.

¹⁴⁹ See *supra* notes 6-8 and accompanying text; *supra* Part II.B.

¹⁵⁰ There are, of course, other rationales for FHA litigation. One is to compensate the victims of housing discrimination. Cf. Act of Jan. 3, 1992, Pub. L. No. 102-191, 1991 U.S.C.C.A.N. (105 Stat.) 584-85 (noting that “the dual purpose of private enforcement of Title VII” includes “mak[ing] whole the individual victims of unlawful discrimination” as well as advancing the national interest in achieving a discrimination-free workplace). The individual-compensation rationale would remain a legitimate justification, even if the compliance-achieving rationale did not exist. Cf. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 *UCLA L. Rev.* 377, 441-42 (1994) (noting that “the compensation that tort law furnishes to the accident victim” is an important benefit independent of the goal of deterrence). The problem with compensation as a justification for FHA litigation, however, is that it is so haphazard, with a few victims being compensated through litigation (and some, through punitive damage awards, being more than fully compensated), while the vast majority of victims do not litigate and receive nothing. Cf. Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 *Cal. L. Rev.* 2403, 2430 (2000) (concluding, with respect to the overall tort system, “that for some victims the system works fine, but for most it does not”); Schwartz, *supra*, at 378 (noting the primacy of deterrence as a rationale for modern tort rules).

An additional rationale for FHA litigation might be to provide the “stories” that are needed to push public attitudes toward more universal acceptance of the nondiscrimination-in-housing principle. Cf. Sugarman, *supra*, at 2425, 2432 (noting first the value in torts scholarship of the “case study” approach in which a particular case is examined “to understand what our personal injury law is about through the lens of a single problem,” and second the “social benefits that may be achieved by tort law” such as satisfying “our collective need to identify and assign blame for wrongdoing when fellow members of society are hurt by that misconduct”).

A. Law and Deterrence Generally

We begin with some general observations about the law's ability to deter undesirable behavior, a topic that has been written about throughout history,¹⁵¹ but about which surprisingly little is actually known. The foundation for much of our modern thinking is Jeremy Bentham, who wrote over two centuries ago that people, being rational evaluators of the costs and benefits of their contemplated actions and desirous of maximizing pleasure and minimizing pain, will be more effectively deterred from a course of action to the extent that punishment for that behavior is increased.¹⁵²

As reasonable as this notion seems, there is precious little empirical evidence to support it. Indeed, in recent decades, a number of legal scholars have challenged it based on real-life experiences in the criminal and tort law fields. For example, a 1988 article on Tennessee laws raising sanctions for certain crimes concluded--after a detailed statistical analysis comparing that state's subsequent experience to those of nearby states without such increased sanctions--that the Tennessee changes had not been successful in reducing crime rates.¹⁵³ Deterrence in tort law¹⁵⁴ -- whose analogy to fair housing is supported by the Supreme Court's determination to treat FHA violations as torts¹⁵⁵ -- has also been the subject of a number of modern empirical studies. Some of these were reviewed in a 1994 article by Professor Schwartz, who focused particularly on experiences in the auto liability and medical malpractice systems and concluded that tort rules in these areas provided some, though not optimal, deterrence against these kinds of

¹⁵¹ See, e.g., Deuteronomy 19:18-20 (New International Version 1984) (calling for punishment of those who give false witness and predicting that "the rest of the people will hear of this, and be afraid, and never again will such an evil thing be done among you").

¹⁵² See, e.g., Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 2 (Free Press 1970) (1789). Bentham's views thus form the foundation for much of how modern economic theory sees people and their reactions to legal sanctions, a topic that is explored further *infra* Part V.D.1.

¹⁵³ George C. Thomas III & David Edelman, *An Evaluation of Conservative Crime Control Theology*, 63 *Notre Dame L. Rev.* 123, 125-26, 158 (1988). A similar disconnect between stronger sanctions and deterrence has been observed in other areas of criminal behavior. See, e.g., Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 *Am. Crim. L. Rev.* 191, 192, 212 (1998) (discussing a 1969 study about juvenile delinquency whose authors "doubted the efficacy of deterrence models driven by formal sanctions" and noting, with respect to drug crimes, that "[t]he little empirical work on the topic suggests that tough sanctions do little to deter those who already have offended from offending again").

¹⁵⁴ Professor Schwartz has described the basic deterrence theory in tort law as follows: "By imposing the threat of liability on tortious conduct, the law can discourage parties from engaging in that conduct." Schwartz, *supra* note 150, at 381.

¹⁵⁵ See *Meyer v. Holley*, 537 U.S. 280, 285-91 (2003); *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974).

negligently inflicted injuries.¹⁵⁶ Looking at the same data, however, other scholars have been less convinced of the deterrent value of personal injury suits in making for “safer drivers or better doctors.”¹⁵⁷

Overall, these modern efforts to determine the extent to which people are actually deterred by legal sanctions suggest that we should, at the very least, be skeptical of assuming that Bentham's simplistic view of deterrence applies in the fair housing field.¹⁵⁸ Certainly, these studies suggest that the heightened sanctions introduced by the 1988 amendments to the FHA should not have been seen as a panacea for the noncompliance problems that had long plagued this law.

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B. Basic Psychological Insights into Punishment and Deterrence

Psychologists know a good deal about the deterrent effect of punishment. The first lesson here is that punishment is generally a less effective way to change undesirable behavior than is rewarding desirable behavior (“positive reinforcement”).¹⁵⁹ Obviously, legal sanctions, such as monetary judgments in civil cases, focus primarily on the former, so it is sometimes hard for law-trained people to imagine how positive reinforcement for potential defendants could be accomplished. Nevertheless, in the quest for more FHA compliance, it seems worthwhile at least to consider what positive rewards might be possible for law-abiding landlords, even if these rewards are to be generated from outside the legal system.¹⁶⁰

¹⁵⁶ See Schwartz, *supra* note 150. It is worth noting here that, unlike the negligent torts examined by Professor Schwartz, the vast majority of FHA rental claims are based on intentional conduct. See *infra* notes 255-56 and accompanying text.

¹⁵⁷ See, e.g., Sugarman, *supra* note 150, at 2431-32 (noting that “empirical studies of the influence of personal injury law,” though becoming more sophisticated, “are extremely difficult to carry out in a convincing manner” and concluding that “the jury is still out on this issue [of the deterrence value of tort law]”). For an earlier and more detailed explanation of Professor Sugarman's belief that tort law is ineffective as a deterrent and in particular his view that theorists who believe otherwise have no convincing empirical support for their position, see Stephen D. Sugarman, *Doing Away with Tort Law*, 73 Cal. L. Rev. 555, 559-91 (1985).

¹⁵⁸ See also Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 Tex. L. Rev. 1249, 1332 (2003) (concluding, based on an empirical study of 1991-2001 Title VII class action lawsuits showing that such suits caused little change in the defendant companies' value or employment policies, that “we should not rely on [class action] litigation to eliminate or deter discrimination”).

¹⁵⁹ See, e.g., Stephen C. Cooper, *The Carrot and the Stick*, 82-JAN Mich. B. J. 20, 23 (2003) (discussing usefulness of rewards and positive reinforcement as a means of promoting desirable behaviors); Jennifer Marie Sanchez, *Therapeutic Jurisprudence and Due Process in the Juvenile Parole Revocation Process: An Arizona Illustration*, 7 Fla. Coastal L. Rev. 11, 119 (2005) (asserting that the efficacy of positive reinforcement as opposed to punishment is a “basic psychological principle that should be imported into the legal system”).

¹⁶⁰ In the 1990s, HUD entered into “Best Practices” agreements with some industry groups, such as the National Association of Realtors and the Mortgage Bankers Association of America, although these apparently did not include rental groups. See U.S. Dep't of Hous. & Urban Dev.,

As for more traditional enforcement techniques (i.e., punishment), basic insights from psychological studies suggest why the FHA enforcement system has failed to achieve better compliance. Such studies establish that, in general, four factors are relevant in determining whether a punishment will be effective in changing behavior: (1) severity; (2) immediacy; (3) consistency; and (4) offsetting motivational factors.¹⁶¹

With respect to the severity of punishment, it is known that specified undesirable behavior (e.g., a child running into the street) will be stopped more reliably if punishment is introduced suddenly and is strong enough to be very unpleasant. Starting out with mild penalties that are gradually increased work less well; in these circumstances, people tend to keep doing the unwanted behavior until the punishment gets very severe. In fact, high intensity punishment for the first offense is best for completely stopping the behavior. If people receive only moderate punishment, they may stop for a while, but start up again later.

With respect to the other factors, immediacy deals with the concept that punishment works better when it follows the behavior closely in time. As for consistency, punishment works best if it occurs every time the undesirable behavior occurs. The rarer the punishment, the less effective it is.¹⁶² A related principle is that each time a person engages in the specified behavior and suffers no negative consequences, the person becomes more likely to engage in that behavior in the future.¹⁶³ Finally, as to other motivations, studies show that if a behavior has strong reinforcers (e.g., people really like doing it or get some other valuable result from doing it), more punishment is required to get them to stop because the punishment has to override the positive consequences they experience

Building Communities and New Markets for the New Century: 1998 Consolidated Report 72 (1999).

More recently, HUD has occasionally made “Fair Housing Best Practices” awards, see HUD Homes & Communities, Two Tennessee Organizations Receive Fair Housing Best Practices Awards for Innovative Programs, <http://www.hud.gov/local/tn/community/fhsgawards.cfm> (last visited Apr. 15, 2007) (reporting on two such awards in 2002), although again none seem to have been made to any landlords or their trade groups. See Hud User, Ongoing Research, HUD Secretary's Awards, <http://www.huduser.org/research/secaward.html> (last visited Mar. 13, 2007) (describing current HUD awards).

¹⁶¹ See, e.g., W. David Pierce & W. Frank Epling, *Behavior Analysis and Learning* 235-44 (1995). This source is the basis for the discussion in this and the following two paragraphs of the text.

¹⁶² Cf. Meares, *supra* note 153, at 212 (speculating, with respect to drug crimes, that “[o]ne reason tough sanctions may be associated with low levels of specific deterrence is that despite a high lifetime likelihood of arrest, the probability that an individual will be caught committing a particular offense is incredibly low” (citing a study of 254 crack dealers showing that eighty-seven percent of them had been arrested at some time, but that the chance of arrest for each particular offense was less than one percent)). Given the high number of race-based violations of the FHA and the relatively low number of FHA claims challenging such violations, see, respectively, *supra* note 14 and Part II.B, the likelihood that a landlord who engages in such a violation will be sued is even less than the one percent figure cited by Professor Meares for crack dealers.

¹⁶³ See, e.g., Jonathan L. Freedman et al., *Social Psychology* 243 (4th ed. 1981); see also *id.* at 243-45 (discussing modeling theory, which suggests that if some people seem to be “getting away with” specified behavior, others will likely follow suit).

from the behavior; a related insight is that people will stop undesirable behavior more readily if they have some alternative way of getting the reward it provides.

Conceding that today's landlords are not a single organism and that they are not even the same individuals whose behavior the FHA first sought to change four decades ago, these principles still seem relevant in explaining why the FHA's "punishments" for race-based rental discrimination have not worked very well. While these punishments have been severe in a few cases, they have now been around for a long time, and landlords know they are not applied very consistently or with any immediacy. Short of a new and unprecedented national commitment designed to guarantee that FHA violations are punished severely, immediately, and consistently--a highly unlikely prospect--these psychological insights suggest that FHA enforcement will *489 continue to have little effect on changing landlords' behavior. Furthermore, to the extent landlords continue to have reasons for engaging in racial discrimination--reasons that even they may not be entirely conscious of¹⁶⁴--they will also presumably continue to see no obvious alternatives for obtaining these benefits.

C. *Why Do People Obey Laws?*

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Of course, people do not obey laws simply out of a fear that disobedience will result in swift and sure punishment.¹⁶⁵ Again, however, surprisingly little is actually known about what does motivate compliance with the law. One of the few empirical studies on this subject was conducted in Chicago in the late 1980s. It involved hundreds of randomly selected citizens whose attitudes about traffic laws and their enforcement were examined.¹⁶⁶ The study concluded that viewing peoples' behavior as "motivated by self-interest," and therefore seeing compliance in terms of how to manipulate behavior "through the control of punishments and incentives," is inadequate.¹⁶⁷ Rather, people focus on "normative issues," such as "the legitimacy of legal authorities and the morality of the law."¹⁶⁸ In other words,

¹⁶⁴ See supra notes 134-36 and accompanying text (describing economic reasons for landlords to discriminate); infra notes 232-45 and accompanying text (describing how people may discriminate for reasons they are not consciously aware of).

¹⁶⁵ See, e.g., Sugarman, supra note 150, at 2431 (implying that other factors lead to desirable behavior by noting, with respect to tort law, "that for the threat of liability to matter it would have to achieve desirable improvements in safety beyond those which would have occurred anyway").

¹⁶⁶ See Tom R. Tyler, *Why People Obey the Law* 8-9 (1990).

¹⁶⁷ Id. at 165.

¹⁶⁸ Id. at 165-66, 168. "People are more responsive to normative judgment and appeals than is typically recognized by legal authorities. Their responsiveness leads people to evaluate laws... in normative terms, obeying the law if it is legitimate and moral." Id. at 178. Furthermore:

[P]eople's normative attitudes matter, influencing what they think and do. The image of the person resulting from these findings is one of a person whose attitudes and behavior are influenced to an important degree by social values about what is right and proper. This image differs strikingly from that of the self-interest models which dominate current thinking in law, psychology,

people's willingness to obey a law despite countervailing personal costs is a function of their perceptions of the moral value of that particular law and of how the legal system enforces it.

The Chicago study suggests that landlords will be more likely to obey the FHA if it reflects values that are seen as moral in their content and as legitimate in the sense that they are supported by a consensus within the rental community. Historically, housing professionals have not been strong supporters of fair housing laws, but there is some evidence that their views have grown more positive in recent times.¹⁶⁹ In any event, achieving consensus within the landlord community that the FHA's nondiscrimination commands are right and proper would be a major step toward more voluntary compliance.

D. Economics

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1. Classical Economics

The principles of modern market-driven economic analysis (“classical economics”) are based on Bentham's basic view of how people respond to rewards and punishments. The best known writer on the interplay between such economic principles and the law is Judge Richard Posner, whose influential book, *Economic Analysis of Law*,¹⁷⁰ was published five years after the passage of the 1968 FHA and is now in its sixth edition.¹⁷¹ Economics, as explained by Posner, is “the science of rational choice,” and it views people as “rational maximizers” of their “satisfactions.”¹⁷² This means, among other things, that people respond to incentives, so that “if a person's surroundings change in such a way that he could increase his satisfactions by altering his behavior, he will do so.”¹⁷³ Thus, for example, economic analysis “predict[s] that an increase in either the severity of the punishment or the likelihood of its imposition will raise the price of crime and therefore reduce its incidence.”¹⁷⁴

political science, sociology, and organization theory, and which need to be expanded.

Id.

¹⁶⁹ This has at least been true for realtors. See, e.g., Massey & Denton, *supra* note 19, at 208-09 (noting how the National Association of Realtors shifted from a position of hostility to fair housing in the early 1980s to working in support of the 1988 amendments that strengthened the FHA). Whether the same can be said for landlords is less certain, in part because landlords lack a national organization that speaks as clearly for them as the NAR does for realtors.

¹⁷⁰ Richard A. Posner, *Economic Analysis of Law* (6th ed. 2003).

¹⁷¹ Though not an economist himself, Posner is well-schooled in the work of professional economists, and his book relies particularly on the work of Gary S. Becker. See, e.g., *id.* at xx n.6 (citing Gary S. Becker, *Economic Theory* (1971)); *id.* at xxi (identifying Becker and four others as “economists who have most shaped my thinking about economics”); *id.* at 3 (citing Gary S. Becker, *The Economic Approach to Human Behavior* (1976)).

¹⁷² *Id.* at 3.

¹⁷³ *Id.* at 4.

¹⁷⁴ *Id.* at 5.

As noted earlier, this prediction does not always correspond with real world experience,¹⁷⁵ and to read Posner on civil rights is indeed to enter a fantasy world. His basic conclusion is that, because market participants with the least prejudice have a competitive advantage over those who discriminate, economic forces will on their own “tend to minimize discrimination.”¹⁷⁶ Posner recognizes that some people have a “taste for discrimination,” that is, they are willing to pay a price to avoid associating with other races, by, for example, refusing “to sell their house to blacks who are willing to pay higher prices than white purchasers.”¹⁷⁷ This means, according to Posner, that providers with the least prejudice will have lower costs and will therefore ultimately “come to dominate the market.”¹⁷⁸ This basic theory has led Posner and like-minded scholars to conclude that Title VII¹⁷⁹--the federal employment discrimination law passed four years before the FHA--is generally an unnecessary intrusion into free labor markets.¹⁸⁰

With respect to housing, Posner believes that such economic principles explain why “there has been general compliance with laws forbidding people to refuse on racial grounds to sell real estate.”¹⁸¹ No authority is cited to support this rosy view of FHA compliance.¹⁸² The fact that Posner's later editions repeat this

¹⁷⁵ See supra notes 153-57 and accompanying text.

¹⁷⁶ Posner, supra note 170, at 682. Posner recognizes that market forces will not completely end discrimination, because he sees some types of discrimination as “efficient.” Id. An example of efficient discrimination would be using race as a proxy to reduce the cost of obtaining information, as when race “is positively correlated with the possession of undesired characteristics...it is rational for people to use th[is] attribute as a proxy for the underlying characteristic.” Id. at 689; see also infra notes 217-18 and accompanying text (describing the economic rationale for using race-based proxies in obtaining information).

¹⁷⁷ Posner, supra note 170, at 681. The “taste for discrimination” idea seems to have originated with Professor Becker. See Gary S. Becker, *The Economics of Discrimination* 14 (2d ed. 1971) (“If an individual has a ‘taste for discrimination,’ he must act as if he were willing to pay something, either directly or in the form of a reduced income, to be associated with some persons instead of others.”).

¹⁷⁸ Posner, supra note 170, at 682.

¹⁷⁹ 42 U.S.C. §§ 2000e to -2000e-17 (2000).

¹⁸⁰ See, e.g., Richard A. Epstein, *Forbidden Ground: The Case Against Employment Discrimination Laws* (1995); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L. Rev. 1311 (1989). See generally Becker, supra note 177. However, according to a recent commentator, “[t]he argument...that an unimpeded labor market will tend to correct for employment discrimination on its own has been largely discredited.” Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 Yale L.J. 170, 203 n.194 (2006) (citing, inter alia, John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Laws*, 44 Stan. L. Rev. 1583, 1592-96 (1992) (summarizing empirical research on Title VII's impact on black workers)).

¹⁸¹ Posner, supra note 170, at 686-87.

¹⁸² See id. Posner's theory is that, since white sellers won't stay in the neighborhood and thus will have little “associational costs” inhibiting their sales to black purchasers, they have no reason to discriminate. Id. at 687. Posner does not consider the possibility that homeowners' real estate agents may have economic incentives to discriminate, although other economists have explored this matter, see supra notes 134-36 and accompanying text, and Posner has elsewhere conceded

*492 phrase without showing any awareness of HUD's intervening studies showing ongoing high levels of sales discrimination against black home buyers¹⁸³ underscores how detached from reality his analysis is. As for housing rentals, Posner recognizes that the on-going nature of the landlord-tenant relationship means that prejudiced landlords will incur some “associational costs” that make their discrimination “rational,” and he added to later editions this observation: “Most housing-discrimination cases, therefore, involve rentals rather than sales.”¹⁸⁴

As we have seen, Posner is correct that discrimination is more common in rentals than sales,¹⁸⁵ but his belief that the reason for this is the difference in “associational costs” seems misguided. The HUD studies show that rental discrimination by agents, not live-in landlords, has continued virtually unabated; there may be economic incentives for such behavior,¹⁸⁶ but the explanation cannot lie in the agents' “associational costs.”

Furthermore, even as to individual landlords with ongoing tenant contacts, Posner's economic principles would suggest--wrongly, it has turned out--that market forces will drive out prejudiced landlords. These principles hold that landlords who refuse to deal with minorities will thereby narrow their market, resulting in an inability to command rents as high as their less prejudiced competitors. Therefore, bigoted landlords will eventually be driven out of the market or, as rational decision-makers, will sell their apartment buildings to nondiscriminating owners and invest the proceeds where their personal prejudices do not interfere with maximizing financial gain.¹⁸⁷ The trouble with this theory, of course, is that it fails to describe the reality of ongoing rental discrimination, as reflected in HUD's three *493 national studies, even more so than it does with respect to sales discrimination.

As with sales discrimination, some economists have tried to adjust Posner's simplified model by identifying elements of the rental market that provide economic incentives for housing providers to discriminate. For example, a nonbiased landlord might, for purely economic reasons, refuse to rent to

that brokers may engage in what he calls “irrational” discrimination. See *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1532 (7th Cir. 1990) (positing the view that it would be “irrational” for real estate agents to engage in the discriminatory practice of racial steering because this would limit their markets and thus reduce their commissions, but acknowledging that real-life experience suggests that some realtors do steer, i.e., behave irrationally under Posner's theory).

¹⁸³ See supra notes 6-8 and accompanying text.

¹⁸⁴ Posner, supra note 170, at 687.

¹⁸⁵ See supra notes 6-9, 11-12, 48 and accompanying text; supra text accompanying notes 69 and 80.

¹⁸⁶ See supra notes 134-36 and accompanying text.

¹⁸⁷ For an example of a prominent economist's exposition of this theory, see Richard F. Muth, *Historic Perspectives: Institutional Discrimination and Other Causal Theories*, discussed in *The Fair Housing Act After Twenty Years* 33, 41 (Robert G. Schwemm, ed., 1989) (explaining Professor Muth's view that people will not act against their own economic interests for long periods of time).

minorities if he perceives that his white tenants will respond by moving out.¹⁸⁸ But, as we have seen, the HUD studies do not support this as a basis for rental discrimination.¹⁸⁹

2. Reality-Oriented Economists

Some economists have shown an awareness that purely financial incentives do not describe the real world of American race relations.¹⁹⁰ Perhaps the most prominent is Nobel Laureate Kenneth Arrow, who observed as early as 1972 that classical economic theory's approach to racial discrimination was simply to predict "the absence of the phenomenon it was designed to explain."¹⁹¹ A quarter century later, Arrow began an article entitled *What Has Economics to Say About Racial Discrimination?* by noting that discrimination continued to "pervade every aspect" of American society.¹⁹² This article describes the empirical record of continuing discrimination as "decisive" and finds the testing studies showing differential treatment in housing to be "[e]specially striking."¹⁹³ Arrow points out an obvious truth: that "any theory of racial discrimination, including any theory of its economic implications, has to be consistent with these patent facts."¹⁹⁴ He concludes that, because the market-based theory's "tendency "to predict that racial discrimination will be eliminated" has been proven wrong, "we must seek elsewhere for non-market factors influencing economic behavior."¹⁹⁵

Arrow notes that modern economists have recognized for some time that "beliefs and expectations influence economic behavior."¹⁹⁶ He concludes that social interaction and networks could play a role in explaining racial

¹⁸⁸ See *supra* notes 134-36 and accompanying text; see also *infra* notes 217-18 and accompanying text (describing the economic rationale for using race-based proxies in lieu of more expensively obtained information).

¹⁸⁹ See *supra* text accompanying notes 137-38.

¹⁹⁰ A number of law professors have also written about the failure of classical economic theory to explain racial discrimination. See, e.g., Steven A. Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 *J. Legal Educ.* 365 (2004); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *Harv. L. Rev.* 1003 (1995); Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 *Soc. Phil. & Pol'y J.* 22 (1991); see also *infra* note 214, 2.

¹⁹¹ Kenneth J. Arrow, *Some Mathematical Models of Race Discrimination in the Labor Market*, in *Racial Discrimination in Economic Life* 187, 192 (Anthony H. Pascal, ed., 1972).

¹⁹² Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 *J. Econ. Persp.* 91 (1998).

¹⁹³ *Id.* at 93.

¹⁹⁴ *Id.* at 92. Judge Posner agrees that "[a]n important test of a theory is its ability to explain reality," but believes that "[j]udged by the test of explanatory power, economic theory is a significant (although only partial) success." Posner, *supra* note 170, at 17.

¹⁹⁵ Arrow, *supra* note 192, at 93.

¹⁹⁶ *Id.* at 96.

discrimination,¹⁹⁷ and he suggests that “beliefs and preferences may themselves be the product of social interactions unmediated by prices and markets.”¹⁹⁸ Arrow finds race preferences and social networks helpful in explaining employment discrimination--where it is “easy to say how social segregation can give rise to labor market segregation through network referrals”¹⁹⁹--but “perhaps less so for housing.”²⁰⁰

Arrow insists that market-based theories for housing discrimination are even less satisfactory than for employment discrimination because, for sellers of houses and mortgages, “[i]t is hard to think of any market-based explanation for refusal to sell.”²⁰¹ Arrow thus concluded his 1998 paper without identifying a satisfactory theory for housing discrimination, but he did maintain that, in housing as well as employment:

[E]ach transaction is a social event. The transactors bring to it a whole set of social attitudes which would be irrelevant in the market model Direct social transactions unmediated by a market play a role. Even the market manifestations will be altered by these direct social influences.²⁰²

3. Behavioral Economics

In recent decades, a group of “behavioral economists” have sought to address the disconnect between real-world results and those predicted by classical economic theory by learning more about how and why people actually make choices.²⁰³ Two prominent examples are Richard Thaler, a University of Chicago economics professor, and Daniel Kahneman, a Princeton psychology professor and the 2002 Nobel Laureate in economics, both of whom began decades ago to show that people are not the efficient profit-maximizers that the traditional theory

¹⁹⁷ Id. at 97.

¹⁹⁸ Id. at 97.

¹⁹⁹ Id. at 98. Thus, in labor markets, “[d]iscrimination no longer has any cost to the discriminator; indeed, it has social rewards. Profit maximization is overcome by the values inherent in the maintenance of the network or other social interaction.” Id.

²⁰⁰ Id.

²⁰¹ Id. at 95-96.

²⁰² Id. at 98; see also id. at 97 (“[T]he very fact of segregation will reinforce beliefs in racial differences” (citing Warren Whatley & Gavin Wright, *Race, Human Capital, and Labour Markets in American History*, in *Labour Market Evolution* (George Grantham & Mary MacKinnon, eds., 1994))).

²⁰³ See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism”*, 151 U. Pa. L. Rev. 1211, 1214-18 (2003) (summarizing developments in behavioral economics over the past two decades); Matthew Rabin, *Psychology and Economics*, 36 J. Econ. Literature 11 (1998) (surveying behavioral economics literature); see also Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1998) (applying behavioral economics principles to various legal issues).

assumed, but are prone to emotion and error even in their financial decision-making.²⁰⁴ Thaler, Kahneman, and other behaviorists have not only shown that people occasionally make economically “irrational” choices,²⁰⁵ but that these “anomalies” fall into recognizable and predictable patterns, that is, we “err in a systematic direction.”²⁰⁶

One example is that people have a bias in favor of the status quo (i.e., we prefer things to stay relatively the same).²⁰⁷ Another *496 is that people are generally “loss averse” (i.e., we are motivated more by fear of loss than by the prospect of gain).²⁰⁸ A third is that our decision-making is affected by how choices are worded or presented, a concept known as “framing.”²⁰⁹ In these and certain other predictable ways, people have been shown to make choices that do

²⁰⁴ Examples of Thaler's work include Richard H. Thaler, *Quasi-Rational Economics* (1991); Richard H. Thaler, *The Winner's Curse: Paradoxes and Anomalies of Economic Life* (1991); see also Richard H. Thaler & Cass R. Sunstein, *Behavioral Economics, Public Policy, and Paternalism*, 93 *Am. Econ. Rev.* 175, 176 (2003) (reporting on research that “over the past three decades has raised questions about the rationality of the judgments and decisions that individuals make”).

Examples of Kahneman's work include Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 *Am. Econ. Rev.* 1449 (2003); Daniel Kahneman, *A Psychological Perspective on Economics*, 93 *Am. Econ. Rev.* 162 (2003).

Thaler and Kahneman have co-authored numerous papers together. See, e.g., Daniel Kahneman & Richard H. Thaler, *Anomalies: Utility Maximization and Experienced Utility*, 20 *J. Econ. Persp.* 1221 (2006); sources cited *infra* notes 207, 210.

²⁰⁵ Thaler and some of his colleagues now resist using the word “irrational” to describe the behavior they have identified, believing that “it is not useful and is likely to mislead. We do far better to specify how human beings actually behave (and depart from the conventional theory) than to argue whether they are ‘irrational.’” Christine Jolls, Cass R. Sunstein & Richard Thaler, *Theories and Tropes: A Reply to Posner and Kelman*, 50 *Stan. L. Rev.* 1593, 1594 (1998).

²⁰⁶ *Id.* at 1599.

²⁰⁷ See, e.g., Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 *J. Econ. Persp.* 193 (1991); William Samuelson & Richard J. Zeckhauser, *Status Quo in Decision-making*, 1 *J. Risk & Uncertainty* 7 (1988); see also Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Science*, 94 *Cal. L. Rev.* 1119, 1126-32 (2006) (describing studies showing that people value the status quo and speculating about why the appeal of the status quo is so great).

²⁰⁸ See, e.g., Kahneman, Knetsch & Thaler, *supra* note 207; Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 *Econometrica* 263 (1979).

²⁰⁹ See, e.g., *Heuristics and Biases: The Psychology of Intuitive Judgement* (Thomas Gilovich, Dale Griffin & Daniel Kahneman, eds., 2002); *Choices, Values, and Frames* (Daniel Kahneman & Amos Tversky, eds., 2000).

not maximize their financial well-being, but rather reflect a desire for fairness,²¹⁰ an allegiance to social norms,²¹¹ and certain other factors.²¹²

Explaining why people systematically make decisions that do not maximize their self-interest is a question that is currently being addressed by researchers in a variety of fields, including psychology, neuroscience, and evolutionary biology.²¹³ However this question is ultimately resolved, it is clear to these researchers that human decision-making is not driven entirely by economic forces.²¹⁴

²¹⁰ See, e.g., Russel B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Cal. L. Rev. 1051, 1135-36 (2000); Ernest Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q. J. Econ. 817 (1999); Daniel Kahneman, Jack Knetsch & Richard H. Thaler, *Fairness as a Constraint on Profit-Seeking: Entitlements in the Market*, 76 Am. Econ. Rev. 728 (1986); Daniel Kahneman, Jack Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 J. Business 285 (1986).

²¹¹ See, e.g., Korobkin & Ulen, *supra* note 210, at 1127-31.

²¹² Actual decision-making is thus seen by behaviorists as being “bounded” by factors other than self-interest. According to Thaler and his colleagues, three separate “bounds” on the way people actually behave that depart from the standard economic model have been identified: (1) bounded rationality (i.e., the need, given the limits on human cognitive abilities, to rely on what are sometimes inaccurate heuristics (“rules of thumb”)); (2) bounded willpower (i.e., engaging in short-term pleasures, such as smoking and eating rich foods, that people know are bad for them); and (3) bounded self-interest (e.g., caring about strangers or about being treated fairly). Jolls, Sunstein & Thaler, *supra* note 205, at 1476-79.

²¹³ See, e.g., John Cassidy, *Mind Games: What Neuroeconomics Tells Us About Money and the Brain*, *The New Yorker*, Sept. 18, 2006, at 30, (describing how neuroscience has spawned a new field of “neuroeconomics” whose practitioners are addressing this question); *supra* notes 204, 2, 207-09 (citing works by the psychologist Daniel Kahneman); *infra* note 214, 1 (referring to evolutionary biology).

²¹⁴ Judge Posner, on behalf of traditional theory, has criticized the behavioralists' approach as providing merely a psychological critique of economic analysis rather than a theoretical construct that can predict behavior, although he does note that rational-choice economics has become more sophisticated in its understanding of human behavior by incorporating principles from other fields, and he argues that the insights of evolutionary biology may be particularly helpful. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 Stan. L. Rev. 1551, 1558-59, 1561-62, 1567 (1998).

For the behaviorists' response to Posner's critique, see Jolls, Sunstein & Thaler, *supra* note 205, at 1594-1605 (noting, *inter alia* at 1600, that the insights that help explain particular forms of non-profit-maximizing behavior “have come more from psychology than biology”); see also Korobkin & Ulen, *supra* note 210, at 1072-73 (recognizing that, “[t]o be useful for legal policy, behavioral theories need to predict (with reasonable success) the likely responses to legal rules of the particular classes of actors to whom the rules are geared,” and that “[t]here is no doubt that a single, universally applicable theory of behavior is convenient and highly desirable,” but arguing that “if universality is inconsistent with sophistication and realism, legal policy makers are better off foregoing universality and, instead, creating a collection of situation-specific minitheories useful in the analysis of discrete legal problems”).

Basically, the behaviorists maintain, like Professor Arrow, see Arrow, *supra* note 192, at 98 (recognizing that market-based models of racial discrimination “get at only part of the story”), that the classical economic model is not entirely wrong, but rather is misleading when regarded as a perfect, all-encompassing description. Korobkin & Ulen, *supra* note 210, at 1144 (“[W]e do not

*497 The behavioralists' work has generally focused on financial decision-making, but Boston University economist, Glenn C. Loury, applied some of their insights to racial issues in a 2002 book.²¹⁵ Loury's book does not address housing discrimination per se, but it does make a number of generalizations about how decision-makers act in race-based ways, one example being a *498 landlord's decision whether to rent to a particular applicant.²¹⁶ Loury posits that decision-makers, hungry for information, are constantly searching for "clues that can equip them to make wiser choices"²¹⁷ and that classifying other humans is thus a "universal practice . . . that lies at the root of all social-cognitive behavior."²¹⁸ Further, he contends that an "awareness of the racial 'otherness' of blacks is embedded in the social consciousness of the American nation owing to the historical fact of slavery and its aftermath."²¹⁹ Thus, using racial stereotypes to evaluate others is deeply ingrained in everyone in the United States.²²⁰

argue that the edifice of rational choice theory...be ripped down. Rather, we suggest that it be revised." Jolls, Sunstein & Thaler, *supra* note 205, at 1475, 1487, maintain:

Behavioral economics is a form of economics, and our goal is to strengthen the predictive and analytic power of law and economics, not to undermine it.... The project of behavioral law and economics, as we see it, is to take the core insights and successes of economics and build upon them by making more realistic assumptions about human behavior.

Similarly, neuroeconomics, according to one of its leading advocates, Harvard Professor David Laibson:

[I]sn't a wholesale rejection of the traditional methodology.... It is just a recognition that decision-making is not always perfect. People try to do the best they can, but they sometimes make mistakes. The idea that a single mechanism maximizes welfare and always gets things right - that concept is on the rocks. But models that I call "cousins" of the rational-actor model will survive.

Cassidy, *supra* note 213, at 37.

²¹⁵ Glenn C. Loury, *The Anatomy of Racial Inequality* (Harvard Univ. Press, 2002). Like other behaviorists, Loury concludes that "[w]e cannot hope to explain all of human behavior with a cost-benefit calculus," and that "it is futile to look for 'rationality' at the foundation of all social action." *Id.* at 43-44.

²¹⁶ *Id.* at 18.

²¹⁷ *Id.* at 17. The "economic" rationale for this phenomenon has been described as follows:
[W]hen individuals encounter [and have to judge] a stranger,... [g]iven the scarcity of information, it is rational to use cheaper information - proxies - to infer the existence of more expensive, individualized information. The economics literature describes the use of proxies for making decisions of material consequence (such as employment) Shared-trait group membership [such as race] is a proxy people use for granting or withholding esteem to individuals they do not know personally.

McAdams, *supra* note 190, at 1021 (footnote omitted).

²¹⁸ Loury, *supra* note 215, at 18-19; see also *id.* at 57 (describing "the forming of generalizations based on superficial physical traits by decision-making agents" as a "nearly universal practice").

²¹⁹ *Id.* at 5.

²²⁰ Loury notes that such attitudes may be held by blacks themselves ("nothing... prevents a black from succumbing to the same cognitive biases as anyone else," *id.* at 53), and he cites a study showing that Asian and Latino immigrants are particularly averse to living near blacks. *Id.* at 90-91 (discussing Camille Zubrinsky Charles, *Neighborhood Racial-Composition Preferences:*

Furthermore, Loury shows that the use of such stereotypes will eventually have the effect of confirming their truth; for example, a lender with a negative view of blacks may think that, on average, “loans to blacks pose a greater risk of default” and, over time, such thinking will result in this view being confirmed.²²¹

*499 Because Loury views the cognitive behavior he describes as “deep-seated,”²²² he is at pains not to criticize it as racism,²²³ but he is also not optimistic that Americans can “control” the instinct to employ race-based classifications. Loury cites studies showing that people who must regularly distinguish among large numbers of blacks do learn to eschew “stereotype-driven behavior and [use] a more refined set of indices to guide their discrimination,”²²⁴ but he notes that this type of “learning” is less likely to occur when decision-making occurs only sporadically (e.g., in selecting a marriage partner or, as one might assume, in selecting tenants for a year’s lease).²²⁵

For present purposes, one problem with Loury’s book is that he is less concerned with racial discrimination (i.e., how people are treated) than with racial stigma, which “is about who, at the deepest cognitive level, they are understood to be.”²²⁶ He views “the classic racial discrimination problem” as having “declined sharply in the United States in the past half-century,”²²⁷ but this has not led--and he believes, cannot lead--“to a solution for the problem of racial economic

Evidence from a Multiethnic Metropolis, 47 Soc. Probs. 379 (2000)); see also *infra* notes 243-45 and accompanying text (discussing favoritism of dominant groups by disadvantaged groups); Paula D. McClain et al., Racial Distancing in a Southern City: Latin Immigrants’ Views of Black Americans, 68 J. Pol. 571 (2006) (reporting, based on a 500-person survey in Durham, North Carolina, that “Latino immigrants hold negative stereotypical views of blacks and feel that they have more in common with whites than with blacks”).

²²¹ Loury, *supra* note 215, at 23-26. The result of this self-confirming stereotype phenomenon in lending, employment, and other areas is that “[t]he ‘social meaning of race’--that is, the tacit understandings associated with ‘blackness’ in the public’s imagination, especially the negative connotations--biases the social cognitions and distorts the specifications of observing agents, inducing them to make causal misattributions detrimental to blacks.” *Id.* at 52.

The same phenomenon has been noted from the perspective of cultural anthropology. In a 1997 article applying this perspective to the problem of price discrimination against blacks and women in car sales (documented in Ayres, *supra* note 136), Professors Conley and O’Barr conclude that such discrimination is an example of:

the individual salespeople... inevitably fall[ing] back on widely shared beliefs and understandings - in other words, on culture.... [E]ach act of [discrimination] by an auto salesperson simultaneously reflects and reinforces the cultural beliefs on which it is premised.... [I]n the manner of a self-fulfilling prophecy, the salesperson’s conduct [not only acts on a cultural stereotype, but] also adds to the strength of the stereotype.

John M. Conley & William M. O’Barr, *Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 L. & Contemp. Probs. 5, 9 (1997) (footnote omitted).

²²² Loury, *supra* note 215, at 35.

²²³ See *id.* at 35, 45, 53-54.

²²⁴ *Id.* at 50.

²²⁵ *Id.* at 51.

²²⁶ *Id.* at 167.

²²⁷ *Id.* at 95.

inequality.”²²⁸ He notes that focusing on discrimination “yields a search for harmful or malicious action as the treatment, using the law and moral suasion to curtail or modify those actions,”²²⁹ but he argues that “conventional legal action and moral suasion” can only have a limited role in achieving the goal of overall racial justice.²³⁰ For this, he says we need to challenge racial stigma by coming to believe in the “equal *500 humanity” of blacks.²³¹ How to achieve such a change in deep-seated public attitudes is not, however, made clear. Furthermore, as we have seen, Loury's assumption that racial discrimination problems have been largely eliminated is inaccurate, at least in rental housing.

Overall, therefore, Loury's analysis of the problem of race-based stereotypes in decision-making seems more helpful than his suggested solution. And, as we shall see in the next section, his economic understanding of how such stereotyped judgments work finds support in recent work of psychologists and other social scientists.

E. Psychological Studies of Implicit Bias and their Implications for Discrimination Law

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Over the past two decades, studies measuring implicit attitudes (i.e., those we are not consciously aware of) have demonstrated that Americans harbor more negative attitudes toward racial minorities than we realize or are comfortable with.²³² This work by social psychologists shows that implicit bias against blacks and other minorities remains widespread, even as Americans profess to hold ever more benign attitudes on racial issues.²³³

One well-known technique for measuring such bias is the implicit association test (IAT), which assesses how quickly people make connections between one factor (e.g., a black or white face) and a good or bad concept (e.g., words like “wonderful” or “evil”).²³⁴ The Race IAT has been administered to tens of thousands of people in the United States, over eighty percent of whom exhibit

²²⁸ Id. at 101.

²²⁹ Id. at 168.

²³⁰ Id. at 167-68.

²³¹ Id. at 87-90.

²³² See, e.g., Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-esteem, and Stereotypes*, 102 *Psychol. Rev.* 4 (1995). For an overview of the basic findings of such studies with a focus on how they relate to racial and gender discrimination, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 *Cal. L. Rev.* 945 (2006).

²³³ See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 *Cal. L. Rev.* 1, 5 nn.12-13 (2006) (citing reviews of the implicit-bias literature and surveys reporting declines in expressed attitudes of racism).

²³⁴ For a popular description of IAT tests and how they show implicit racial bias, see Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking*, 77-88 (2005). Descriptions of such tests by legal scholars concerned with discrimination include R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 *Cal. L. Rev.* 1169, 1182-83, 1186-89 (2006); Greenwald & Krieger, *supra* note 232, at 952-58; Bagenstos, *supra* note 233, at 6.

an implicit pro-white bias.²³⁵ These results show that our *501 unconscious racial attitudes “may be utterly incompatible with our stated conscious values.”²³⁶ For example, even people who profess strongly egalitarian views often exhibit pro-white implicit biases.²³⁷

It may not seem surprising that people have a built-in tendency to favor those who look like themselves over those who appear different.²³⁸ Indeed, the concept of favoring “ingroup” members over outsiders seems so natural as to suggest it may have evolutionary roots.²³⁹ In any event, the phenomenon has been well documented.²⁴⁰ Furthermore, there are psychological *502 incentives that

²³⁵ Gladwell, *supra* note 234, at 84; see also Bagenstos, *supra* note 233, at 7 (noting that “[w]hite Americans, on average, show strong implicit preference for their own group and relative bias against African Americans” (quoting Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 *Soc. Just. Res.* 143, 147-48 (2004))). “Similar results have been obtained in terms of White Americans’ implicit attitude toward other ethnic groups such as Latinos.” *Id.*

²³⁶ Gladwell, *supra* note 234, at 85.

²³⁷ See Bagenstos, *supra* note 233, at 7. According to the American Psychological Association: Studies demonstrate that even those who firmly maintain and articulate explicit attitudes of racial equality and acceptance nevertheless implicitly harbor a variety of negative feelings about members of other racial and ethnic groups. See generally [Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in *Prejudice, Discrimination and Racism* 61 (John F. Dovidio & Samuel L. Gaertner, eds. 1986)]. Studies focusing specifically on “aversive racism”—that is, racist prejudice harbored by those who would find it aversive to acknowledge their racial biases—has [sic] demonstrated that these subconscious prejudices can trigger discriminatory behavior. See *id.* It can also trigger avoidance: that is, people who harbor prejudice—even implicit prejudice—will often shy away from contact with persons of other races. See, e.g., Pettigrew & Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, [90 *J. Personality & Soc. Psychol.* 751 (2006)].

Brief of Amici Curiae the American Psychological Association and the Washington State Psychological Association in Support of Respondents at *24, *Parents Involved in Community Schools v. Seattle School District No. 1 and Meredith v. Jefferson County Board of Education*, 2006 WL 2927084 (6th Cir. 2007) (No. 05-908, No. 05-915) [hereinafter *Psychological Brief*].

²³⁸ See Bagenstos, *supra* note 233, at 7 (noting that there is “plenty of evidence for the pervasiveness of stereotypic beliefs about outgroups especially when those outgroups are racial minorities” (quoting Dasgupta, *supra* note 235, at 147-48)). For more on how people consistently favor ingroup over outgroup members, see D. G. Pruitt & S. H. Kim, *Social Conflict: Escalation, Stalemate, and Settlement* (2004).

²³⁹ See, e.g., Benedict Carey, *Neurology Study Uncovers a Tendency to Learn Racial Bias*, *N.Y. Times D4* (Aug. 2, 2005) (reporting on a study by Harvard Psychologist Mahzarin Banaji and others finding that “the sight of a stranger of another race can prompt a measurable nervous reaction that probably reflects unconscious biases”).

²⁴⁰ By now almost a hundred studies have documented people’s tendency to automatically associate positive characteristics with their ingroups more easily than outgroups (i.e., ingroup favoritism) as well as their tendency to associate negative characteristics with outgroups more readily than ingroups (i.e., outgroup derogation). Bagenstos, *supra* note 233, at 6 (quoting Dasgupta, *supra* note 235, at 146); see also *Psychological Brief*, *supra* note 237, at 5 (citing numerous studies supporting the fact that “individuals tend to assign value to differences between

sustain prejudiced views toward persons different from ourselves--such as added ingroup cohesiveness, which increases the likelihood that a person's needs will be met.²⁴¹ Further, it is well established that implicit racial bias is reinforced by racial isolation and reduced by interaction with diverse groups.²⁴²

Implicit pro-white bias in the United States is so strong that it often shows up even among blacks; that is, it trumps blacks' tendency to favor their own ingroup members. Thus, for example, about half the blacks who have taken the Race IAT have shown stronger associations with whites than with other blacks.²⁴³ In other words, American blacks "often harbor the same stereotypes about their own group as [whites] harbor about them."²⁴⁴ As the popular writer Malcolm Gladwell (himself half black) wrote after discovering that his own Race IAT scores showed a pro-white bias: "How could we not? We live in North America, where we are surrounded every day by cultural messages linking white with good."²⁴⁵

*503 Because Americans' tendencies to hold prejudiced views toward racial minorities are often based on cultural sources of which we are unaware, it seems inevitable that we will make race-based choices, particularly in spontaneous situations, for reasons we are not fully conscious of.²⁴⁶ This is not to

others and the group to which they belong, developing more favorable attitudes toward 'ingroup' members").

²⁴¹ See, e.g., Henri Tajfel, *Cognitive Aspects of Prejudice*, 4 *J. Soc. Issues* 79, 83-85 (1969).

²⁴² See, e.g., Psychological Brief, *supra* note 237, at 11 (citing studies showing that "interaction among members of different groups can be expected to reduce intergroup prejudice...among both majority and minority group members"); see also Greenwald & Krieger, *supra* note 232, at 964 & n.55 (noting studies showing that personal connections with members of other races reduce racial bias); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 *Cal. L. Rev.* 969, 981 & n.56 (2006) (citing a "significant body of social science evidence support[ing] the conclusion that the presence of population diversity in an environment tends to reduce the level of implicit bias"); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 *J. Personality & Soc. Psychol.* 597 (2006) (finding, in criminal jury deliberations, that whites are more amenable to discussion of racism when in racially diverse versus all-white groups and are more lenient toward black defendants when performing in diverse groups).

²⁴³ Gladwell, *supra* note 234, at 85.

²⁴⁴ Bagenstos, *supra* note 233, at 7, n.17 (citing Dasgupta, *supra* note 235, at 149); see also Blasi & Jost, *supra* note 207, at 1121, 1136 (noting that "numerous studies show that members of disadvantaged groups often prefer members of other, more advantaged groups" and that "[d]ozens of studies have produced evidence of implicit outgroup favoritism among members of disadvantaged groups").

²⁴⁵ Gladwell, *supra* note 234, at 85. Gladwell's instincts here are confirmed by Professor Mahzarin Banaji, a Harvard psychologist and prominent IAT researcher, whom Gladwell quotes as follows: "You don't choose to make positive associations with the dominant group...[b]ut you are required to. All around you, that group is being paired with good things. You open the newspaper and you turn on the television, and you can't escape it." *Id.*; see also Greenwald & Krieger, *supra* note 232, at 959-60 (discussing why implicit bias is so pervasive).

²⁴⁶ See Greenwald & Krieger, *supra* note 232, at 961 (concluding that "implicit attitudinal biases are especially important in influencing nondeliberate or spontaneous discriminatory behaviors"). According to the American Psychological Association:

say that such implicit racial biases will invariably affect a person's conduct, for ““even when stereotypes and prejudices are automatically activated, whether or not they bias behavior depends on how aware people are of the possibility of bias, how motivated they are to correct potential bias, and how much control they have over the specific behavior.””²⁴⁷ Still, to the extent these other factors do not overcome the built-in tendencies generated by implicit bias, these psychological studies suggest that, even among people who do not consider themselves racially prejudiced, biased reactions are not unusual.²⁴⁸

*504 The implications of this body of psychological research for antidiscrimination law are both obvious and discouraging. It suggests that, even if the FHA were successful in eliminating all consciously motivated discrimination, a great deal of race-based discrimination would still occur in rental markets, practiced by landlords who are not even aware they are disfavoring minority applicants and who may see themselves as law-abiding housing providers.²⁴⁹ As

Negative thoughts about other racial groups often contribute unconsciously to prejudiced attitudes. This type of implicit prejudice, in turn, often manifests itself in discriminatory behavior, anxiety when dealing with members of other groups, and in avoidance of substantial interaction with members of other groups.

Psychological Brief, *supra* note 237, at 7 (citing Gaertner & Dovidio, *supra* note 237, and other sources); see also *id.* at 24 (noting that studies have shown that “subconscious prejudices can trigger discriminatory behavior” and that “the ‘dominant response’ to intergroup anxiety is avoidance”); Gladwell, *supra* note 234, at 85-86 (citing evidence that those having “a strongly pro-white pattern of associations” will be affected in the way they “behave in the presence of a black person,” demonstrating subtle, albeit clearly negative, differences in body language and speech patterns that, though unconscious, will tend to throw the personal interaction “hopelessly off course”). But see Banks et al., *supra* note 234, at 1187 (concluding that “there is little evidence that RACE IAT scores correlate with discrimination against African Americans” and that “evidence linking IAT scores and racially discriminatory behavior is similarly sparse”).

²⁴⁷ Bagenstos, *supra* note 233, at 9-10 (quoting Dasgupta, *supra* note 235, at 157); see also Sommers, *supra* note 242 (citing studies finding “that motivations to avoid prejudice lead Whites to a more systematic and thorough processing of information conveyed by or about Black individuals”). But see Greenwald & Krieger, *supra* note 232, at 963 (suggesting “caution in assuming that implicit bias can be reduced merely by increased deliberative effort on a decision”).

²⁴⁸ The phenomenon of “aversive racism,” which leads people who believe in equal opportunity to discriminate against minorities, see *supra* note 237 and accompanying text, “primarily manifests itself ‘when a candidate’s qualifications for the position [are] ambiguous’” (i.e., he is neither clearly qualified nor clearly unqualified). Bagenstos, *supra* note 233, at 9 n.30 (quoting John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 *Psychol. Sci.* 315, 318 (2000)).

²⁴⁹ See, e.g., Bagenstos, *supra* note 233, at 42-43 (“Discrimination actuated by implicit bias is not rooted in a set of objectionable values so much as it is built into the structure of how people’s brains make sense of the avalanche of information they must process.”) (footnote omitted); see also *id.* at 7-8 (“In a culture in which race...and ethnicity are salient,...even the well-intentioned will inexorably categorize along racial...and ethnic lines.”) (quoting Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161, 1217 (1995)); R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 *N.Y.U. L. Rev.* 803, 829 (2004) (“[A]ntidiscrimination statutes designed to curb intentional action, as a practical matter, can have no real impact on

Professor Bagenstos recently observed with respect to employment discrimination law: “There is some question whether existing antidiscrimination law even prohibits actions driven by unconscious bias. But even assuming those actions violate the law as a formal matter, such violations are extremely difficult to prove. Unconscious biases ‘sneak up’ on a decisionmaker.”²⁵⁰

Two decades ago when the implicit-bias studies were relatively new, their implications for antidiscrimination law were highlighted in an influential article by Professor Charles *505 Lawrence.²⁵¹ Noting that psychologists had shown that unconscious bias is a pervasive aspect of American life,²⁵² Professor Lawrence advocated an approach to equal protection jurisprudence based on “a more complete understanding of the nature of human motivation” and a recognition that “a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”²⁵³

But how can this be done?²⁵⁴ The FHA outlaws practices undertaken “because of race”²⁵⁵ and thus generally seeks, like the Equal Protection Clause, to

automatic responses to racial difference that we know can compound racial stigma and the negative meanings associated with race.”).

²⁵⁰ Bagenstos, *supra* note 233, at 8 (footnotes omitted); see also Conley & O’Barr, *supra* note 221, at 10 (concluding, with respect to discrimination by car salespersons that may be based on cultural stereotypes, that “it is hard to see how the law can deter [this] kind of misconduct... [because] the individual salespeople have no discriminatory intent, and no awareness of the results that their conduct is producing”); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgment, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, *Law & Hum. Behav.* (forthcoming 2007) (manuscript at 6, on file with author) (noting research demonstrating “that people can offer compelling explanations for their behavior even when unaware of the factors--such as race--that are actually influential”); *id.* (manuscript at 8) (describing an experiment involving hiring for a stereotypical male job that showed “[t]he majority of participants hired the male applicant regardless of qualifications, yet very few cited gender as influential” and instead used specious justifications to explain their choice); *id.* (manuscript at 21) (reporting on jury-challenge experiments that demonstrate “the causal effects of race on jury selection and the facility with which decision-makers can provide race-neutral justifications for peremptory use”).

²⁵¹ Lawrence, *supra* note 3.

²⁵² *Id.* at 336-39.

²⁵³ *Id.* at 322-24. Professor Lawrence’s legal focus was the Equal Protection Clause, whose protection of racial minorities had been limited by the Supreme Court a decade earlier in *Washington v. Davis*, 426 U.S. 229, 239 (1976), to outlawing only those official acts that had been shown to reflect “a racially discriminatory purpose,” and not also those that had “a racially disproportionate impact.”

²⁵⁴ See Conley & O’Barr, *supra* note 221, at 11. Conley and O’Barr ask, presumably rhetorically, with respect to culturally driven discrimination by car salespersons:

How could the law insist that individual salespeople ignore the cultural information that they use in negotiating? What would they replace it with? Would they be required to develop a conscious awareness of their stereotypes, and then introduce a correction factor? [And what then about] the law of unintended consequences.

Id.

²⁵⁵ See *supra* text accompanying notes 24, 26. Some, but not all, of the FHA’s substantive prohibitions use the term “discriminate” to describe the practices forbidden by the statute. See 42

accomplish its goals only by eliminating discrimination prompted by conscious prejudice.²⁵⁶ Again to quote Professor Bagenstos: “The problem of implicit bias . . . is a prime example . . . of the limits of a fault-based antidiscrimination law. . . . Unconscious bias . . . generates inequalities that our current antidiscrimination law is not well equipped to solve.”²⁵⁷

In the past decade, a number of legal scholars concerned with employment discrimination have responded to Professor Lawrence's challenge by examining how implicit-bias discrimination contributes to workplace inequality and may be countered.²⁵⁸ Their basic conclusion has been to advocate that courts and employers dismantle “structural” impediments that bar minorities and women from achieving job parity, an effort that has been described as the “second generation” of the legal fight against employment discrimination.²⁵⁹ As insightful as much of this work is with respect to the problems posed by implicit bias, its advocacy of a new structural approach to workplace discrimination law faces daunting problems, perhaps the most serious of which is the courts' resistance to expanding Title VII doctrine beyond situations involving intentional discrimination.²⁶⁰

U.S.C. §§ 3604(b), (f)(1)-(2), 3605-06. For an argument that the use of this word in Title VII might be interpreted to prohibit acts prompted by implicit, as well as conscious, bias, see Linda Hamilton Krieger & Susan T. Fiske, Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment, 94 Cal. L. Rev. 997, 1053-55 (2006).

²⁵⁶ Although the disparate impact theory is available in FHA cases, see Schwemm, *supra* note 5, at § 10:4, it has mainly been used to challenge exclusionary land-use decisions and has rarely been applied in rental cases. Among the few rental cases using this theory are: *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 986-88 (4th Cir. 1984); *Langlois v. Abington Housing Authority*, 234 F. Supp.2d 33, 55-70 (D. Mass. 2002); see also *Boyd v. Lefrak Org.*, 509 F.2d 1110, 1114 (2d Cir. 1975) (rejecting this theory in a rental case).

²⁵⁷ Bagenstos, *supra* note 233, at 3, 42-43.

²⁵⁸ For a review of this literature, see *id.* at 4-20.

²⁵⁹ See, e.g., Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458 (2001). Proposals offered by the Title VII structuralists for dealing with implicit-bias discrimination include a greater reliance on the discriminatory impact doctrine, on affirmative action and anti-harassment programs, and on challenging employer processes that facilitate subtle forms of discrimination. See Bagenstos, *supra* note 233, at 15-20; see also Jolls & Sunstein, *supra* note 242, at 979-80, 984-85, 987-88 (describing research suggesting that affirmative action programs can reduce implicit bias and its discriminatory effects in employment).

²⁶⁰ Bagenstos, *supra* note 233, at 3-4, 21-26, 40-41. Thus, Professor Bagenstos's ultimate conclusion with respect to the structuralists' suggested solutions is that they make sense less as a call for new legal doctrine than as a call for new politics of workplace quality. Without such a new politics, it is doubtful that the doctrinal proposals that have emerged from the structural turn will ever have a meaningful effect on employment discrimination. *Id.* at 47; see also Michael Selmi, Subtle Discrimination: A Matter of Perspective Rather Than Intent, 34 Colum. Hum. Rts. L. Rev. 657, 659 (2003) (arguing that recent employment scholarship's concentration “on how discrimination is now more frequently subtle in form rather than overt in nature...has failed to capture much support either in the courts or in our social conscience, where we continue to be fixated on overt claims of discrimination”).

The problems seem even more daunting with respect to rental discrimination. Here, blatant racial discrimination remains widespread, suggesting that even the “first generation” of FHA work has yet to be accomplished.²⁶¹ Even as to subtle forms of discrimination, the structural solutions proposed in the employment context (e.g., greater use of the discriminatory impact theory and of affirmative action programs) are not generally transportable to the rental market, because of its domination by small, local providers who often personally evaluate applicants on an individual basis rather than by applying broad-based objective standards.²⁶² Furthermore, the structural approach in *507 employment has generally focused on how employees are dealt with after they are hired (e.g., harassment issues and the “glass ceiling” phenomenon),²⁶³ whereas the basic discrimination problem in rentals, as revealed by HUD's national studies, is that minorities are not accorded equal treatment at the initial inquiry stage.²⁶⁴

Still, the work of the Title VII structuralists provides at least a foundation for approaching the problems of implicit-bias discrimination. Such discrimination may be even more widespread in rental than in employment markets, due to the former's heavy reliance on decision-makers' spontaneous judgments. Thus, while the specific solutions offered by this Title VII-related work may not be helpful for rental markets, its effort to confront the problems posed by implicit-bias discrimination should inspire housing scholars to do the same.

As we undertake this effort, however, we must recognize the modest role that the FHA may be able to play in dealing with such discrimination. Thus, to paraphrase Professor Bagenstos, the appropriate response to implicit-bias discrimination in rental markets may require less a call for new FHA doctrine than a call for a new politics of housing equality.²⁶⁵

F. Summary

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This foray into social science in search of lessons to help curb race-based rental discrimination has not been encouraging. First, we have seen that the deterrence value of FHA litigation must be questioned, both as a general matter in light of empirical studies in other areas, as well as the fact that FHA enforcement is not ever likely to be conducted in a way that its “punishments” will effectively deter discrimination by landlords. It is also clear that classical economic theory fails to provide significant insights into how racial discrimination in rentals can be curbed, and indeed the more sophisticated behavioralists have identified forces suggesting that landlords' adherence to their discriminatory practices may be even

²⁶¹ See supra notes 6-9 and accompanying text; supra notes 85, 119-20, 122.

²⁶² See supra notes 100-104 and accompanying text (concerning small providers' dominance of the rental market); supra notes 246, 248 (concerning the fact that implicit racial bias generally manifests itself in spontaneous and “close call” situations).

²⁶³ See Bagenstos, supra note 233, at 10-12.

²⁶⁴ See supra notes 6-9 and accompanying text and Part IV.A.

²⁶⁵ See supra note 260.

harder to discourage than simple self-interest theories imply (e.g., because of people's "irrational" attachment to the status quo and their tendency to avoid risk). The psychological studies on implicit bias are particularly daunting for those who advocate stronger FHA enforcement as the key to changing landlords' tendency to discriminate against racial minorities.

Some social science insights, however, do suggest promising approaches, albeit primarily "non-legal" ones. These stem from the fact that people generally--and presumably landlords as well--tend to be more influenced by "positive reinforcements" and also tend to obey laws more out of a sense of their moral value and fairness and a desire to adhere to social norms rather than from the threat of punishment. This suggests that greater attention should be paid to non-legal sources of encouragement for landlords to treat all would-be tenants equally. An example might be an ad campaign emphasizing the patriotic imperative of fair housing by, for example, featuring military personnel of all races returning from service in Iraq asking their fellow citizens to end rental discrimination so that all of their comrades-in-arms can have a fair shot at the American dream.²⁶⁶

Whatever the specific ideas, we may have to recognize, as Professor Wax pointed out some years ago in discussing employment discrimination problems posed by implicit bias, that: "[S]tereotypical patterns of thought will be eroded, if at all, not through measures effected at the level of the individual workplace, but rather through a gradual sea change on multiple cultural fronts."²⁶⁷ Or, to quote from a decade-old article providing an anthropological perspective on a discrimination problem:

This may be an instance in which the law cannot lead but must sit back and wait for progressive developments in the national culture. Such developments would presumably have at least two principal components: a change in consumer awareness and behavior among the . . . minorities who . . . are being taken

²⁶⁶ Those who are skeptical about the capacity of such campaigns to change public attitudes might consider how Americans' attitudes have vastly changed in recent years on subjects such as cigarette smoking in public places and the use of seatbelts. See, e.g., Korobkin & Ulen, *supra* note 210, at 1132 (arguing that "[g]overnmental attempts to disseminate information on the health risks of tobacco consumption might have encouraged the development of a social norm against smoking"). Of course, race-based attitudes are so powerful in the United States that the skepticism might be justified. See, e.g., William Julius Wilson & Richard P. Taub, *There Goes the Neighborhood* 161 (2006) (finding, based on detailed studies of four Chicago neighborhoods, that racial attitudes and hostilities were so powerful that "neighborhoods in urban America, especially in large metropolitan areas like Chicago, are likely to remain divided, racially and culturally").

²⁶⁷ Amy L. Wax, *Discrimination as Accident*, 74 *Ind. L.J.* 1129, 1196 (1999); see also Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 *UCLA L. Rev.* 701, 780 (2006) (arguing that an effective response to subtle workplace discrimination may require "a broader social movement that seeks to explain how pervasive discrimination remains, and how discrimination continues to disadvantage... minorities").

advantage of, and a complementary change among those alleged to be taking advantage. One can imagine a number of agents for change other than the law. The press, for example, might take up the issue, leading to an explosion of public awareness²⁶⁸

Conclusion

Race and national origin discrimination in rental housing remains at alarmingly high levels, virtually unchanged from thirty years ago and apparently unaffected by decades of litigation under the Fair Housing Act. This “disease” has continued unabated even as the 1988 Fair Housing Amendments Act gave the FHA the most powerful enforcement scheme among the nation's civil rights laws and led to thousands more claims and tens of millions of dollars more in monetary relief. The unmistakable conclusion from this record is that the deterrent value of FHA litigation for rental discrimination has been minimal and that something else must be tried if we are serious about providing equal opportunity to the next generation of Americans, a generation that will include an unprecedented number of minority renters.

This is not to advocate an end to FHA litigation. There is evidence that such litigation has had some positive effect in other areas, such as sales discrimination. Even as to rentals, FHA litigation presumably has some value. Without it, discrimination rates might have actually increased. Plus, FHA rental litigation at least transfers some wealth from discriminating landlords to their victims and keeps alive the story of America's shameful record of racial discrimination in housing.²⁶⁹

But if we truly want to end, or even substantially lower, the rates of race-based discrimination in rental housing, we must look beyond FHA litigation. Even a cursory awareness of modern social science principles shows why. The FHA's “punishment” of recalcitrant landlords is sporadic and often weak and delayed, which means that even prejudiced landlords are unlikely to be much deterred by its threat. More importantly, a large amount of rental discrimination against racial minorities may be the result of unconscious bias by landlords who do not see themselves as prejudiced. To change this behavior will require efforts beyond simply more rigorous enforcement of the FHA's intent-based nondiscrimination commands.

One lesson from Title VII scholars who have advocated a “structural” approach to employment bias is that we need to focus on, and learn more about, the “supply side” of rental discrimination. Why not, for example, simply ask

²⁶⁸ Conley & O'Barr, *supra* note 221, at 11.

²⁶⁹ See also Jolls & Sunstein, *supra* note 242, at 980 (noting that “antidiscrimination law...has some effect on the level of implicit bias [because it] naturally tends to increase population diversity in these entities [e.g., housing complexes]”).

landlords why they discriminate?²⁷⁰ The data produced by HUD's national *510 studies could be used to identify landlords who have violated or obeyed the FHA. HUD has allowed use of this data for private enforcement efforts directed against sales discrimination.²⁷¹ I am not here suggesting a similar enforcement effort with respect to landlords (although it is puzzling why HUD has not pursued rental, as well as sales, enforcement, given the fact that rental discrimination is a more widespread problem). My suggestion is simply that we use the HUD data--or some other appropriate targeting information--to try to learn more about why landlords behave as they do and thereby to find better ways of influencing their behavior. For example, it would be interesting to determine how professional rental agents managing large apartment complexes see their antidiscrimination duties compared with "Mom-and-Pop" landlords.

Finally, on a broader scale, fair housing advocates must realize that much of what we seek depends on American society embracing less divisive attitudes in matters of race. This does not mean we should simply wait passively and accept whatever trends in racial attitudes occur. It is important--as a fair housing matter--to constantly oppose negative media portrayals of racial minorities and to offer positive alternative images.²⁷² Similarly, pointing out the benefits of interracial associations must be part of our advocacy, which particularly means supporting integrated communities and opposing residential segregation, both through FHA suits and other means.²⁷³

The fact that this may require a long and difficult struggle some four decades after enactment of the FHA may be frustrating, but it is not a reason to avoid making the effort. The potential *511 rewards for a future generation of American home seekers are too important not to strive for a better "cure" than simply continued FHA litigation.

²⁷⁰ See L. A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 *Stan. L. Rev.* 1615, 1641 (1992) (arguing that effective legal scholarship concerning social change requires not only dealing with social science data, but also "other easy steps such as asking living individuals why they think they acted as they did").

²⁷¹ As a follow-up to its 2000 study, see *supra* note 6 and accompanying text, HUD contracted with the National Fair Housing Alliance to do further testing and take appropriate enforcement action against some of the sales offices whose conduct during the 2000 testing process had revealed discriminatory steering practices. See 2006 Trends, *supra* note 75, at 4 (reporting on the HUD-NFHA contract and some of the resulting complaints filed against real estate offices in Detroit, Atlanta, Chicago, and Westchester County, New York).

²⁷² See, e.g., Remarks of Professor Robert Ellickson in *The Fair Housing Act After Twenty Years*, *supra* note 187, at 61 (suggesting, at a fair housing conference, with respect to the then-popular Bill Cosby television show which featured an upper-middle class black family, that "i[t] is possible that someone like Bill Cosby will do more for fair housing than will all the lawyers in this room put together").

²⁷³ See, e.g., Yinger, *supra* note 13, at 218 (noting the important "role played by public rhetoric about race relations and discrimination...[on] actual outcomes" and suggesting that "national leaders could have a significant positive impact on race relations in this country with a regular series of strong public statements against racial and ethnic prejudice and discrimination").