FORWARD

This marks the fourth issue of The John Marshall Law School Fair & Affordable Housing Commentary. The Commentary publishes articles of current concern to the fair and affordable housing communities. As in past issues, the Commentary publishes new articles and also reprints of older articles that are still relevant but may not be easily accessible to fair housing and affordable housing advocates.

In this issue, we republish an article first published in the Connecticut Law Review in 2006 by Kathleen C. Engel, on the standing of cities to sue for predatory home lending practices. This is a matter of current concern due to the financial crisis now being experienced in this country and around the world. The suggestion made by Professor Engel has been implemented in a lawsuit filed by the City of Baltimore against the Wells Fargo Bank for alleged predatory practices of that institution that the City maintains injured the City directly.

We also publish a new contribution by Illinois attorney Grant Nyhammer on the problems of defaulting tenants and their right to notice. Mr. Nyhammer provides a practical discussion to a problem that affects defaulting tenants in Illinois.

I have provided two contributions. My short article on standing in administrative investigations is not meant to be a scholarly discussion of standing in the courts. Rather it is a reexamination of whether the same standards to determine standing in judicial actions apply to administrative complaints filed with the United States Department of Housing and Urban Development and substantially equivalent state and local human rights agencies. My conclusion is that the 1988 Fair Housing Amendments Act provides an autonomous administrative procedure and that the complex legal determination of standing should not be made by investigators in determining the merits of an administrative complaint.

My article on the Cairo experience first appeared in the Oregon Law Review in 1982. I think it is of more than historical significance. We view the courts and judicial remedies very differently today than we did forty years ago. Perhaps we are more realistic or perhaps we are
just tired. In any event, we are now eight years into the new millennium and many of the problems that faced us in the 1950s, 60s, and 70s are still with us. We need to look at what we did then and consider what remedies are still viable and where we should search for new approaches. What is clear is that despite some impressive gains at the top, those at the bottom of our society are often as bad off as they were a generation ago.

Professor Robert G. Schwemml’s article published in The John Marshall Law Review in 2007 on why landlords still discriminate and what can be done about it raises another call to action. The concerns of the proponents of the Fair Housing Act are still with us. Can the Fair Housing Act provide a remedy? What really is our Nation’s commitment to fair housing?

Each of these articles offer new ways of thinking about old problems. Their messages are timely to the current housing situation.

I would again like to thank Frank Young, a recent John Marshall Law School graduate and attorney, who has organized and formatted every issue of the commentary. Frank’s hard work is much appreciated.
DO CITIES HAVE STANDING? REDRESSING THE EXTERNALITIES OF PREDATORY LENDING

Kathleen C. Engel

Abstract

The Connecticut Law Review originally published this article in its February 2006 edition. Please cite this article as 38 Ct L Rev 355 (Feb 2006). This article contains page numbers from that edition so the Connecticut Law Review may be properly cited, i.e., [355].

Copyright © 2006 Connecticut Law Review
DO CITIES HAVE STANDING? REDRESSING THE EXTERNALITIES OF PREDATORY LENDING

By
Kathleen C. Engel *

[355]

I. INTRODUCTION

Predatory lenders penetrate communities and, like polluters, leave distressed properties and desperate people in their wake. The task of cleaning up falls to cities, yet predatory lending reduces the resources available for this clean up. Declining property values resulting from predatory lending mean reduced tax revenues just as abandoned buildings lead to increased demand for fire and police protection. City budgets are further strained when victims of predatory lending turn to cities for relief programs and protection from abusive lenders. In the language of economics, predatory lending imposes negative externalities on cities.

Lawyers across the country are pursuing claims on behalf of victims of predatory lending. Legislators are passing new laws to extend protection to borrowers, and researchers are exploring the causes of and cures for predatory lending. Yet little attention has been paid to the plight of cities.

In this Article, I analyze whether cities have standing to recover damages for the externalities that predatory lenders impose on them and whether cities have standing as parens patriae to protect the interests of their residents. Following this introduction, in Part II, I describe the impact of predatory lending on municipalities. In Part III, I discuss the law governing municipal standing and in Part IV, I analyze municipal standing to sue predatory lenders. In Part V, my focus turns to the particular claims cities could bring against predatory lenders. I conclude by arguing that broad grants of standing to cities to pursue claims against predatory lenders are necessary to enable cities to protect residents from lender wrongdoing, to recover damages for the injuries predatory lenders impose on cities, and to force abusive lenders to internalize the externalities of their lending practices.2

* Assistant Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. In researching and writing this Article, I received invaluable ideas for and comments on earlier drafts from Frank Alexander, Phyllis Crocker, Jonathan Entin, Kermit Lind, Patricia McCoy, Elizabeth Renuart, Steven Steinglass, and Alan Weinstein. The Article would not have been possible without the outstanding research assistance of Corryn Firis, Christine Flanagan, Jessica Mathewson, Nathaniel McDonald, Thomas Owen, and Brian Weber. Lastly, I am grateful to the Cleveland-Marshall Fund for summer grant support.

1 Throughout this Article, I use the terms “cities” and “municipalities” interchangeably.

2 Suits by aggrieved borrowers provide the most direct approach to holding predatory lenders responsible for their wrongdoing. However, borrowers typically do not have the financial or
II. THE IMPACT OF PREDATORY LENDING ON CITIES

Predatory lenders\(^3\) market their products to people who have little or no experience with mortgage loans and who do not have sufficient skills\(^4\) to untangle the maze of contract terms and engage in meaningful assessments of their options.\(^5\) Oftentimes, the borrowers are people of color\(^6\) and of low [357] and emotional resources to bring lawsuits. Often they are on the verge of losing their homes or, in the worst cases, are among the homeless. Without the threat of litigation, predatory lenders have every incentive to continue to peddle their abusive loans, and the burden of their misdeeds falls on borrowers, neighbors and municipalities.

I use this term to include all the various actors who play roles in originating predatory loans, including mortgage brokers and lenders.

There is no uniform definition of predatory lending. In an earlier article, Professor Patricia McCoy and I defined predatory lending as:

[A] syndrome of abusive loan terms or practices that involve one or more of the following five problems:

1. loans structured to result in seriously disproportionate net harm to borrowers, e.g., loans that contain unaffordable balloon payments,
2. harmful rent seeking, e.g., prepaid credit life insurance,
3. loans involving fraud or deceptive practices,
4. other forms of lack of transparency in loans that are not actionable as fraud, and
5. loans that require borrowers to waive meaningful legal redress.

Most, if not all, predatory loans combine two or more of these problems. Similarly, some abusive terms or practices fall into more than one category. Kathleen C. Engel & Patricia A. McCoy, A Tale of Three Markets: The Law and Economics of Predatory Lending, 80 TEX. L. REV. 1255, 1260-61 (2002).

I use generally Engel & McCoy, supra note 3, at 1280-86 (discussing the marketing of predatory loans to unsophisticated borrowers).

Calem et al., supra note 4, at 603 (noting that even when controlling for risk, subprime loans are disproportionately made to people of color); see also JIM CAMPEN, MASS. CMTY. & BANKING COUNCIL, BORROWING TROUBLE? V: SUBPRIME MORTGAGE LENDING IN GREATER BOSTON, 2000-2003 5 (Jan. 2005), http://www.masscommunityandbanking.org/PDFs/BorrowingTrouble5.pdf (finding that African-Americans and Latinos are more likely than whites at the same income levels to have subprime loans); RICHARD RHEY & ARI POSNER, SOUTHWEST FAIR HOUS. COUNCIL, THE AMERICAN DREAM LOST: FORECLOSURES IN PIMA COUNTY, ARIZONA 12 (Sept. 20, 2004), http://www.swfhc.com/PimaCountyForeclosures.pdf (finding that 34.7% of homes in foreclosure in 2002 in Pima County, Arizona involved Hispanic borrowers although only 11.9% loans in 2002 were made to Hispanic people); Elvin K. Wyly et al., American Home: Predatory Mortgage Capital and Neighborhood Spaces of Race and Class Exploitation in the United States 16-17, http://www.geog.ubc.ca/~ewyly/Research/gab05.pdf (last visited Nov. 4, 2005) (finding that African-Americans are twice as likely as whites to have subprime loans even when controlling for income and debt).
moderate incomes.\textsuperscript{7} The lenders exploit their lack of sophistication and lure them into loans they cannot afford through promises of future refinancing, misrepresentation of loan terms, and various bait and switch tactics.\textsuperscript{8}

Ultimately, those borrowers with predatory loans who cannot meet their repayment obligations lose their homes to foreclosure.\textsuperscript{9} In fact, many researchers are now attributing much of the recent and dramatic rise in foreclosures in the United States\textsuperscript{10} to predatory lending.\textsuperscript{11} Other borrowers, \textsuperscript{358} who are struggling

Although subprime loans are not necessarily abusive, there is compelling evidence that the great bulk of subprime loans contain predatory terms. \textit{See, e.g.}, DAN IMMERGLUCK & GEOFF SMITH, WOODSTOCK INST., RISKY BUSINESS--AN ECONOMETRIC ANALYSIS OF THE RELATIONSHIP BETWEEN SUBPRIME LENDING AND NEIGHBORHOOD FORECLOSURES 3 (Mar. 2004), http://woodstockinst.org/document/riskybusiness.pdf (discussing studies of the incidence of predatory terms in subprime loans).

\textsuperscript{7} For example, a study in the Atlanta area found a 440\% rise in subprime lending in neighborhoods with incomes less than half the median for the metropolitan area between 1994 and 1998. Low-income tracts, experienced a 238\% increase in subprime lending during the same time period. DEBBIE GRUENSTEIN & CHRISTOPHER E. HERBERT, ABT ASSOCS. INC., ANALYZING TRENDS IN SUBPRIME ORIGINATIONS AND FORECLOSURES: A CASE STUDY OF THE ATLANTA METRO AREA 6 (Feb. 2000) (on file with author).

\textsuperscript{8} Engel & McCoy, \textit{supra} note 3, at 1267-68.

\textsuperscript{9} Other borrowers give up necessities such as health insurance, cars, heat, or childcare to avoid losing their homes.


\textsuperscript{11} See, \textit{e.g.}, BOURASSA, \textit{supra} note 10, at 9 (using select indicators to identify loans as predatory and finding that one-third of mortgage foreclosures in Jefferson County, Kentucky contained one or more of the indicators of predatory lending); ROBERT G. QUERCIA ET AL., CTR. FOR CMTY. CAPITALISM, THE IMPACT OF PREDATORY LOAN TERMS ON SUBPRIME FORECLOSURES: THE SPECIAL CASE OF PREPAYMENT PENALTIES AND BALLOON PAYMENTS 27 (Jan. 25, 2005), http://www.kenanflagler.unc.edu/assets/documents/foreclosurepaper.pdf (finding that “extended prepayment penalties increase the odds of foreclosure by an additional 20 percent ... [A] balloon-payment requirement increases the incremental odds of foreclosure by 50 percent”); THE REINVESTMENT FUND, PREDATORY LENDING: AN
to meet their loan obligations, may neglect needed home repairs because their disposable income is going to service their mortgage debt. Nearby homeowners, watching property values decline and fearing further neighborhood decay, move

Appraoch to identify and understand predatory lending 53, http://www.trfund.com/policy/FordForWeb.pdf (last visited Nov. 4, 2005) (finding that in some Philadelphia area neighborhoods, up to twenty-one percent of loan refinancing transactions contained evidence of predatory lending); Richard D. Stock, Ctr. for Bus. & Econ. Research, Predation in the Sub-Prime Lending Market: Montgomery County 7 (Oct. 25, 2001), http://www.mvfairhousing.com/cber/pdf/report.pdf (reviewing a sample of foreclosed loans made by subprime lenders in Montgomery County, Ohio, between 1994 and 2000 and finding that up to seventy-two percent of the loans contained predatory characteristics); Lynne Dearborn, Mortgage Foreclosures and Predatory Lending in St. Clair County, Illinois 1996-2000, 21 (July 2003) (on file with author) (using eight loan features as proxies for predatory lending and concluding that over half of the sampled foreclosure complaints in St. Clair County, Illinois had “characteristics which suggest predatory lending practices were employed”).

Other studies have found that subprime loans represent a disproportionate share of foreclosure filings. Dan Immergluck & Geoff Smith, Measuring the Effect of Subprime Lending on Neighborhood Foreclosures: Evidence from Chicago, 40 Urb. Aff. Rev. 362, 380 (2005) (finding that subprime loans were twenty-eight times more likely than prime loans to result in foreclosure); ACORN, supra note 10 (documenting a connection between subprime lending and foreclosures); Paul Bellamy, Ohio Cnty. Reinvestment Project, The Expanding Role of Subprime Lending in Ohio’s burgeoning Foreclosure Problem 10, http://www.coohio.org/projects/ocrp/SubprimeLendingReport.pdf (last visited Nov. 4, 2005) (same); Gomez et al., supra note 10, at 4 (noting a connection between subprime lending and foreclosures); Gruenstein & Herbert, supra note 7, at III (finding that subprime foreclosures increased by 232% in the Atlanta area between 1996 and 1999 even though overall foreclosure rates were on the decline); Debbie Gruenstein & Christopher E. Herbert, Abt Assocs. Inc., Analyzing Trends in Subprime Originations and Foreclosures: A Case Study of the Boston Metro Area (Sept. 2000), http://www.abtassociates.com/reports/2000804000192_87267.pdf (noting a connection between subprime lending and foreclosures); Immergluck & Smith, supra note 6, at 1 (same); Pa. Dept. of Banking, Losing the American Dream: A Report on Residential Mortgage Foreclosures and Abusive Lending Practices in Pennsylvania 25 (Mar. 15, 2005), http://www.banking.state.pa.us/banking/lib/ banking/robert/statwideforeclosure/statwide_forclosure_report.pdf (noting that “60-75 percent of all sampled loans in foreclosure were originated by subprime lenders”); Quercia et al., supra, at 21 (finding that 20% of subprime loans were originated within three years of origination); Rhey & Posner, supra note 6, at 11 (finding that 67% of loans in foreclosure in 2002 in Pima County, Arizona were subprime); Ken Zimmerman et al., N.J. Inst. for Social Justice, Predatory Lending in New Jersey: The Rising Threat to Low-Income Homeowners (Feb. 2002), http://www.njisj.org/reports/predatory_lending.html (identifying a connection between subprime lending and foreclosures).

See The Housing Council, Residential Foreclosure in Rochester, New York 10 (2003) (on file with author) (finding that “[h]omes sold near foreclosed properties also experience decreases in market price”); see also Dan Immergluck & Geoff Smith, There Goes the Neighborhood: The Effect of Single-Family Mortgage Foreclosures on Property Values 9 (June 2005) (on file with author) (estimating that homes in low- and moderate-income neighborhoods in Chicago experience between a 1.44 and 1.8 percent decline in value per foreclosed home within one-eighth of a mile); Kathe Newman & Elvin K. Wyly, Geographies of Mortgage Market Segmentation: The Case of Essex County,
to more stable communities. Homes that were previously owner-occupied become rental housing or, worse yet, become vacant, both of which lead to greater demands for police and fire protection and city sanitation services. The

New Jersey, 19 HOUSING STUD. 53, 54 (Jan. 2004) (arguing that “[t]he expansion of predatory [lending] practices threatens the long-overdue gains in home ownership in urban and minority communities, as mounting foreclosures sap individual equity and neighbourhood vitality”); Robert A. Simons et al., The Value Impact of New Residential Construction and Neighborhood Disinvestment on Residential Sales Price, 15 J. REAL EST. RESS. 147, 158-59 (1998) (finding that property tax delinquencies in a neighborhood have a negative impact on housing prices in the neighborhood--for each one percent increase in tax delinquencies, there was a corresponding sales price decrease of $778 per home).

See, e.g., THE HOUSING COUNCIL, supra note 12, at 26 (identifying ninety-two homes that had gone through the foreclosure process and finding that half were still vacant a year later). Some vacant property is actually abandoned property. For different reasons, cities and lienholders may elect not to foreclose when borrowers default and move out of their homes. For cities that are strapped for cash, the short-term costs of foreclosing on tax liens may be prohibitive even if the long-term gains exceed the foreclosure costs. For lienholders, the outstanding tax liability when coupled with the possibility of incurring fines for housing code violations or liability in nuisance claims may exceed the value of the property; this is particularly true if the property is unoccupied and in serious disrepair. Geoff Dutton, Lenders Play the Foreclosure Game, Columbus Dispatch, Nov. 7, 2005 (“Lenders typically don't foreclose on a vacant house if they decide it is a bigger liability than asset. The legal responsibility then becomes even murkier, with the owner and the lender both walking away.”). It also may be the case that a non-performing property is a more valuable “book” asset than a foreclosed-upon property. See Janet Kidd Stewart, SEC Faults Household Policies on Bad Loans: Cease-and-desist Order to Lender Part of Settlement, CHI. TRIB., March 20, 2003, at C1, available at LEXIS, News Library, ALLNWS File (discussing how one lender restructured non-performing loans on its books to give the impression that the loans were not in default).

See Gregory D. Squires & Charis E. Kubrin, Privileged Places: Race, Uneven Development and the Geography of Opportunity in Urban America, 42 URB. STUD. 47, 54 (2005) (noting a link between increases in the number of rental units and increased crime rates); Edward M. Gramlich, Governor, Fed. Reserve Bd., Remarks at the Financial Services Roundtable Annual Housing Policy Meeting (May 21, 2004), http://www.federalreserve.gov/boarddocs/speeches/2004/20040521/default.htm (discussing the link between subprime lending and foreclosure rates and stating that “[t]here is . . . evidence of serious neighborhood blight if foreclosure rates, and abandoned properties, proliferate in a given city area”); see also ALAN MALLACH, BRINGING BUILDINGS BACK: TURNING ABANDONED PROPERTIES INTO COMMUNITY ASSETS 7-8 (May 2005) (on file with author) (citing an array of problems that arise in areas with abandoned property, including declining property values and increases in the amount of crime, the number of fires, public health problems, costs to cities to clean up deteriorated neighborhoods, and social isolation among residents); Dan Immergluck & Geoff Smith, The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime 15-16 (Jan. 31, 2005) (unpublished manuscript, on file with author) (finding that increases in neighborhood foreclosure rates result in higher rates of violent crime); WILLIAM C. APGAR & MARK DUDA, COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM 6 (May 11, 2005), http://www.hpfonline.org/press/Aggar-Duda%20Study%C% Final.pdf (stating that “[f]or municipalities, foreclosures trigger significant direct expenditures for increased policing and fire suppression”).

APGAR & DUDA, supra note 14, at 6; see also Olivia Perkins & Scott Haasen, Vacancies Costly to Cleveland: Abandoned Homes Drag Down City, but Few Owners Face Consequences,
residents who remain are either renters or, as homeowners, have reduced incentives to maintain and improve their communities.

Predatory lending causes cities to lose essential property tax revenues. Cities are hampered further as families lose their financial bearings and experience associated disruptions. Although precise calculation of the externalities predatory lenders impose on cities may be impossible, there is no doubt that predatory lending has an impact extending beyond borrowers themselves. The ability of cities to recover these costs associated with predatory lending results in borrowers losing their homes, low-income families also lose important vehicles for wealth accumulation, which ultimately can cause the public to bear more social welfare costs. See, e.g., THOMAS P. BOEHM & ALAN M. SCHLOTTMANN, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIV., HOUSING AND WEALTH ACCUMULATION: INTERGENERATIONAL IMPACTS (Oct. 2001), http://www.jchs.harvard.edu/publications/homeownership/liho01-15.pdf (recognizing intergenerational benefits of parental homeownership).

Recently, several researchers have attempted to quantify the costs to cities of predatory lending and foreclosures. One study found that the cost to municipalities when homes are vacant following foreclosure range between $430 to $34,199 per unit, depending on whether the property was abandoned prior to foreclosure, secured, in need of demolition, or damaged by fire. See APGAR & DUDA, supra note 14, at 10-15; see also FAMILY HOUSING FUND, COST EFFECTIVENESS OF MORTGAGE FORECLOSURE PREVENTION 16-17 (1995) (on file with author) (estimating the costs of foreclosed-upon and abandoned property to the cities of Minneapolis and Saint Paul and finding that the cities lose an average of $2,000 in tax revenues when a home is vacant, spend $25,000 to $40,000 for each home they rehabilitate for sale, and $6,000 to $10,000 for each home they demolish). These costs are greatly reduced and sometimes even absent in neighborhoods where property values are rising. In these neighborhoods, victims of predatory lending may simply transfer their homes to willing buyers.
lending and to obtain equitable relief depends on whether they can establish standing before the courts.

III. STANDING REQUIREMENTS FOR MUNICIPALITIES

Determining whether governmental entities have standing to bring claims against predatory lenders is not a simple calculus. The standing rules applicable to state and federal courts vary and can be outcome determinative. To complicate matters, standing takes on new dimensions when municipalities bring claims in their capacity as _parens patriae_. In this section of the Article, I summarize the various standing rules that apply to municipalities.

A. State v. Federal Standing Rules

Whether state or federal standing requirements govern a lawsuit depends on the forum in which they are litigated. Plaintiffs asserting state law claims in state courts need only comply with state standing rules. Federal standing rules apply to all claims brought in federal courts, even if the claims are brought under state law and even if the state standing requirements are more liberal than

---


23 This is not an issue when state standing requirements parallel the federal standing rules. See Stasha D. McBride, _Civil Procedure: Time to Stand Back: Unnecessary Gate-Keeping to Oklahoma Courts_, 56 OKLA. L. REV. 177, 177 (2003) (criticizing the Oklahoma Supreme Court’s adoption of Article III standing requirements for the state courts); Michael E. Solimine, _Recalibrating Justiciability in Ohio Courts_, 51 CLEV. ST. L. REV. 531, 536, 550 (2004) (arguing that the Ohio Supreme Court should adhere more closely to federal standing doctrine).

those enumerated under Article III. When state courts hear federal claims, they can apply more liberal state law to find standing even if the plaintiffs would fail to meet federal standing requirements. It is less clear whether state courts can apply state standing limits to deny standing to plaintiffs asserting federal claims if a federal court hearing the same claims would find standing.

B. Standing Requirements

To establish standing, municipalities must allege that the defendants' wrongdoing had an adverse impact on their quasi-sovereign or proprietary interests. When they bring claims as quasi-sovereigns, cities are acting to protect and benefit their residents as parens patriae and must satisfy unique criteria that I describe below. When they bring suits for damages in their proprietary capacities, cities are acting to protect their own interests and must meet the traditional Article III and prudential standing requirements.

1. Standing Based on Quasi-Sovereign Interests

The great bulk of cases recognizing quasi-sovereign standing involve states invoking their right to protect their citizens from harm. The extent to which cities have standing as quasi-sovereigns is unsettled and not uniform. Because of this uncertainty and lack of uniformity, I begin this section by first addressing quasi-sovereign standing as it applies to states and then later consider its extension to municipalities.

25 See, e.g., Cantrell v. City of Long Beach, 241 F.3d 674, 677, 683-84 (9th Cir. 2001) (applying federal standing rules to a state law claim brought in federal court); Int'l Primate Prot. League v. Adm'rs Tulane Educ. Fund, 895 F.2d 1056, 1058 (5th Cir. 1990) (applying federal standing requirements to state law claim removed to federal court).
26 Asarco, Inc. v. Kadish, 490 U.S. 605, 617-18 (1989) (recognizing that plaintiffs in state court had standing under state law to pursue resolution of federal law claims even though they would not meet the federal justiciability requirements).
27 At least one court has held that if state standing requirements are more onerous than federal requirements, the state rules yield to the federal requirements. Barcik v. Kubiaczyk, 895 P.2d 765, 772-73 (Or. 1995); see also Paul J. Katz, Comment, Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis, 99 NW. U. L. REV. 1315, 1345 (2005) (taking the position that "[w]hen state courts raise the standing bar on federal law issues, they deny justice to plaintiffs that Congress intended to protect"). The likelihood of this scenario is slim because state standing rules tend to be more generous, rather than more onerous, than their federal counterparts. See generally Hershkoff, supra note 24, at 1835-37 (discussing the vagaries of state standing rules and comparing them to the Article III and prudential requirements).
28 As I discussed previously, state courts may impose more or less onerous standing rules. For purposes of this Article, I focus primarily on federal standing doctrine.
30 Id. at 601-02.
Article III requires states asserting standing as *parens patriae* to allege that the defendants' actions had an impact on a quasi-sovereign interest and that their actions affected a substantial portion of the population.\(^{31}\) In addition, states' interests must be distinct from those of any individuals who suffered injuries at the hands of the defendant.\(^{32}\) Furthermore, there is a prudential rule requiring that, for statutory claims, states must fall within the class of entities that the statutes were designed to protect.\(^{33}\) These requirements for quasi-sovereign standing were developed in the federal courts and have been adopted by the state courts.\(^{34}\)

**a. Quasi-Sovereign Interests**

When governmental entities assert injuries to their quasi-sovereign interests, they are not claiming a direct injury to themselves. Rather, they are suing to protect the interests of their residents.\(^{35}\) The Supreme Court, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, defined quasi-sovereign interests as “a set of interests that the State has in the well-being of its populace,”\(^{36}\) including the health, safety, welfare, and economic and physical well-being of their citizens.\(^{37}\) The Court described this interest as “a judicial construct that does not lend itself to a simple or exact definition. Its nature is perhaps best understood by comparing it to other kinds of interests that a State may pursue and then by examining those interests that have historically been found to fall within this category.”\(^{38}\)

The Court then illustrated the concept through examples.\(^{39}\) Most of the illustrative

---

\(^{31}\) The Article III analysis for quasi-sovereign standing has been described as “the exact inverse” of conventional Article III analysis, which is based on individualized interests. See Karl S. Coplan, *Direct Environmental Standing for Chartered Conservation Corporations*, 12 DUKE ENVTL. L. 


\(^{33}\) Maria Gabriela Bianchini, *The Tobacco Agreement that Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, 87 CAL. L. REV. 703, 730 n.133 (1999); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REVV. 1859, 1871 (2000). It is noteworthy that, although state courts do not necessarily follow federal standing rules for proprietary claims, they have adopted the same standing rules that federal courts apply for claims based on quasi-sovereign standing.

\(^{34}\) E.g., Pennsylvania v. Kleppe, 533 F.2d 668, 671 (D.C. Cir. 1976) (explaining that in some instances a state may sue to “vindicate the interests of its citizens”).

\(^{35}\) *Snapp*, 458 U.S. at 602.

\(^{36}\) Id. at 607.

\(^{37}\) Id. at 601. One commentator has described the imprecise notion of “quasi-sovereign interests” as “one of those loopy concepts that comes along often enough to remind us that appellate courts sometimes lose their moorings and drift off into the ether.” Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REVV. 1847, 1851 (2000).

\(^{38}\) *Snapp*, 458 U.S. at 603. These examples included: North Dakota v. Minnesota, 263 U.S. 365, 371 (1923) (evaluating a change in a state's water drainage system that resulted in flooding a community in the complaining state); Pennsylvania v. West Virginia, 262 U.S. 553, 581 (1923) (dealing with a state's laws that restricted the complaining state's access to natural gas); New York
cases involved claims of one state against another, in which states asserted that other states had taken actions that compromised or intended to take steps that would compromise the health, safety or welfare of their citizens. Quasi-sovereign standing is not, however, limited to interstate claims. For example, in Snapp, the Court found that Puerto Rico had quasi-sovereign standing to sue private entities—apple growers—that allegedly discriminated against the citizens of Puerto Rico.

b. Numerosity

The Snapp Court required that the injury alleged by the state had to affect “a sufficiently substantial segment of its population.” In describing this requirement, the Court did not “draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well.” Applying this principle, the Snapp Court relied on allegations that the defendants' discriminatory hiring practices directly harmed some individuals and also indirectly affected the state's “economic and commercial interests, [and its] interest in securing residents from the harmful effects of discrimination” to find that Puerto Rico had standing. In keeping with Snapp, state and federal courts have taken into account both indirect and direct injuries, and actual and potential victims, when assessing the number of people on whom the defendants' wrongdoing had an impact. Oftentimes, the actual number of individuals

---

40 Snapp, 458 U.S. at 601-06.
41 Id. at 608.
42 Id. at 607.
43 Id.
44 Id. at 609.
45 See, e.g., New York v. 11 Cornwall Co., 695 F.2d 34, 39 (2d Cir. 1982) (taking into account potential future victims to hold that the State of New York had standing to bring a conspiracy claim against property owners whose unlawful actions directly affected at most ten mentally-impaired adults and two of their caretakers); Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 100-01 (D. Mass. 1998) (finding state standing where only fifty employees were direct victims of defendant's age discrimination, but indirect effects extended more broadly); New York v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 812 (N.D.N.Y. 1996) (concluding that the state had standing even though the state alleged discrimination against only eight identifiable African-Americans); New York v. Mid Hudson Med. Group, P.C., 877 F. Supp. 143, 147-48 (S.D.N.Y. 1995) (holding that the State of New York had standing in a discrimination claim against a medical clinic that refused to provide translators for at most ten hearing impaired patients, based on allegations that the defendant's discriminatory actions threatened the seven percent of New Yorkers who were hearing impaired); Support Ministries for Persons with AIDS, Inc., v. Vill. of Waterford, 799 F. Supp. 272, 274-75, 277 (N.D.N.Y. 1992) (recognizing that the state met the Snapp numerosity requirement in a discrimination claim against a village that denied
directly [364] affected has been quite small, but when taking into account those indirectly affected or those potentially affected, the courts have found that the plaintiffs met the Snapp numerosity requirement.⁴⁶

c. Injury to State is Distinct from Injuries to Individuals

The Snapp court also required governmental entities asserting quasi-sovereign standing to “articulate an interest apart from the interests of particular private parties.”⁴⁷ This requirement can be problematic when a defendant's actions caused injury to the health, welfare and safety of a governmental entity and to individual citizens. In a pre-Snapp decision, the Supreme Court considered the wisdom of allowing quasi-sovereign claims when citizens and a state were both injured and found standing when the individual relief would be “wholly inadequate and disproportionate” to the injury to the governmental entity.⁴⁸ In assessing the adequacy of individual relief, courts have taken into account the “resources and stamina” an injured individual would need for “prolonged litigation.”⁴⁹ They have also [365] considered the relief that is available to individual plaintiffs. For example, where a governmental entity could obtain zoning approval for a residence for people with AIDS that would serve up to fifteen people on the grounds that the state had an interest in protecting all people with AIDS); In re Hemingway, 39 B.R. 619, 622 (Bankr. N.D.N.Y. 1983) (reasoning that the State of New York had standing to represent six victims of consumer fraud on the grounds that “such representation is part of a much broader scheme of consumer protection”).

⁴⁶ See, e.g., the cases discussed supra note 45.
⁴⁷ Snapp, 458 U.S. at 607.
⁴⁸ Missouri v. Illinois, 180 U.S. 208, 241 (1901) (holding that “suits brought by individuals [to challenge the city of Chicago's dumping of sewage into the Mississippi River], each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies”); see also Hawaii v. Standard Oil Co., 405 U.S. 251, 261-64 (1947) (rejecting parens patriae claim for damage to economy arising from antitrust violations where individuals could seek individual relief for the same violations, creating the possibility of duplicative recovery); Georgia v. Pa. R.R. Co., 324 U.S. 439, 446-52 (1945) (allowing parens patriae standing where private entities and the state economy were injured when shippers charged discriminatory freight rates).

Although the availability of individual relief does not necessarily preclude state actions, some courts have barred individual lawsuits and class action litigation on claims that parallel existing state actions based on quasi-sovereign interests. Ratliff, supra note 38, at 1849 n.8.
⁴⁹ Mid Hudson Med. Group, 877 F. Supp. at 148-49; see also Maryland v. Louisiana, 451 U.S. 725, 737-39 (1981) (allowing parens patriae standing where a state imposed an unlawful tax on individual consumers that was of such small amounts that the consumers would not have an incentive to bring individual claims to contest the tax); Puerto Rico ex rel. Quinos v. Bramkamp, 654 F.2d 212, 217 (2d Cir. 1981) (granting standing, in part, because “[t]here is no assurance that the individual workers could bear the cost of a lawsuit that would achieve complete relief”); Peter & John's Pump House, 914 F. Supp. at 813 (recognizing that it is speculative whether private victims of discrimination would “pursue costly litigation”); Support Ministries, 799 F. Supp. at 278-79 (holding that where private plaintiffs might elect to abandon the litigation, “the vindication of the rights of New Yorkers to be free from discrimination against the disabled cannot be made dependant on the actions and potentially limited resources of private parties”).
equitable relief that would not be available in claims by individuals, the courts have found the individual relief inadequate.50

d. Statutory Claims

When a governmental entity brings a parens patriae claim pursuant to a statute, it must also satisfy the court that the relevant legislative body intended the statute to cover the particular entity.51 The analysis is effectively the “zone of interests” test that applies to direct injury claims.52 Where the relevant statute is silent regarding claims by public entities, courts glean the legislative intent from the language of the statute and the legislative history.53

e. Municipalities as Quasi-Sovereigns

The federal courts have unequivocally held that political subdivisions cannot bring claims as parens patriae because their power is derivative, not

---

50 See, e.g., Pennsylvania v. Porter, 659 F.2d 306, 315-16 (3d Cir. 1981) (considering the unavailability of injunctive relief in individual lawsuits when granting parens patriae standing to the state); Bull HN Info. Sys., 16 F. Supp. 2d at 101-02 (noting the unavailability of injunctive relief in individual lawsuits when granting parens patriae standing to the state); see also Bramkamp, 654 F.2d at 217 (finding standing on grounds that even if victims of discrimination brought a class action, there was “no assurance that ... relief against widespread and future discrimination would be actively pursued”); Peter & John's Pump House, 914 F. Supp. at 813 (granting state standing based on reasoning that private plaintiffs might elect money damages over injunctive relief--remedies that would not prevent future discrimination). But see New York v. Holiday Inns, Inc., 656 F. Supp. 675, 677-78 (W.D.N.Y. 1984) (denying state standing on the grounds that individuals could obtain complete relief for them-selves and injunctive relief for future victims of unlawful employment discrimination).


52 For a discussion of the “zone of interests” test, see infra the text accompanying notes 84-87.

53 See, e.g., Connecticut v. Physicians Health Servs. of Conn., 287 F.3d 110, 120-21 (2d Cir. 2002) (denying parens patriae standing in an ERISA claim where courts have “consistently” ruled that “non-enumerated parties lack statutory standing” under the operative provision in ERISA); EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 197-98 (E.D.N.Y. 2003) (finding that states could bring suits as parens patriae under Title VII regardless of statutory ambiguity as to whether states' authority to sue under the statute was based on proprietary or quasi-sovereign interests); Louisiana v. Borden, Inc., Civ. A. No. 94-3640, 1995 WL 59548, at *3 (E.D. La. Feb. 10, 1995) (holding that although the statute did not grant state standing, the state could bring the action as parens patriae in an antitrust suit); Mid Hudson Med. Group, 877 F. Supp. at 146, 149 (holding that the state could bring claims as parens patriae under the Americans with Disabilities Act and the Rehabilitation Act even though neither act explicitly provided standing to attorneys general to bring suit); Sclater v. Sclater, 40 B.R. 594, 596-97 (Bankr. E.D. Mich. 1984) (allowing the attorney general to pursue a claim as parens patriae under state consumer protection law even though the statute was silent on the question of the attorney general's authority to bring suit). But see Lubin v. Farmers Group, 157 S.W.3d 113, 122 (Tex. App. 2004) (refusing to grant parens patriae standing under the state insurance code in the absence of clear legislative intent to grant such standing).
Thus, cities bringing claims as quasi-sovereigns in federal court or whose claims as quasi-sovereigns are removed to federal court are certain to face dismissal. The law governing parens patriae claims brought in state court is less certain. Only a handful of jurisdictions have reported decisions addressing municipal standing as quasi-sovereigns, leaving most cities in the dark about their ability to bring such claims.

Whether a municipality has standing as a quasi-sovereign turns on its jurisdiction's statutory and constitutional home rule provisions. The parameters of home rule provisions are not uniform across the states. Some cities have broad grants of home rule authority and are often deemed to have the powers of a sovereign, subject only to limitations imposed by their state legislatures and constitutions. This expansive authority arguably enables cities to bring lawsuits as parens patriae. An Illinois court has gone so far as to call home rule units “quasi-sovereign entities.”

In a typical case, a state court held that New York City's charter allowed the city to assert parens patriae standing based on its interest in protecting the “health, welfare and safety of her residents” to challenge a decision of the state Commissioner of Social Services. The New York City charter states:

---

54 Cnty. Commc'n Co. v. City of Boulder, 455 U.S. 40, 53-54 (1982) (noting that our system of government “has no place for sovereign cities”); City of Sausalito v. O'Neill, 386 F.3d 1186, 1197 (9th Cir. 2004) (holding that political subdivisions are precluded from suing as parens patriae); Colo. River Indian Tribes v. Town of Parker, 776 F.2d 846, 848 (9th Cir. 1985) (same); United States v. City of Pittsburg, Cal., 661 F.2d 783, 786-87 (9th Cir. 1981) (same); In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 131 (9th Cir. 1973) (same); Prince George's County v. Levi, 79 F.R.D 1, 3-4 (D. Md. 1977) (same). On the same basis, federal courts have ruled that cities may not invoke sovereign immunity under the Eleventh Amendment. Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (denying Eleventh Amendment immunity to a county); see also Melvyn R. Durchslag, Should Political Subdivisions be Accorded Eleventh Amendment Immunity?, 43 DEPAUL L. REV. 577, 580-82 (1994) (discussing criticisms of Lincoln County and its progeny).

One commentator has noted that cities are often reluctant to classify their interests as quasi-sovereign even when that appears to be the basis for standing. Laura L. Gavioli, Who Should Pay: Obstacles to Cities in Using Affirmative Litigation as a Source of Revenue, 78 TUL. L. REV. 941, 959-60 (2004). This reluctance may arise from concern that the federal courts will only grant standing when cities' claims are proprietary.


56 See Barron, supra note 55, at 2260 n.7, 2290.


Except as otherwise provided by law, the corporation counsel shall have the right to institute actions in law or equity and any proceedings provided by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof.  

[367] Other courts have reached the same conclusion.  
In contrast, more restrictive views of home rule authority typically conclude that home rule “does not confer the sovereign attributes and powers of the state on municipalities. It merely permits them to exercise their local powers free of state control.”  
In these jurisdictions, courts may well reject municipal claims for quasi-sovereign standing.  
There are still a few states that continue to abide by some variant of Dillon's rule, and thus retain extensive power over municipal governments. The likelihood of courts granting cities standing as parens patriae in these jurisdictions approaches zero. It is worth noting, however, that many states— even some of those that severely restrict the power of cities—do grant municipalities what could be considered quasi-sovereign standing to pursue specific types of claims. The most common example is public nuisance.  
The outcomes in city lawsuits against gun manufacturers reflect the impact that vagaries in home rule authority can have on city efforts to establish standing. The gun industry and some states have taken the position that city lawsuits against

60 Id. at 712.  
61 See, e.g., City of Wilmington v. Lord, 340 A.2d 182, 183 (Del. Super. Ct. 1975) (applying Wilmington's home rule charter to hold that the city was “to be considered the sovereign for the purposes of municipal functions”); City of Urbana v. Houser, 367 N.E.2d 692, 694 (Ill. 1977) (“Home rule units ... have the same powers as the sovereign except where such powers are limited by the General Assembly.”). For a discussion of state home rule provisions, see generally 2 SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW § 21.01 (2001); see also Chad A. Readler, Local Government Anti-Discrimination Laws: Do They Make a Difference?, 31 U. MICH. J.L. REFORM 777, 790-96 (1998) (surveying the intersection between grants of home rule authority and municipal power to pass anti-discrimination ordinances). Those jurisdictions that consider municipalities imperium in imperio (a state within a state) are most likely to treat municipalities as sovereigns. Ferguson, supra note 57, at 268-82 (discussing approaches to home rule and describing municipalities with imperium in imperio home rule as “sovereign powers within the borders of the sovereign state”).  
63 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911) (presenting as a canon of statutory construction a rule that confers on municipalities only those powers that are clearly stated in a charter or statute and resolves any doubt concerning the existence of a municipality's power against the municipal corporation).  
64 For a further discussion of municipalities' standing to bring public nuisance claims, see infra text accompanying notes 153-58.
gun companies are unlawful attempts to circumvent state authority. This argument has particular force in states that have retained exclusive power to regulate firearms. Not surprisingly, it is cities with broad home rule authority that have been able to survive motions to dismiss for lack of standing.

Although there is no uniform test for determining whether a court will recognize cities as quasi-sovereigns, there are several factors that are predictive. First, the federal courts have made it clear that they will not grant cities quasi-sovereign standing. This is true even if the relevant state court would allow cities to pursue the same claims under state standing rules. Thus, cities would fare best by bringing parens patriae claims in state court and excluding claims or defendants that could subject them to removal to federal court. Cities desiring to bring claims as quasi-sovereigns in state courts clearly have the greatest chance of establishing standing if they have broad home rule powers; they have the least likelihood of success in jurisdictions that continue to adhere to Dillon's rule.

65 See, e.g., Morial v. Smith & Wesson Corp., 785 So. 2d 1, 16 (La. 2001) (construing a Louisiana statute as being "aimed at suits, such as the one filed by the city in the instant case, that attempt to indirectly regulate the firearms industry at the local level"); see also Gavioli, supra note 54, at 951 (noting that “[i]n almost every safe gun case so far, the gun industry has argued that city litigation is an attempt to circumvent the legislative process to achieve reform”); Bryce Jensen, From Tobacco to Health Care and Beyond--A Critique of Lawsuits Targeting Unpopular Industries, 86 CORNELL L. REV. 1334, 1377-84 (2001) (discussing public policy arguments against municipalities using litigation to achieve social change).


Some states, in an effort to stave off real or threatened city litigation against gun manufacturers, have passed legislation explicitly prohibiting municipalities from suing gun manufacturers. See, e.g., Sturm, Ruger & Co. v. City of Atlanta, 560 S.E.2d 525, 527-30 (Ga. Ct. App. 2002) (holding that a state law passed five days after Atlanta filed suit against gun manufacturers, which reserved to the state the right to sue gun manufacturers, preempted the city's claim); Morial, 785 So. 2d at 15-19 (dismissing a city suit against gun manufacturers based on a state law enacted after the lawsuit was filed that prohibited municipalities from bringing claims against gun manufacturers).

67 Tom Perrotta, City Gun Suit Kept Alive Despite Failure of Similar State Action, N.Y.L.J., Apr. 13, 2004, at 1, available at LEXIS, News Library, ALLNWS File (quoting trial court's decision allowing city claim against gun manufacturers to proceed: “[i]n light of the respect for local autonomy embodied in New York law, precluding the city from bringing a suit aimed at redressing the problem of gun-related violence would interfere with its authority to promote the safety and well-being of its inhabitants”).

68 See supra note 54 and accompanying text.

69 See supra note 25 and accompanying text.
In those jurisdictions that do permit municipalities to pursue claims as *parens patriae*, cities must still establish that they have standing, using the requirements that were developed in the federal courts and have been adopted by the states. Specifically, they must: (1) demonstrate that they have a quasi-sovereign interest; (2) meet the numerosity test; (3) allege a distinct injury; and (4) if the claim is statutory, prove they fall within the zone of interests that the statute was designed to protect.

2. Standing Based on Proprietary Interests

When municipalities bring claims in federal court to recover for injuries they experienced directly, they must meet Article III standing minima and oftentimes the prudential limitations as well. For claims in state court, the particular state's standing law may impose different requirements. In addition, as I discussed previously, some states have restricted the ability of municipalities to bring lawsuits challenging certain activities. These restrictions apply to claims brought to protect quasi-sovereign and proprietary interests.

a. Article III Requirements

Article III prohibits the rendering of advisory opinions and requires proof of injury, causation, and redressability. To establish the injury prong, a plaintiff must demonstrate an actual or immediate risk of direct and real injury as a result of the defendant's wrongdoing. Where a statute expressly or by clear implication creates legal rights, plaintiffs satisfy the Article III injury requirement by alleging that the defendant's violation of their statutory rights caused them injury. The causation and redressability requirements, which are often considered together, require that plaintiffs establish that their injuries are “fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed.

---

70 See supra note 34.
71 See supra Part III.B.
72 See supra Part III.A.
73 Id.
74 See supra note 66.
75 Plaintiffs satisfy the prohibition on advisory opinions by demonstrating that there is a genuine controversy between adverse parties and by showing that if they prevail, there will be a substantial likelihood that the court's decision will bring about some change or effect. See CHEMERINSKY, supra note 24, at 50-51. I do not discuss the prohibition against advisory opinions because this limitation is not relevant to this Article.
76 Id. at 59-60.
77 Id. at 61; see also Paterson v. Texas, 308 F.3d 448, 449-51 (5th Cir. 2002) (holding that Texas did not have standing to intervene in a class action to challenge a settlement provision permitting unclaimed funds to revert to the defendant where the state had no interest in the settlement funds).
78 CHEMERINSKY, supra note 24, at 70.
by the requested relief.”

To meet these requirements, plaintiffs' relief cannot be speculative, nor can causation be indirect.

b. Prudential Requirements

The prudential standing limitations require that plaintiffs assert their own rights and not the rights of others. In addition, they cannot seek redress for harms that are “‘generalized grievance[s]’ shared in [a] substantially equal measure by all or a large class of citizens,” the resolution of which should lie in the hands of the legislative branch. Lastly, the “zone of interests” requirement applies when plaintiffs seek relief pursuant to a statute, and it requires that plaintiffs show that they fall within the group the statute was intended to benefit. Where the language of the statute makes clear that the legislature intended to grant or deny standing to governmental bodies, the zone of interests test inquiry is simple. However, statutory language that fails to specify whether public entities can bring claims creates uncertainty that courts resolve based on review of the legislative history and statutory construction.

Plaintiffs do not have to meet the prudential standing requirements if Congress has granted an implied or express right of action to people in the plaintiffs' class. Thus, depending on the statutory language, people “may have

79 Id. at 74 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).
80 See id. at 75 (citing Linda R.S. v. Richard D., 410 U.S. 614 (1973)).
81 Id. at 77 (citing Allen, 468 U.S. at 757).
82 Id. at 83. The Supreme Court has recognized exceptions to this limitation if: (1) the aggrieved parties are unlikely to be able to assert their own rights, Secretary of State of Maryland v. J.H. Munson Co., 467 U.S. 947, 956 (1984); (2) there is a close relationship between the aggrieved party and the plaintiff, Singleton v. Wulff, 428 U.S. 106, 117-18 (1976); or (3) the plaintiffs are challenging a statute that does not infringe upon their own First Amendment rights but that does violate the rights of others not before the court, Village of Schaumburg v. Citizens for a Better Environment, 461 U.S. 620, 634 (1980). See generally CHEMERINSKY, supra note 24, at 83-87.
83 Warth v. Seldin, 422 U.S. 490, 499 (1975); see also Asarco Inc. v. Kadish, 490 U.S. 605, 616 (1989) (stating that claims that a state statute permitting the leasing of land held in trust for the schools undermined the educational quality in the state was an uncognizable generalized grievance).
84 CHEMERINSKY, supra note 24, at 60. The scope and applicability of this requirement is the subject of considerable debate. Id. at 100-02 (discussing cases in which the Supreme Court has inconsistently applied the zone of interests test).
85 See, e.g., Pennsylvania v. Kleppe, 533 F.2d 668, 671-72 (D.C. Cir. 1976) (denying standing to Pennsylvania because the injuries alleged were not within the zone of interests protected by the Small Business Act). In Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153-54 (1970), the Supreme Court made clear that the zone of interests test should be applied expansively. See also Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 399-400 (1987) (stating that “[t]he test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff”).
86 Warth, 442 U.S. at 500-01; see also Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208-09 (1972) (deferring standing based on a finding that Congress intended to define standing broadly for parties aggrieved under the Fair Housing Act); Hardin v. Ky. Util. Co., 390 U.S. 1, 5-6 (1968) (granting standing based on a finding that the relevant statutory provision reflected congressional
standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.”

3. Summary

Cities asserting standing in their quasi-sovereign or proprietary capacities face several potential hurdles. The most formidable is federal courts' refusal to confer quasi-sovereign standing on cities. Similarly, home rule provisions can limit or preclude municipalities from bringing claims as quasi-sovereigns and state laws can restrict cities from bringing certain types of claims in any capacity. The specific requirements for each type of standing pose the final hurdle.

[371]

IV. ESTABLISHING CITY STANDING TO MAINTAIN CLAIMS AGAINST PREDATORY LENDERS

In this section of the Article, I apply the standing doctrine I just discussed to analyze whether cities have standing to bring claims against predatory lenders as quasi-sovereigns or in their proprietary capacities.

C. Quasi-Sovereign Standing

To establish standing to bring claims against predatory lenders as *parens patriae*, cities must meet the Snapp quasi-sovereign interest, numerosity and distinct injury requirements and, for statutory claims, demonstrate that they fall within one of the classes the statute was designed to protect.

1. Demonstrating a Quasi-Sovereign Interest

Unquestionably, predatory lending adversely affects the “well-being” of communities. Homeowners who are the victims of fraud and discrimination can lose their homes or may not be able to afford their upkeep, leading to neighborhood decline. The resulting reduction in tax revenue and increase in demand for city services strain city coffers, impairing the overall economic well-being of communities. These injuries all invoke cities' quasi-sovereign interests.
In addition, as parens patriae, cities have an interest in protecting their residents from fraud and discrimination.

2. Meeting the Numerosity Requirement

Snapp's second requirement is that the alleged injury had to have affected "a sufficiently substantial segment of the population." In so holding, the Snapp Court made clear that both those residents directly and those indirectly injured her citizens have seriously suffered as a result of this alleged conspiracy. Discriminatory rates . . . may affect the prosperity and welfare of a State as profoundly as any diversion of waters from rivers . . . . Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, [and] retards her development”; Iowa ex rel. Miller v. Block, 771 F.2d 347, 353, 353 n.6 (8th Cir. 1985) (noting that “increased responsibility for the welfare and support of its affected citizens while its available tax revenues are declining” could invoke parens patriae standing); Puerto Rico ex rel. Quiros v. Bramkamp, 654 F.2d 212, 216-17 (2d Cir. 1981) (finding allegations that defendants' discrimination against Puerto Rican migrant workers had an effect on “the health of the Puerto Rican economy” sufficient to confer parens patriae standing); Burch v. Goodyear Tire & Rubber Co., 554 F.2d 633, 634 (4th Cir. 1977) (holding that allegations that defendants' violations of antitrust laws injured the “general economy of the State of Maryland [were] sufficient to confer standing . . . in a parens patriae capacity . . . ”); Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997) (holding that Texas has a quasi-sovereign interest in a claim against tobacco manufacturers, based on allegations that the “economy of the State and the welfare of its people [had] suffered at the hands of the Defendants”).  


93 Snapp, 458 U.S. at 607.
should be included in determining numerosity.\footnote{Id.} Cities can readily meet this requirement by alleging that predatory lenders’ wrongdoing directly affects the borrowers they prey upon and indirectly affects other residents, who experience declining property values and disruptions to the social fabric of their neighborhoods.\footnote{See supra note 45 (identifying cases where both direct and indirect injuries satisfy the numerosity requirement).}

3. Demonstrating Interests Separate from Those of Individuals

Cities must also demonstrate that their interests are separate from those of any private parties; i.e., the cities must be more than nominal parties.\footnote{Snapp, 458 U.S. at 607.} The factors relevant to this determination include whether individual relief would be adequate to achieve the interests of the city, whether private parties would have the resources to pursue claims, and whether private individuals and the city would be entitled to the same relief.\footnote{Supra notes 48-50 and accompanying text.}

Victims of predatory lending frequently live close to the financial margin and lack the time, money, and emotional stamina to bring affirmative claims against lenders.\footnote{Cf. Claudine Columbres, Targeting Retail Discrimination with Parens Patria, 36 COLUM. J.L. & SOC. PROBS. 209, 219 (2003) (discussing the same phenomenon in the context of retail discrimination claims).} And those who do attempt to pursue claims may find it difficult to secure attorneys, who may be averse to taking cases that typically generate low damage awards.\footnote{Engel & McCoy, supra note 3, at 1316 (discussing the disincentives for private lawyers to take on predatory lending cases).} At best, borrowers may be able to find legal services lawyers or attorneys from consumer advocacy organizations to represent them. More often than not, the litigation will be defensive, in response to threatened foreclosures where the focus is on borrowers' retaining their homes. Even when borrowers have the wherewithal to bring individual claims, they are rarely entitled to relief that would prevent similar harm to future borrowers.

Class actions, which could result in significant damage awards and thus provide something approximating adequate relief, may not meet certification requirements. Borrowers in predatory lending class actions inevitably represent a variety of unique situations. Some may have already lost their homes and be seeking damages. Others may be keeping up with their loan payments but want to rescind or reform their loans. In some cases, the lenders may have engaged in fraud. In others, they may have failed to make the required disclosures. A court may conclude that the “differences” exceed the “commonalities” to an extent that precludes class certification.\footnote{See Fed. R. Civ. P. 23; Lopez, supra note 89, at 261-64 (discussing concerns inherent in choosing an appropriate class when filing a class action lawsuit against predatory lenders); see
Given the difficulties victims of predatory lending encounter bringing lawsuits against predatory lenders, it is highly unlikely that private litigation would be an adequate vehicle to satisfy cities' interests in curtailing predatory lending. In addition, cities could obtain broad equitable relief that would be unavailable in individual lawsuits. It thus appears that municipalities can satisfy the Snapp distinct injury requirement.

4. Zone of Interests

As I mentioned previously, when bringing statutory claims, cities must demonstrate that they fall within the zone of interests the statutes were intended to benefit. Because satisfaction of this element depends on the provisions of individual statutes, I have reserved the discussion of the zone of interests requirement for Part V, where I review specific causes of action.

5. Summary

The above analysis demonstrates that cities filing claims as quasi-sovereigns in state courts should be able to meet the Snapp requirements in claims against predatory lenders if they meet the zone of interests test for any statutory claims. This assumes, of course, that their states have granted them the authority to bring claims as quasi-sovereigns.

[D. Standing to Bring Claims Based on Proprietary Interests]

When cities seek relief in federal court against predatory lenders that have injured them in their proprietary capacities, they must meet the Article III injury, causation, and redressability requirements. Additionally, in the absence of a legislative override, cities must satisfy the prudential standing requirements.

1. Injury in Fact

To demonstrate injury in fact, a city must allege that predatory lenders have caused or will imminently cause the city to experience a direct and real injury. When predatory lending leads to abandoned and neglected homes, cities

---

*also* Castano v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996) (decertifying a plaintiffs' class action that asserted fraud claims against numerous tobacco companies, in part because the court would have to individually try the “reliance” element).


102 CHEMERINSKY, *supra* note 24, at 61.

It is noteworthy that several courts have imported proximate cause analysis from antitrust cases to determine injury in fact. For example, in *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 344-
experience declines in tax revenues. Some of this decline is because the owners simply cannot afford to pay the taxes. Other times, the property is abandoned and the mortgage holder has elected not to foreclose, for example, because the outstanding tax liability exceeds the value of the property. A more general reduction in tax revenue occurs when neglected homes cause widespread depreciation in home values throughout neighborhoods. 103 Numerous courts have held that lost tax revenues can affect governmental [375] entities' proprietary interests. 104

55, 780 A.2d 98, 118-24 (2001), the court rejected the city of Bridgeport's argument that it had standing to bring claims against entities involved with the manufacturer and sale of guns. The city had alleged that because of the defendants' wrongdoing, the city incurred added expenses for police and emergency services, pension benefits and health care. Id. at 344-45, 780 A.2d at 118. It also claimed that as a result of reduced productivity, the city experienced a decline in investment, economic development and tax revenues. Id. at 345, 780 A.2d at 118. In denying standing, the court listed the many causal links between the manufacturers' initial sales of the handguns to their distributors and the city's expenditures for added police protection, and concluded that the city's injury was remote from the defendants' wrongdoing. Id. at 345-46, 353-54, 363-66, 780 A.2d 118-19, 123, 129-30. The court reached this result using a proximate cause analysis, rather than constitutional standing doctrine. See id. at 352-53, 780 A.2d at 122-23. The court stated that it denied standing based on prudential limitations, but the authority on which it relied and the nature of its analysis suggests it was, in fact, determining whether the city had satisfied the injury in fact requirement. See id. at 360-62, 780 A.2d 127-28. But see White v. Smith & Wesson, 97 F. Supp. 2d 816, 824 (N.D. Ohio 2000) (rejecting defendants' claim that proximate cause should be the basis for determining injury in fact); James, 820 A.2d at 44-45 (discussing and rejecting numerous decisions in which courts borrowed proximate cause analysis from antitrust cases to determine standing). See also City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1156 (Ohio 2002) (Cook, J. dissenting) (hesitating "to include a proximate-cause component within a conventional standing analysis").

This application of a substantive element of an underlying claim to determine standing muddies already cloudy waters and may ultimately lead courts to erroneously conclude that cities have not incurred injuries in fact.

The use of proximate cause to determine standing does not necessarily lead to a finding that a city lacks standing. See, e.g., City of Boston v. Smith & Wesson, No. 199902590, 2000 WL 1473568, at *4-*7 (Mass. Dist. Ct. July 13, 2000) (using proximate cause analysis to find that the city of Boston had standing to sue gun manufacturers).


104 See, e.g., Wyoming v. Oklahoma, 502 U.S. 437, 451 (1992) (holding that Wyoming had standing to assert a commerce clause claim against Oklahoma after Oklahoma passed legislation requiring the use of some Oklahoma resources when generating power sold in Oklahoma, which caused Wyoming to suffer economic harm in the form of reduced severance taxes); Gladstone Realtors, 441 U.S. at 110-11 (1979) (finding, in what appeared to be a claim based on proprietary interests, that “[a] significant reduction in property values [as a result of defendants' discrimination] directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services”); Colo. River Indian Tribes v. Town of Parker, 776 F.2d 846, 848-49 (9th Cir. 1985) (finding that a municipality challenging a tribal ordinance restricting liquor sales had a proprietary interest in its loss of tax revenues on liquor sales); Iowa ex rel. Miller v. Block, 771 F.2d 347, 353 (8th Cir. 1985) (recognizing that a state's proprietary interests can be affected when a defendant's actions result in a decline in tax revenues); Pennsylvania v. Kleppe, 533 F.2d 668, 671 (D.C. Cir. 1976) (noting that a loss of tax revenues could invoke a state's proprietary interests but ultimately denying standing on the
Predatory lenders exploit municipalities' community development efforts by stripping equity that homeowners have gained as a result of city investments in neighborhoods. When predatory lenders target neighborhoods that have appreciated because of city development projects, the lenders become the third-party beneficiaries of the cities' investments. Not only do cities ultimately lose the returns on these investments—increased taxes and a reduction in the need for city services—but they also must respond to these once-stable neighborhoods crying for renewed economic development. Money has to be diverted from other worthy causes to help save neighborhoods from further decline. To the extent that lenders reap the benefits of community development and impede effective revitalization, they impose direct harms on cities.105

Whether by engaging in fraud, discrimination, or other forms of illegal activity, predatory lenders cause borrowers to become financially vulnerable. Victims of predatory lending can lose their homes to foreclosure or forego necessities like food and heat in order to keep their homes. They then turn to public agencies for assistance. Cities must meet an increased demand for homeless shelters, heat subsidies, food stamps and other relief programs. In addition, when families are dislocated, children's educations are interrupted, which can impose added costs on cities. Neighborhoods become vulnerable, too. Abandoned homes become targets for drug dealing and arson. As neighborhoods lose their cohesion, crime increases. The need for police and fire services rises in relation to neighborhood decline, further burdening city resources. The increased costs for city services directly affects the proprietary interests of cities.106

grounds that the state did not fall within the zone of interests the statute was designed to protect); White, 97 F. Supp. 2d at 824 (finding the city's allegation of reduced tax revenues stated an injury in fact where the claim was that defective firearms caused a reduction in productivity). 105 N.D. Fair Hous. Council v. Allen, 319 F. Supp. 2d 972, 977 (D.N.D. 2004) (allowing nonprofit housing agency to bring a housing discrimination claim based on allegations that the agency suffered injuries in fact because the agency had to “divert[] scarce resources ... to ... counteract the effects of the Defendants' alleged discrimination”); Support Ministries for Persons with AIDS, Inc., v. Vill. of Waterford, 799 F. Supp. 272, 275 (N.D.N.Y. 1992) (recognizing that the state had a proprietary interest where the defendants' actions limited the ability of the state to “carry out its policy of developing community-based adult care facilities for homeless citizens with AIDS”). 106 See City of Sausalito v. O'Neill, 386 F.3d 1186, 1198-99 (9th Cir. 2004) (holding that a National Park Service development plan had an impact on the city of Sausalito's proprietary interests because the plan “would result in a detrimental increase in traffic and crowds in downtown Sausalito, affecting city-owned streets as well as municipal management and public safety functions”); Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245, 256 (D.N.J. 2000) (reasoning that the city satisfied injury in fact because it alleged that the negligent sale and marketing of handguns increased the cost to the city of “prosecuting and punishing handgun crimes”); White, 97 F. Supp. 2d at 824 (finding that city of Cleveland alleged injury in fact in a complaint claiming that defective firearms caused the city to incur increased expenses for police and emergency services); Support Ministries for Persons with AIDS, 799 F. Supp. at 278 (finding that an allegedly unlawful zoning ordinance that had the affect of prohibiting a residence for homeless people with AIDS caused the state to incur direct economic harm because without the facilities homeless people with AIDS would be “languishing in hospitals” at greater cost to the state); James v. Arms Tech., Inc., 820 A.2d 27, 45-46 (N.J. Super
2. Causation and Redressability

The second and third prongs of the Article III analysis require that the plaintiff's injuries be “fairly traceable” to the defendant's wrongdoing “and likely to be redressed by the requested relief.”107 Where a city can demonstrate that lenders have deceived borrowers into accepting loans on terms that they could not afford and, as a result, the borrowers lost or could not maintain their homes, resulting in reduced tax revenues and increased demand for city services, a court could find that the city's injuries were “fairly traceable” to the predatory lending. Furthermore, to the extent a city claimed damages for the injuries the city itself sustained and equitable relief to prevent future injury, the redressability requirement would be satisfied.108

3. Prudential Limits


107 Allen v. Wright, 468 U.S. 737, 751 (1984); see also CHEMERINSKY, supra note 24, at 74 (discussing the requirements for Article III standing).

108 Few of the cases brought by public entities against gun manufacturers have addressed the causation/redressability prong of Article III standing. This is likely because so many courts dismissed the cases by analyzing injury in fact using a proximate cause standard. See supra note 102 and accompanying text. For the most part, where courts have found injury in fact in these cases, they have also found that the plaintiffs sufficiently alleged causation and redressability. E.g., White, 97 F. Supp. 2d at 825 (holding that the city's allegations of a decline in tax revenues and an increase in the costs for municipal services were fairly traceable to the defendants' manufacturing of defective guns and could be redressed by a favorable judgment); James, 820 A.2d at 45-46 (applying New Jersey standing rules to reject the proximate cause approach to injury in fact and to find that the city of Newark had standing to sue gun manufacturers).
In addition to meeting Article III standing minima, cities must meet the prudential standing requirements: (1) they must assert their own rights; (2) they cannot bring claims that are generalized grievances; and (3) when bringing statutory claims, they must fall within the zone of interests the statute was intended to protect.\textsuperscript{109} Cities can avoid these requirements if their claims are pursuant to a statute in which Congress explicitly or implicitly granted them standing.

The first two prudential requirements can be easily dispensed with. When cities sue for direct injuries in their proprietary capacity, they are seeking remedies for damages they incurred and are not asserting the rights of others.\textsuperscript{110} The prohibition on generalized grievances is inapplicable to city predatory lending claims because it governs only taxpayer or citizen suits to challenge a governmental law or policy.\textsuperscript{111} Whether a state satisfies the zone of interests test depends on the provisions of individual statutes, which I discuss in Part V.

4. Summary

Applying the Article III and prudential limits, cities appear to have bases for standing under federal standing doctrine to pursue claims against predatory lenders when seeking damages for the direct injuries I have described so long as they meet the zone of interests test, where relevant, and, as I discussed previously, there are no state laws imposing any restrictions on their ability to bring the claims.

V. CAUSES OF ACTION CITIES CAN BRING AGAINST PREDATORY LENDERS

The question of standing cannot be resolved without considering the underlying causes of action. In this section of the Article, I look at specific causes of action and assess whether municipalities can pursue each cause of action either in their quasi-sovereign capacity or in their proprietary capacity. The five causes of action on which I focus are fraud, consumer protection, public nuisance, and unjust enrichment under state law, and housing discrimination under federal law.\textsuperscript{112} For some causes of action, such as fraud and consumer protection claims, cities can only sue as \textit{parens patriae}. Conversely, federal housing discrimination claims must be based on direct injuries to cities' proprietary interests.

\textsuperscript{109} See generally CHEMERINSKY, supra note 24, at 83, 89, 97-98.
\textsuperscript{110} See. e.g., White, 97 F. Supp. 2d at 825 (finding that city's claim against gun manufacturers for its own economic losses was an assertion of the city's own rights, not the rights of others).
\textsuperscript{111} CHEMERINSKY, supra note 24, at 89-90.
\textsuperscript{112} This is not an exhaustive list of claims. For example, cities might be able to establish legal and factual support for negligent marketing and RICO claims.
The basis on which cities assert standing—quasi-sovereign versus proprietary—not only determines the applicable standing rules, but also can dictate what relief they can obtain. Generally speaking, as quasisovereigns, cities seek injunctive relief and, depending on the operative statute or common law, they may also request civil penalties, restitution and other remedies. There are, however, some exceptions. At times, courts allow public entities to recover money damages, as distinct from civil penalties or restitutionary recovery for individuals, when bringing claims as parens patriae. Conversely, some courts preclude restitutionary damages in parens patriae actions. When cities act in their proprietary capacities, they are typically entitled to monetary damages for the injuries they directly sustained. It is also possible for them to obtain injunctive relief, depending on the law of the jurisdiction, the causes of action, and the facts.

Because of these vagaries, it is impossible to state with certainty the remedies to which cities are entitled for any given cause of action against predatory lenders. Just the same, in the following sections, I do attempt to specify the nature of the relief that is typically available.

A. Fraud Claims

Predatory lenders employ a menu of deceptive practices to lure borrowers into accepting loans on terms they do not understand and cannot afford. They convince borrowers that the proffered loans are in their best interests. They make false assurances that the borrowers will not have balloon payments or that they will be eligible in the future to refinance at reduced interest rates. The examples of misrepresentation by lenders are without limit. Ultimately, many borrowers enter into contracts that were obtained through fraud.

Few courts have addressed whether governmental entities have standing to bring common law fraud claims in their capacity as quasisovereigns. This is likely because state consumer protection statutes—the natural vehicles for pursuing such claims—typically grant enforcement authority to a state agency, most

113 E.g., Maine v. M/V Tamano, 357 F. Supp. 1097, 1101-02 (D. Me. 1973) (permitting the state to maintain a parens patriae claim for money damages against defendants who discharged oil into state waters).
114 E.g., California v. Frito-Lay, Inc., 474 F.2d 774, 775 (9th Cir. 1973) (holding that parens patriae “has received no judicial recognition in this country as a basis for recovery of money damages for injuries suffered by individuals” because to do so would violate the requirement that the entity asserting quasi-sovereign standing suffer an injury distinct from that suffered by individuals).
115 E.g., Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979) (recognizing that village had standing to pursue monetary relief in its proprietary capacity in a housing discrimination claim).
116 For a discussion of some of the challenges plaintiffs face in attempting to prove fraud and related claims, see Engel & McCoy, supra note 3, at 1299-1305.
117 Id. at 1267-88 (discussing the various types of fraud and deceptive practices).
often attorneys general. Those cases where courts have considered public entity standing to pursue common law fraud claims have involved actions by attorneys general pursuant to their common law or statutorily created authority to protect the public interest. The remedies sought in these cases have been restitution for the aggrieved parties and injunctive relief. In common law fraud claims by municipalities, resolution of the standing issue would likely turn on the generosity of the particular state's home rule provisions. Courts in jurisdictions that give broad authority to cities would be more willing to permit cities to bring common law fraud claims as quasi-sovereigns.

The fact that cities are not parties to predatory loans prevents them from harnessing borrowers' fraud claims to obtain relief in their proprietary capacities. In general, plaintiffs state common law fraud claims if they allege that the defendants made affirmative misrepresentations that the plaintiffs relied on to their detriment. Thus, to satisfy the injury in fact prong of Article III standing, cities would have to plead that they suffered an actual injury because of their reliance on the defendants' misrepresentations. Given that borrowers, not the cities, are the parties that rely on lenders' misrepresentations, cities do not have standing to bring fraud claims in their proprietary capacities.

118 See, e.g., IDAHO CODE ANN. § 48-606 (LEXIS through the 2005 Legis. Sess.) (conferring enforcement power on the attorney general for consumer protection violations); N.D. CENT. CODE § 51-10-05.1 (LEXIS through 2005 Sess.) (same).

119 Alaska v. First Nat'l Bank of Anchorage, 660 P.2d 406, 420-21 (Alaska 1982) (holding that the attorney general had “the authority to bring suit in the public interest for common law fraud to obtain restitution for defrauded land purchasers”); Lowell Gas Co. v. Massachusetts, 385 N.E.2d 240, 247-48 (Mass. 1979) (finding that state had standing to pursue common law fraud “in accord with the attorney general's common law duty to represent the public interest and to enforce public rights”). Although these courts did not discuss parens patriae standing, the language they employed makes clear that the states were suing in their quasi-sovereign capacities and not for direct injuries.


Likewise, the doctrine of unconscionability, which permits a court to “refuse to enforce [a] contract, ... enforce the remainder of [a] contract without the unconscionable clause, or ... limit the application of any unconscionable clause,” cannot provide any relief to cities in claims brought for direct injuries because they are neither parties to nor assignees of predatory loans. See U.C.C. § 2-302(1) (2002). Although the Uniform Commercial Code governs the sale of goods, courts have applied the unconscionability doctrine to mortgage loans. Frank Lopez, Note, Using the Fair Housing Act to Combat Predatory Lending, 6 GEO. J. ON POVERTY L. & POL'Y 73, 86 (1999).
B. Consumer Protection Claims

Lending practices that constitute unfair and deceptive acts or practices [380] ("UDAP") can give rise to consumer protection claims under state statutes. Actions that constitute violations include failure to comply with federal disclosure laws, affirmative misrepresentations, omissions of material information, unconscionable terms and practices, and false advertising. Some UDAP statutes have substantive limitations, for example, precluding coverage for real estate-related transactions that make them less promising routes to pursue claims against predatory lenders.

Attorneys general typically have authority under state UDAP laws to pursue injunctions, restitution on behalf of aggrieved consumers, civil penalties, and

122 Some cities have passed anti-predatory lending ordinances, giving city attorneys or specific city departments the authority to refuse to engage in financial transactions, e.g., serving as depositories for city funds, with lenders who have violated the ordinances' prohibitions on predatory lending. See, e.g., NEW YORK CITY, N.Y., LOCAL LAW NO. 36 (2002), invalidated by Mayor of N.Y. v. Council of N.Y., 780 N.Y.S.2d 266 (N.Y. Sup. Ct. 2004). Other cities have adopted anti-predatory lending ordinances that allow the cities to impose fines on predatory lenders. See, e.g., DAYTON, OHIO, OHIO REV. CODE GEN. ORDINANCE § 112.43(A) (2001), invalidated by City of Dayton v. Ohio, 813 N.E.2d 707 (Ohio Ct. App. 2004). The District of Columbia passed an ordinance that allows the mayor to impose civil penalties, restitution, and cease and desist orders against lenders found to have engaged in specific predatory lending practices. D.C. CODE ANN. § 26-1153.03(a) (West, Westlaw through July 25, 2005). In addition, if lenders are found to have engaged in systematic predatory lending, the mayor can refuse to renew or order the suspension or revocation of any licenses issued by the mayor. Id. The mayor can also restrict the lenders from engaging in any activities that the mayor regulates and enjoin lenders from taking actions that violate the ordinance. D.C. CODE ANN. § 26-1153.03(b) (West, Westlaw through July 25, 2005).


and other relief against people or entities that violate the statutes. One way to understand this authority is as legislative recognition of parens patriae standing. Even in the absence of express authority, some courts have held that attorneys general can maintain actions under their state's deceptive trade practices statutes, seeking restitution as quasi-sovereigns protecting the economic interests of their residents.

For cities, the most significant barrier to bringing UDAP claims is statutory language making attorneys general the exclusive public authority permitted to pursue claims. In states where this is the case, cities are barred from bringing claims because they fall outside the zone of interests the statutes were intended to benefit. In some states, the attorney general or his or her authorized delegate can bring UDAP claims. Authorized delegates can include county attorneys and city attorneys, who request authority to sue from and are granted authority to sue by the attorney general. Similarly, some states give district attorneys, county attorneys, or county or municipal Offices of Consumer Affairs the power to bring UDAP claims, impliedly as parens patriae. In the most liberal grant of power to political subdivisions, at least one state expressly allows town, city and county attorneys to bring UDAP claims.

Some municipal ordinances allow cities to bring actions against people or entities that violate consumer protection ordinances. For example, New York

126 New York v. Lipsitz, 663 N.Y.S.2d 468, 475-77 (N.Y. Sup. Ct. 1997) (permitting the state to obtain injunctive relief and restitution in an enforcement action under the state consumer protection law); Wisconsin v. Excel Mgmt. Servs., 331 N.W.2d 312, 316 (Wis. 1983) (holding that in an attorney general consumer protection action, the trial court could “order restoration of pecuniary losses which [were] suffered as a result of the practices forming the basis [of] the action”).

127 One court stated that when a state agency acts pursuant to its authority under a state consumer protection law, “the Division serves a quasi-sovereign interest, the presence of which confers parens patriae standing.” In re Edmond, 934 F.2d 1304, 1311 (4th Cir. 1991).

128 Minnesota v. Ri-Mel, Inc., 417 N.W.2d 102, 112 (Minn. Ct. App. 1987) (holding that the “attorney general has broad powers, which are not limited by statute” even though there was “no express statutory authority for the attorney general[]” to bring the particular action); see also Sclater v. Sclater, 40 B.R. 594, 596-97 (Bankr. E.D. Mich. 1984) (recognizing that attorney general had parens patriae standing to sue under consumer protection law).

129 For a further discussion of municipal standing and the zone of interests requirement, see supra notes 84-87 and accompanying text.

130 E.g., ARIZ. REV. STAT. ANN. § 44-1521 (West, Westlaw through 2005 Sess. year).

131 E.g., S.C. CODE ANN. § 39-5-130 (West, Westlaw through 2004 Reg. Sess.).

132 E.g., COLO. REV. STAT. § 6-1-107 (LEXIS through 2005 Supp. Sess.).

133 E.g., MINN. STAT. ANN. § 325F.70 (West, Westlaw through 2005 Reg. Sess.).


135 VA. CODE ANN. § 59.1-203 (West, Westlaw through 2005 Reg. Sess.). Although this statute is a good example of a generous grant of standing, other provisions in the statute preclude suits against mortgage lenders. Id. § 59.1-199 (West, Westlaw through 2005 Reg. Sess.).

136 See, e.g., CLEVELAND, OHIO, CHARTER & CODIFIED ORDINANCES §§ 643.02, 643.11 (West, Westlaw through June 30, 2004) (allowing the city to seek injunctive relief and compensatory damages against those who engage in deceptive or unfair trade practices); MINNEAPOLIS, MINN., CODE §§ 154.10, 154.70, 156.10 (West, Westlaw through Ord. No.
City's Consumer Protection Law,\(^{137}\) prohibits “deceptive or unconscionable trade practice(s) in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts.”\(^{138}\) Those who violate the ordinance can be subject to civil penalties, disgorgement, injunctions, and restraining \(^{139}\) orders in actions brought by the city.

Like common law fraud claims, UDAP statutes typically restrict direct injury claims to consumers, who had relationships to the challenged transactions.\(^ {140}\) Thus, with rare exceptions,\(^ {141}\) cities are precluded from bringing UDAP claims in their proprietary capacity because they cannot establish injury in fact.

**C. Public Nuisance**

Public nuisance claims are an age-old tool used by government entities to pursue lenders who engage in unlawful and unsavory lending practices.\(^ {142}\) In a particularly eloquent decision fifty years ago, the Alabama Supreme Court described the basis for a public nuisance claim against a small loan company:

---


\(^ {138}\) NEW YORK CITY, N.Y., CODE § 20-700. Although this code reflects a generous grant of city standing, it would not permit claims against predatory mortgage lenders unless the loans involved the sale of goods or services. Id.

\(^ {139}\) Id. § 20-703; see also Polonetsky v. Better Homes Depot, Inc., 760 N.E.2d 1274, 1275-76 (N.Y. 1997) (allowing city enforcement action against seller who “showed potential buyers substandard properties at inflated prices .... If buyers observed that the structures were in disrepair, [the defendant] would promise to perform repairs before title closed. Often, however, the repairs were done poorly, incompletely or without required permits. Further, if buyers were hesitant to go through with the sale because of the poor condition of the property, [the defendant] threatened to keep their down payments.”).

\(^ {140}\) See, e.g., Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 970-71 (E.D. Tex. 1997) (holding, in a suit against tobacco manufacturers, that the state did not allege a sufficient relationship to consumers' purchase of tobacco products for the state to qualify as a consumer under the state's Deceptive Trade Practices Act).

\(^ {141}\) See, e.g., Maryland v. Philip Morris Inc., No. 96122017, CL211487, 1997 WL 540913, at *18 (Md. Cir. Ct. May 21, 1997) (permitting the state to maintain a Consumer Protection Act claim against numerous tobacco companies, seeking monetary damages as the result of the defendants' violation of the statute, even though the state did not meet the statutory definition of "consumer" and was not involved in the transaction that gave rise to the claim).

Most of those who made loans from the lending company were in the lower-income brackets of life; were people of little education; some of them positively ignorant, and few of them had any idea whatever what the lawful rate of interest was in their own State, and most of them had only a faint conception, if any, what a promissory note was and what were the legal consequences affecting them when they signed one. All of the borrowers who testified had no assets except their earning power, and could not obtain loans from commercial banks ....

They were people who did not fully understand what their legal rights were. They were people who could easily be imposed upon .... The testimony shows that, perhaps with one exception, every borrower applying for a loan was pressed by the need of money for the necessities of life. Sometimes loans were needed to pay doctors, medical and hospital bills, and funeral expenses ....

The lenders’ business methods have created a public nuisance by their charging and collecting unlawful and unconscionable interest from their more than 1050 customers .... These actions present an evil and repulsive picture of oppression and intimidation; of the exaction from lowly and humble folk of unconscionable and extortionate rates of interest on small loans, of intentional flouting of the wise public policy of the State; of taking advantage of the necessities of financially distressed people, pictures which in their ugliness are hardly shown by any other record found in the books and files of this court. This court of equity in the face of the odious conditions shown by the record in this case would be unworthy of its title, “a court of conscience,” if it stood idly by and failed now to use its restraining and injunctive powers to stop the oppressive practices of the loan company.143

The Restatement of Torts defines a public nuisance as “an unreasonable interference with a right common to the general public.”144 Factors that “may sustain a holding that an interference with a public right is unreasonable include the following:

(a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation,

---

143 Larson v. State ex rel. Patterson, 97 So. 2d 776, 780-82 (Ala. 1957).
144 RESTATEMENT (SECOND) OF TORTS § 821B (1979).
(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. 145

Predatory lending satisfies all three of these factors. Abusive lending [384] interferes with the public health, safety, comfort and peace of individuals and communities. The lenders often obtain the loans through fraud in violation of various laws. Predatory lending is not a one-time event with limited consequences. Rather, it is a lending modus operandi in low and moderate income communities, with devastating effects on cities that may take years to reverse. In terms of the scienter element, predatory lenders know the impact of their actions on communities.

Some states impose elements beyond the Restatement criteria. Examples include requiring that plaintiffs prove that the defendants' activities involved the use of the defendants' own property or that the defendants interfered with the public entities' use of their own property. 146 In jurisdictions that require either of these additional elements, cities would not be successful bringing public nuisance claims against predatory lenders.

Still other states restrict public nuisance actions to situations in which the defendant can control and abate the nuisance. 147 This requirement could prove problematic. Most home mortgage loans are sold on the secondary market. 148 Thus, the entities engaged in predatory lending oftentimes are not in a position to renegotiate the terms of loans to abate nuisances. 149 Similarly, because they do not hold the notes, they cannot foreclose on or rehabilitate abandoned properties. 150 There are times, however, when originators who sold loans for securitization ultimately “reown” the loans. 151 Deal provisions in securitized loans typically include recourse terms, requiring originators to repurchase non-performing

145 Id. Public plaintiffs, unlike private individuals bringing public nuisance claims, do not have to prove they “suffered harm of a kind different from that suffered by other members of the public.” Id. § 821C.
146 Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997). At least one jurisdiction precludes public nuisance suits against “manufacturers for lawful products that are lawfully placed in the stream of commerce.” Camden v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001). This “unlawfulness” requirement would not preclude public nuisance claims against predatory lenders because most predatory loans are illegal in some respect. See, e.g., IND. CODE ANN. § 24-9-4-1 (West 2005) (restricting the practices of creditors making high cost home loans); N.C. GEN. STAT. ANN. § 24-1.1E(c) (West 2001) (prohibiting certain predatory features in high-cost loans).
149 See generally id. (discussing the securitization of home mortgage loans).
150 Id. at 730.
151 Id.
loans. When this occurs, originators are in a position to control and abate any nuisances.

For the most part, attorneys general, representing the states as quasisovereigns, have brought public nuisance claims against lenders to pursue injunctive relief, including ordering lenders to abate the nuisances. This, however, does not evince a universal preclusion of municipal standing. Some jurisdictions statutorily grant cities standing to bring public nuisance claims, while others have recognized their standing through common law. Still others are silent on the issue, leaving open the question whether municipalities in those jurisdictions can bring public nuisance claims.

It is not always clear whether cities' standing to bring public nuisance claims is based on their proprietary or their quasi-sovereign interests. When

---

152 Id.
154 E.g., WIS. STAT. ANN. § 823.01 (West 1994) (granting municipalities authority to maintain actions to recover damages, to abate a public nuisance, and to obtain injunctions); Camden v. Beretta, U.S.A. Corp., 123 F. Supp. 2d 245, 264-65 (D.N.J. 2000) (noting that a municipality's broad statutory power to sue allows an inference to be drawn that municipalities have general statutory and constitutional standing to sue in order to abate public nuisances).
156 See Recovering the Cost of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry, 113 HARV. L. REV. 1521, 1522-23 (2000) [hereinafter Recovering the Cost] (arguing that municipal plaintiffs have conflated proprietary and quasi-sovereign standing in their public nuisance claims).
cities seek sweeping equitable relief such as injunctions and orders to abate, they appear to be invoking their quasi-sovereign interests.\textsuperscript{157} Claims to recover expenses incurred abating nuisances arguably are akin to direct injury claims and thus would be based on cities' proprietary interests.\textsuperscript{158} It is, however, also possible to conceive of claims for abatement costs as expenditures made in furtherance of cities' \textit{parens patriae} obligations to protect the health, safety and welfare of their residents.

\textbf{D. Unjust Enrichment and Restitution}

Unjust enrichment claims offer another vehicle for cities to pursue. The elements of an unjust enrichment claim typically include: “(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so.”\textsuperscript{159} Cities could allege cognizable unjust enrichment claims by stating that predatory lenders make abusive and unlawful loans that cause neighborhoods to deteriorate and increase the demand for city services. The cities then repair the damage the lenders cause, incurring costs the lenders rightfully should bear. By financially redressing the externalities that predatory lenders impose on them, cities arguably confer a benefit on the lenders, giving municipalities standing to bring claims for restitution.\textsuperscript{160}

\textsuperscript{157} The Restatement of Torts states that if a plaintiff has the right to recover damages in a public nuisance claim, it has the power to seek an injunction to abate a nuisance. \textit{RESTATEMENT (SECOND) OF TORTS} § 821C(2) (1979). This suggests that if a city can bring a claim in its proprietary capacity, it can obtain the equitable relief that is usually brought in \textit{parens patriae} actions.

\textsuperscript{158} For cities to recover abatement costs, they would need to avoid allegations that could lead courts to construe their claims as sounding in private nuisance. This is because interference with the plaintiffs' use and enjoyment of their own land is an element of private nuisance. See \textit{Recovering the Cost}, supra note 156, at 1530-31 (noting the proof problems cities would encounter with private nuisance claims). Cities could not make such an allegation in good faith and thus could not plead injury in fact. \textit{Id}.

\textsuperscript{159} \textit{White}, 97 F. Supp. 2d at 829.

\textsuperscript{160} Similar theories in the litigation against gun, lead and tobacco manufacturers have met with mixed success. See Maryland v. Philip Morris, Inc., No. 96122017, CL 211487, 1997 WL 540913, at *16-17 (Md. Cir. Ct. May 21, 1997) (finding in state's claim against tobacco companies for restitution of health care expenses the state paid for the treatment of smokers through Medicaid that "bald assertions that [the State] spared Defendants thousands of individual lawsuits from Medicaid recipients [are] too speculative and remote to constitute a benefit" for the purposes of an unjust enrichment claim); see also Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 972 (E.D. Tex. 1997) (finding the state's claims that cigarette manufacturers benefited from the state paying smoking-related medical expenses "too attenuated and indirect to find support under the theory of unjust enrichment"); James v. Arcadia Machine & Tool, No. Esx-L-6059-99, at 23 (N.J. Super. Ct. Law Div. Dec. 10, 2001) (unpublished opinion) (rejecting an unjust enrichment claim that the city of Newark brought against gun manufacturers on the grounds that the city had not shown that the defendant had diverted assets from the city, and citing a case that required the plaintiff to allege that it “expected remuneration from the defendant at the time it performed or conferred a benefit
For the same reasons I just discussed in the section on nuisance, city unjust enrichment claims arguably could be deemed direct injury, proprietary claims or claims based on their status as parens patriae to obtain damages [387] they incurred protecting the health, welfare and safety of their residents.

E. Discrimination Claims161

Empirical studies have found that predatory lenders target people of color, selling them loans on terms that are more onerous than those contained in loans made to whites with similar risk profiles.162 These racially discriminatory lending practices fall within the ambit of the federal Fair Housing Act (“FHA”).163 The FHA makes it illegal “for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”164 A real estate-related transaction includes “[t]he making or

---

161 See Engel & McCoy, supra note 3, at 1314-17 (discussing discrimination claims against predatory lenders).
162 See supra note 6 (discussing the evidence of discrimination in mortgage lending).
163 42 U.S.C. §§ 3601-31 (2000). Lenders may also be in violation of state fair housing laws, a discussion of which is beyond the scope of this Article. See infra note 170. There are also city codes granting cities the power to bring housing discrimination claims. See Michael H. Schill, Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission, 23 FORDHAM URB. L.J. 991, 1005-14 (1996) (discussing the New York City Human Rights Commission's authority to bring housing discrimination claims).
164 42 U.S.C. § 3605(a) (2000). Federal and state laws also prohibit credit discrimination based on race; however, these statutes typically permit only applicants for credit or clearly enumerated state or federal governmental agencies to bring claims. See, e.g., Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691(c)-(e) (2000) (allowing claims by aggrieved applicants for credit and specified federal agencies).
purchasing of loans or providing other financial assistance ... for purchasing, constructing, improving, repairing, or maintaining a dwelling."\textsuperscript{165}

The standing provisions in the FHA provide a cause of action to “aggrieved persons,” defined as those who “claim[ ] to have been injured by a discriminatory housing practice; or ... believe[ ] ... [they] will be injured by a discriminatory housing practice that is about to occur.”\textsuperscript{166} Although the statute does not explicitly permit or preclude claims by governmental entities,\textsuperscript{167} and the definition of persons does not include any public entities,\textsuperscript{168} the Supreme Court, in \textit{Gladstone Realtors v. Village of Bellwood}, \textsuperscript{388} relied on the statute's broad definition of aggrieved parties to evince a congressional override of the prudential standing requirements to allow cities to bring claims based on injuries to their proprietary interests.\textsuperscript{169} The language limiting standing to “aggrieved parties,” however, precludes cities from bringing \textit{parens patriae} actions.\textsuperscript{170}

\begin{itemize}
\item \textsuperscript{165} 45 U.S.C. § 3605(b)(1) (2000).
\item \textsuperscript{166} 42 U.S.C. § 3602(i) (2000).
\item \textsuperscript{167} At least one court has discussed the omission of governmental bodies from the FHA definition of person. In \textit{Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca}, 952 F.2d 1183 (10th Cir. 1991), Ponca City moved to dismiss a claim by the Housing Authority--a state agency, claiming that the Authority was not an aggrieved person under the FHA. The court rejected Ponca City's argument on the grounds that: (1) earlier Supreme Court cases had held that “those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered;” (2) the legislative history of the FHA revealed that the legislature intended that the term “aggrieved person” be given a broad definition; and (3) HUD has interpreted “aggrieved persons” to include governmental bodies. \textit{Id.} at 1193-95 (quoting \textit{Trafficante v. Metro. Life Ins. Co.}, 409 U.S. 205, 210 (1972)).
\item \textsuperscript{168} The statutory definition of “person” “includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, receivers, and fiduciaries.” 42 U.S.C. § 3602(d) (2000).
\item \textsuperscript{169} \textit{Gladstone Realtors v. Vill. of Bellwood}, 441 U.S. 91, 100, 103, 109, 111, 115 (1979).
\item \textsuperscript{170} Under state fair housing laws, cities may be able to bring claims in their quasi-sovereign capacity. For example, California's anti-discrimination laws provide that:

\begin{quote}
No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, sex, disability, or medical condition of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

\textit{CAL. CIV. CODE § 51.5 ["Unruh Civil Rights Act"] (West 1982 & West Supp. 2005). Additional provisions state that: Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint.}
\end{quote}
When predatory lenders market abusive loans to people of color, they increase the instability of already vulnerable neighborhoods and impose direct harms on cities, in the form of increased expenses and decreased revenues. These injuries are sufficient to confer standing under the FHA. In Gladstone Realtors, the city alleged that the defendants' discrimination caused “a significant reduction in property values [which] directly injure[d] [the] municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services.” In a subsequent case, a court found that the city of Chicago had standing based on its allegations that:

[R]acial steering leads to resegregation, the process by which a neighborhood which is predominantly white rapidly becomes populated by racial or ethnic minorities. People who have lived in the neighborhoods become panicked and lose interest in the community. This causes a destabilization of the community and a corresponding increased burden on the City in the form of increased crime and an erosion of the tax base. Further, the City's fair housing agency has to use its scarce resources to ensure compliance with the fair housing laws (including its own fair housing ordinances). The City's fair housing agency cannot perform its routine services--human relations training, community workshops, etc.--because it has to commit resources against those engaged in racial steering.

Given that predatory lenders cause the same types of injuries described by the cities of Bellwood and Chicago, it appears that municipalities would have standing to maintain FHA claims in their proprietary capacities against predatory lenders.

F. Summary

There are a number of claims cities could pursue to redress predatory lending either in their proprietary or quasi-sovereigns capacities. Cities that are permitted to bring claims as quasi-sovereigns can seek restitution and injunctive relief as parens patriae for common law fraud. Likewise, to the extent that their

---

Id. § 52(c).

171 Gladstone Realtors, 441 U.S. at 110-11.

172 City of Chicago v. Matchmaker Real Estate Sales Ctr., 982 F.2d 1086, 1095 (7th Cir. 1993) (internal citations omitted); see also Heights Cmty. Congress v. Hilltop Realty, Inc., 774 F.2d 135, 138-39 (6th Cir. 1985) (finding sufficient allegations of a threatened injury to the city to confer standing under the FHA).

173 It is theoretically possible, but highly unlikely, that a state court applying standing rules that are more restrictive than the federal rules could deny a city standing to bring a claim under the Fair Housing Act in its proprietary capacity. See supra note 27 and accompanying text.
state laws grant municipalities standing to bring statutory UDAP claims, cities can bring claims requesting civil penalties and other relief enumerated by statute.

Public nuisance claims may provide the best hope for city lawsuits against predatory lenders because many states, even some of those that severely restrict municipal exercise of power, have recognized that political subdivisions have standing to bring public nuisance actions. The potential remedies in public nuisance claims include injunctive relief and recovery of any costs cities expended abating the nuisance. Similarly, cities may seek restitution through claims of unjust enrichment. Although the basis for city standing in public nuisance and unjust enrichment claims is somewhat unsettled, cities would be wise to frame the claims as proprietary rather than quasi-sovereign. This is because proprietary claims can be brought in federal court and because home rule provisions are more likely to impede cities' ability to bring claims based on quasi-sovereign standing than they are to prevent claims based on proprietary standing.

Lastly, cities can bring Fair Housing Act claims in their proprietary capacities, seeking damages for their direct injuries and injunctive relief.

VI. CONCLUSION

The law governing the standing of municipalities is a quagmire. When it comes to quasi-sovereign standing, the uncertainties outweigh the certainties. Most states have never addressed whether cities have standing as quasi-sovereigns. Those that have typically relied on the amount of power the states had granted political subdivisions to determine whether their cities could sue as parens patriae. However, some jurisdictions that have restricted cities' home rule authority have permitted cities to pursue nuisance claims based on what could be construed as assertions of parens patriae authority. And, regardless of what powers particular states may have granted their cities, the federal courts have not recognized cities as quasi-sovereigns and have precluded all municipal parens patriae claims. Proprietary standing entails less murky waters. Cities can bring claims for direct injuries in state and federal court unless state law imposes restrictions on municipal claims against predatory lenders.

Although there are legitimate bases for municipal standing to bring claims against predatory lenders, there are also significant hurdles, especially when it comes to quasi-sovereign standing. There is also the very real possibility that states will erect additional barriers if the threat of widespread municipal litigation impels the lending and mortgage broker industries to pressure states to prevent such litigation. States may well respond by passing laws preempting municipal lawsuits against predatory lenders and intervening in city litigation to assert that the states' power to regulate lenders prevents cities from suing lenders.

174 See supra text accompanying notes 66-67. In addition, to the extent that states have passed laws preempting city efforts to redress predatory lending through ordinances, they may claim that the preemption applies equally to litigation. See supra note 122 (discussing state preemption of local anti-predatory lending ordinances).
Communities across the country are confronting the mounting external costs of predatory lending and searching for tools to stem the tide. For cities to effectively curtail predatory lending, they need the power of quasi-sovereigns to seek broad relief against the lenders that are destroying their neighborhoods and the ability to pursue claims for direct injuries in their proprietary capacities. Of the many social and economic issues that could justify granting cities broad powers to litigate claims, predatory lending is one of the most compelling.

Predatory lending is a local problem, and it is local governments that have the greatest interest in halting it. This is because states do not bear the financial burden of predatory lending and thus have reduced incentives, relative to cities, to pursue abusive lenders. It is also possible that predatory lending simply falls below the radar of many attorneys general, who are removed from injuries occurring in localities far from their capitals. In addition, depending on the political winds, governors and their cabinets may be more beholden to the interests of the mortgage industry than to politicially less-powerful victims of predatory lending in far-off cities.

Predatory lenders target this country's most vulnerable communities and most vulnerable people. Many victimized borrowers are ill-equipped to protect themselves from these lenders and are even less well-equipped to pursue litigation. Absent enforcement by public entities, abusive lenders often proceed unchecked. Even when aggrieved borrowers have the financial and emotional resources to litigate claims against predatory lenders, the remedies they obtain are personal to them, e.g. damages or loan rescission or reformation, and have little or no impact on lenders' practices and do not redress the externalities that predatory lending imposes on cities.

With the power to pursue claims against predatory lenders as quasi-sovereigns and in their proprietary capacities, cities could more effectively protect their citizens and recover damages for the harms predatory lenders impose on the cities themselves. Most importantly, city lawsuits have the potential to force

175 See Richard Briffault, Home Rule for the Twenty-First Century, 36 URB. LAW. 253, 256, 272 (2004) (arguing that “the political, economic and social structure of metropolitan areas” necessitate revamping home rule statutes).
176 This is not to suggest that states never take an interest in predatory lending. The Connecticut Department of Banking recently entered into a settlement agreement with Ameriquest Mortgage Company of over $7 million, which included a civil penalty, the creation of a Housing Assistance Fund, restitution of unlawfully charged fees, and $500 to each victim of Ameriquest's wrongful lending practices. Kenneth R. Gosselin, Lender Agrees to Big Penalty, HARTFORD COURANT, Jul. 15, 2005, at E1, available at LEXIS, News Library, ALLNWS File.

Although actions by the state may be effective at obtaining restitution for victims and injunctive relief, they typically do not address the externalities imposed on cities.
predatory lenders to internalize the externalities their lending creates, thereby reducing their incentives to engage in abusive lending practices.
PUTTING DEFAULT ON THE TENANT:
DEFAULTING TENANTS AND WRITTEN APPEARANCES
IN EVICTIONS IN ILLINOIS

Grant Nyhammer

Copyright © 2008 The John Marshall Law School
PUTTING DEFAULT ON THE TENANT:
DEFAULTING TENANTS AND WRITTEN APPEARANCES
IN EVICTIONS IN ILLINOIS

By
Grant Nyhammer*

Introduction

The adage that home is a castle (at least one you can defend) is not necessarily true in Illinois where evictions are conducted through a summary statutory proceeding,1 which can transform tenants from lord of the manor to homelessness in a matter of days. Tenants are particularly vulnerable in eviction cases since most are pro se and are unaware of the procedural rules.2 Exacerbating the problem further is that most eviction courts are burdened with huge caseloads and have little time or inclination to protect tenants’ rights.3 Most troublesome, however, is that the Illinois Supreme Court Rules have created a potential procedural ambiguity4 that allows a trial court to whisk tenants into the street without giving them a chance to defend their housing.5

The ambiguity arises, ironically, out of Illinois Supreme Court Rule 181 (b)(2)6 ("the Eviction Rule"), which was ostensibly implemented in 1970 to simplify the eviction process for tenant defendants.7

The Eviction Rule states:

The defendant must appear at the time and place specified in the summons. If the tenant appears, he need not file an answer unless ordered by the court; and when no answer is ordered, the allegations of the complaint will be deemed denied, and any defense may be proved as if it were specifically pleaded.8

* Grant Nyhammer is a 1997 graduate of the John Marshall Law School, and an attorney for legal services.
4 Supreme Court Rule 181(b)(2), 166 Ill.2d R. 181(b)(2).
6 Supreme Court Rule 181(b)(2), 166 Ill.2d R. 181(b)(2).
7 See the 1974 Supreme Court Rule 101(b), 166 Ill.2d R. 101(b), Committee Comments which recognized that a summons in an eviction should give tenants "as much specific information ... as possible" and criticized trial courts for failing to do so under Supreme Court Rule 181, 166 Ill.2d R. 181 (b)(2).
8 Supreme Court Rule 181 (b)(2), 166 Ill.2d R. 181 (b)(2).
While the Eviction Rule relieves the tenant of having to file the usual written defense, it oddly fails to address whether written appearances are still required. This failure allows for an aggressive trial court to dispense with conducting a hearing on the merits by defaulting an unsuspecting tenant for not entering a written appearance.\(^9\) Despite the apparent ambiguity, however, the correct interpretation of the Eviction Rule is that it does not require a written appearance and it is unfair, therefore, for a trial court to default a tenant for failing to do so.

Before discussing the language of the Eviction Rule itself, it is necessary to understand what authority the trial court has in entering a default judgment. Traditionally, the trial court had almost unfettered authority in defaulting tenants regardless of the result.\(^10\) The only limitation on the trial court under the traditional approach was that it had to act within "the bounds of reason."\(^11\) Uncomfortable with vesting too much power in the trial court, a contemporaneous and less deferential approach developed\(^12\) now known as "substantial justice," which focuses on the fairness and not on the rationale of the trial court.\(^13\)

Both standards coexisted until 1960 when the Fourth District Appellate Court in *Widicus v. Southwestern Electric Cooperative, Inc.* effectively rejected the traditional approach by stating the main issue when entering a default judgment is substantial justice.\(^14\) The *Widicus* decision severely limited the authority of the trial court by pointing out that a default judgment is rarely justified and should be used only as a last resort.\(^15\) While the Illinois Supreme Court's adoption of *Widicus* has been somewhat mixed,\(^16\) the modern trend has been to reject the traditional approach and to limit the authority of the trial court to enter a default judgment only to circumstances where it is fair to the parties.\(^17\)

---

14. *Id.* at 102.
15. *Id.*
16. In *Patrick v. Burgess-Norton Manufacturing Company*, 63 Ill.2d 524; 349 N.E.2d 52 (1976), the Illinois Supreme court adopted the rationale of *Widicus* and focused solely on substantial justice in evaluating a default judgment. In *People ex rel. Reid v. Adkins*, 48 Ill.2d 402; 270 N.E.2d 841 (1971), the traditional standard was absorbed into the substantial justice standard when the Illinois Supreme Court stated that a trial court abuses its discretion if substantial justice is not done between the parties. However, in *Foutch v. O'Bryant*, 99 Ill.2d 389, 392; 459 N.E.2d 958 (1984), the Supreme Court implicitly relied on the traditional approach without discussing substantial justice. *Foutch* appears to be an aberration, however, in that it was based largely on the defendant's failure to provide an adequate record on appeal.
Under the substantial justice approach, therefore, it is unfair for a trial court to use the Eviction Rule to default a tenant for failing to file a written appearance for three reasons. First, the express language of the Eviction Rule does not require a written appearance in forcible entry and detainer actions ("Evictions"). Second, it is unfair for a trial court to enter a default judgment once a tenant answers the complaint by appearing in court. Third, a default judgment is too drastic a remedy and is usually not warranted under the circumstances. A tenant's appearance in court, therefore, effectively denies the authority of the trial court to use the Eviction Rule to enter a default judgment.

A. Written appearances not required

The first reason that it is unfair for a trial court to default a tenant for failing to enter a written appearance is that it is not required when considering the language of the Eviction Rule. When interpreting the Eviction Rule, the normal rules of statutory construction apply which involve examining: 1) the plain language; 2) each section in relation to the whole; and 3) the purpose for enactment. When applying these methods to the Eviction Rule, it is clear a written appearance in Evictions is not required for three reasons.

1. Express language

First, the plain language of the Eviction Rule is that the tenant's presence in court constitutes the entering of an appearance and answering the complaint. The Eviction Rule states that "the tenant must appear at the time and place specified in the summons" and "need not file an answer." A formal appearance is made, therefore, when the tenant physically appears before the trial court. Once in court, the Eviction Rule expressly waives the necessity of filing further written documents.

2. Entire Illinois Supreme Court Rule

Second, reading the Illinois Supreme Court Rule in its entirety, it is evident that a written appearance is not required in Evictions. Illinois Supreme Court Rule 181(b) states:

When Summons Requires Appearance on Specified Day.

---

18 735 ILCS 5/2-1301(d) (West 2000).
19 Biscan, 277 Ill. App. 3d at 848.
21 Supreme Court 181(b)(2), 166 Ill.2d R, 18II(b)(2).
(1) Actions for Money. Unless the "Notice to Defendant" (see Eviction Rule 101(b)) provides otherwise, an appearance in a civil action for money in which the summons requires appearance on a specified day may be made by appearing in person or by attorney at the time and place specified in the summons and making the appearance known to the court, or before the time specified for appearance by filing a written appearance, answer, or motion, in person or by attorney. The written appearance, answer, or motion shall state with particularity the address where service of notice or papers be made upon the party or attorney so appearing. When a tenant appears in open court, the court shall require him to enter an appearance in writing. When an appearance is made in writing otherwise than by filing an answer or motion, tenant shall be allowed 10 days after the day for appearance within which to file an answer or motion, unless the court, by Eviction Rule or order, otherwise directs.

(2) Forcible Detainer Actions. In actions for forcible detainer (see Eviction Rule 101(b)), the defendant must appear at the time and place specified in the summons. If the tenant appears, he need not file an answer unless ordered by the court; and when no answer is ordered, the allegations of the complaint will be deemed denied, and any defense may be proved as if it were specifically pleaded.23

Illinois Supreme Court Rule 181(b) is divided into two sections and describes how appearances are made in cases in which the summons requires an appearance on a particular day. The first section, 181(b)(1), states the general rule for entering an appearance and the second section, 181(b)(2), is an exception for Evictions. The first section expressly states that defendants are required to file a written appearance when appearing in court.24 The second section for Evictions, however, omits all language regarding a written appearance and simply states that a tenant must appear at the place specified in the summons. The Eviction exception is significant for several reasons. First, entering an appearance in Evictions is different from other civil matters or there would be no need for the express exception. Second, the only purpose for omitting the written appearance language for Evictions is that it is not required. To conclude otherwise would make section 181(b)(2) meaningless because it would be redundant of section 181(b)(1). It is the intent of Illinois Supreme Court Rule 181(b), therefore, to require written appearances in actions for money but not in Evictions.

3. Written appearances unnecessary

23 Supreme Court 181(b)(2), 166 Ill2d R, 181(b)(2).
24 Supreme Court 181(b)(1), 166 Ill2d R. 181(b)(1).
Third, when considering the purpose of Evictions, it is evident that a written appearance is not required. The purpose of Evictions is to summarily decide property claims as evidenced by the Eviction Rule waiving the necessity of a written answer, which is, arguably, more crucial to litigation than a written appearance. Further, a written appearance is unnecessary in Evictions. The function of a written appearance is to determine jurisdiction and to facilitate subsequent filings. There is usually no issue of jurisdiction in Evictions since both parties are in court. Also, having a written appearance in the court file does not aid any subsequent filings since it is unlikely there will be any. Even if there were to be additional filings, however, a tenant is obviously a named party and the complaint will contain the tenant's address. It is contrary, therefore, to the purpose of a summary proceeding to require the unnecessary formalities of a written appearance when a tenant is standing before the court having already answered the complaint. The purpose of the Eviction Rule, therefore, does not require a written appearance. Since the purpose and language of the Eviction Rule waive a written appearance, it is unfair for a trial court to default a tenant for failing to file a written appearance.

B. Complaint has been answered

The second reason it is unfair to enter a default judgment is that tenant's presence in court answers the complaint. The trial court may default a tenant for "want of an appearance, or for failure to plead." As stated above, a tenant's physical appearance in court is an appearance and an answer denying the allegations of the complaint. Courts have long recognized that once the complaint has been answered, it is an error for the trial court to enter a judgment of default. An answer necessitates a hearing on the merits. This necessity is particularly true in summary proceedings. Consequently, it is unfair for the trial court to default a tenant for failing to file a written appearance once the complaint has been answered.

C. Default too drastic an action

The final reason it is unfair to default a tenant for not entering an appearance is that it is too drastic a measure. Even if, arguendo, a tenant is required to enter a written appearance, failing to do so does not merit a default

25 See Supreme Court Rule 104, 134 Ill.2d R. 104, and 735 ILCS 5/2-301 (West 2000) et seq.
26 735 ILCS 5/2-1301(d) (West 2000).
27 See Stamm, 19 Ill. App. 3d at 1089.
29 Dils, 62 Ill. App. 3d at 479.
A default is an extreme measure, which is rarely warranted. The factors for determining if the trial court acted fairly in entering a default judgment include: the tenant's diligence; the severity of the penalty; and the hardship on the plaintiff for not entering the default. Further, the entering of a default judgment is subject to close scrutiny. For example, it is unfair for a trial court to default a tenant for failing to: reappear in court after filing a counter claim; file an answer that was not ordered by the court; and file a timely answer. Similarly, defaulting a tenant for not entering a written appearance is unfair. First, a tenant simply appearing in court on time for an Eviction demonstrates due diligence. Second, the penalty to tenants of entering a default judgment is severe because they are deprived of the chance to defend their housing even from an illegal eviction or from a party who may not even own the property. Conversely, the only burden generally on the landlord for not entering a default judgment is proving the allegations of the complaint. Since the hardships are usually overwhelming against a tenant in an Eviction, a hearing on the merits is virtually mandatory.

Further, the trial court generally has less drastic options available than ordering a default, including: having a hearing on the merits without further filings; ordering a tenant to file an appearance; giving the tenant an appearance form; or continuing the matter to allow the tenant the time file an appearance. Without exploring and exhausting all of these options, a trial court lacks the authority to order a default. Consequently, absent a tenant failing to appear for a trial, a default judgment can rarely be justified by the trial court.

In summary, it is unfair for a trial court to default a tenant for not entering an appearance in an Eviction. Despite the pressures of a busy docket, a trial court should not use the Eviction Rule as sword but rather as a shield to ensure that tenants receive their day in court.

---

31 Biscan, 277 Ill. App. 3d at 848.
32 Id.
34 People v Kruger, 146 Ill. App. 3d 530, 534, 495 N.E.2d 993 (1986).
35 Ryan, 66 Ill. App. 3d at 131.
38 Rockford Housing Authority, 337 Ill. App.3d at 576.
39 Id.
40 Biscan, 277 Ill. App. 3d at 848.
Standing to Complain in Fair Housing Administrative Investigations

Michael P. Seng, Professor*
The John Marshall Law School Fair Housing Legal Support Center
Chicago, Illinois

I. The Problem

Much time and effort is spent at the administrative level in fair housing cases determining whether the complainant has standing to bring the complaint. While this is a proper inquiry for actions brought under the Fair Housing Act \(^1\) in the federal courts, it is not a proper inquiry at the administrative level, whether before the United States Department of Housing and Urban Development (HUD) or before a state or local human rights organization that has been certified as a substantially equivalent agency by HUD.

The sole inquiry at the administrative level should be whether housing discrimination has occurred. If discrimination has not occurred, the agency should find no reasonable cause. If discrimination has occurred, the agency should find reasonable cause and prosecute the action in the name of the agency. Non-attorney investigators should not be asked to make an initial determination whether the complainant has fulfilled the legal requirements for standing, even the very minimal requirements set forth by the United States Supreme Court in fair housing cases. The issue of standing will itself become moot once reasonable cause is found and an enforcement action is initiated either in the name of the Secretary if the parties elect to proceed before a HUD Administrative Law Judge, or in the name of the United States if the parties elect to proceed in federal court.

Adoption of this standard is consistent with Congressional intent in enacting the 1988 Fair Housing Amendments Act. \(^2\) While one could argue that there is seemingly contrary language in Supreme Court opinions that occurred prior to the passage of the 1988 Amendments Act, this is not the case. The Supreme Court has not addressed the issue of standing since 1988, and by-passing the standing requirement in the administrative forum as advocated here will expedite enforcement by removing an irrelevant and potentially time-consuming inquiry at the investigatory stage. Such an approach is consistent with Congress’ intent in 1988 to provide a fully effective administrative remedy to eliminate housing discrimination.

---

*The Author would like to thank John Marshall student Ravinda Marur for his research assistance on this article and Maurice McGough, Director of the Chicago Program Center, Region V. Office of Fair Housing and Equal Opportunity, the United States Department of Housing and Urban Development, for his valuable insights into the HUD administrative process.

\(^1\) 42 U.S.C. §§3601 et seq.

II. An Analysis of Trafficante and Related Standing Decisions under the Fair Housing Act.

The first and still most important case on standing under the Fair Housing Act is the Supreme Court’s decision in Trafficante v. Metropolitan Life Insurance Co., 3 decided in 1972. In Trafficante, two tenants of an apartment complex filed suit claiming that the complex discriminated against nonwhites in violation of the Fair Housing Act. One of the plaintiffs was white.

Under the procedures of the Fair Housing Act as it was originally drafted in 1968, any persons who claimed to have been injured by a discriminatory housing practice or who believed that he or she was about to be irrevocably injured could file a complaint with the Secretary. 5 The Secretary was required to investigate the complaint and to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation and persuasion. If the secretary was not able to obtain voluntary compliance within 30 days, the aggrieved person could file a civil action in a United States district court for appropriate relief. If there was a state agency that could provide relief the Secretary was required to defer to the state agency.

The complainants in Trafficante were unsuccessful at HUD and filed a civil suit in the United States District Court claiming that they were injured because they lost the benefits of living in an integrated community, had missed business and professional advantages which would have accrued to them if they had lived with members of minority groups, and had suffered embarrassment and economic damage by being stigmatized as residents of a “white” ghetto. 6

The District Court dismissed the action for lack of standing, and this decision was affirmed by the Court of Appeals.

The 1968 Fair Housing Act defined a “person aggrieved” as “[a]ny person who claims to have been injured by a discriminatory housing practice.” 7 The Supreme Court acknowledged that “complaints by private persons are the primary method of obtaining compliance with the Act” and cited a Third Circuit opinion that the Act reflected “a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.” 8 The Court noted that HUD had consistently given the words “parties aggrieved” a broad construction and that this construction should be deferred to. 9

The Supreme Court recognized that the government itself had no means of generating complaints under the Act and therefore private persons acted as “private attorneys

---

3 409 U.S. 205 (1972).
5 42 U.S.C. §3610.
6 409 U.S. at 208.
7 42 U.S.C. §3610(c).
9 409 U.S. at 210.
general” in generating private suits “vindicating a policy that Congress considered to be of the highest priority.” 10

The Court’s reasoning was thus clear. The primary means of enforcement under the 1968 Fair Housing Act was through private civil suits. Administrative enforcement was minimal. HUD could only try to persuade the parties to settle voluntarily. Private civil suits can only be instituted by parties that meet the requirements of Article III standing. Therefore, the Court noted that Congress intended that complainants must meet the bare minimum standing requirement under Article III. Thus, while administrative enforcement is present, the Court noted that realistically anyone bringing a complaint to HUD would almost inevitably be required to file suit in federal district court if HUD could not obtain voluntary compliance. Standing to file an administrative complaint was thus coequal to the minimum standing requirements of Article III, below which the Court could not go.

This reasoning prevailed in the other two Supreme Court decisions involving standing to bring a complaint under the 1968 Fair Housing Act, prior to its being amended in 1988.

In Gladstone, Realtors v. Village of Bellwood,11 the Supreme Court again read standing as broadly as Article III allowed. Suit had been brought by the Village of Bellwood, Illinois, five of its residents – one black and four white, and a black resident of a neighboring town, who claimed that the defendant real estate brokers were engaging in racial steering. The individual plaintiffs were all fair housing testers and were not themselves seeking to purchase homes. The actions of the brokers were alleged to have illegally manipulated the housing market by creating and maintaining segregated neighborhoods that injured the village and the individual complainants. The trial judge ruled that the plaintiffs lacked standing to make the argument, but was reversed by the Court of Appeals.

As a general rule of law, the Supreme Court stated that:

“Congress may, by legislation expand standing to the full extent permitted by Art. III, thus permitting litigation by one ‘who otherwise would be barred by prudential standing rules.’ . . . In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered ‘a distinct and palpable injury to himself,’” . . . that is likely to be redressed if the requested relief is granted.”12

Unlike Trafficante, where the parties first sought administrative relief under Section 810 before HUD, the parties in Bellwood filed their action directly in federal district court under Section 812. The realtors argued that standing should be more restrictive under Section 812, where administrative remedies were not a prerequisite to the invocation of

---

10 409 U.S. at 211.
12 441 U.S. at 100.
the federal judicial power.\textsuperscript{13} However, the Court rejected this argument finding that “nothing in the language of §812 suggests that it contemplates a more restricted class of plaintiffs than does §810.”\textsuperscript{14} The Court recognized that Congress intended the victims of housing discrimination to have two alternative methods for redress that were independent of each other and available to the same class of plaintiffs and concluded that “Standing under §812, like that under §810, is ‘as broa[d] as is permitted by Article III of the Constitution.’”\textsuperscript{15}

Thus, \textit{Bellwood} follows \textit{Trafficante} in recognizing that the primary means of enforcing the 1968 Fair Housing Act was through suits filed in the federal district courts where the parties would be required to meet only the bare minimum standing requirement of Article III. The only difference between proceeding under Section 810 and Section 812 was whether the plaintiffs sought HUD’s help in seeking a voluntary settlement with the defendant before filing their court action.

The Supreme Court’s third decision follows this same remedial path. In \textit{Havens Realty Corp. v. Coleman},\textsuperscript{16} the Court held that a “tester’ who had been given false information about the availability of housing\textsuperscript{17} and a fair housing organization that claimed that it had diverted its resources to fight housing discrimination and that its mission to secure equal access to housing was frustrated had standing under the Section 812 of 1968 Fair Housing Act.

The Supreme Court thus consistently held that Congress intended that there be broad standing under the 1968 Fair Housing Act. Because the Court saw judicial enforcement as the essential remedial mechanism under the Act, the Court never considered the question of administrative standing apart from the question of Article III standing.

\textbf{III. The 1988 Fair Housing Amendments Act and Administrative Investigations}

The 1988 Fair Housing Amendments Act completely changed the nature of fair housing enforcement. As the Supreme Court had correctly recognized in \textit{Trafficante}, the 1968 Act relied primarily upon private enforcement actions in the federal courts. The only exceptions were the voluntary settlement procedures that could be initiated by plaintiffs at HUD. However, if the defendant was not willing to negotiate or if the parties’ expectations were too far apart, a private lawsuit in the federal court was the only avenue open to them under the Act. The United States Department of Justice could

\begin{footnotes}
\item[13] Justice Rehnquist agreed with the realtors and dissented arguing that because Section 812 did not have an exhaustion requirement the Court should impose a prudential limitation stricter than the bare requirements of Article III.\textsuperscript{13}
\item[14] 441 U.S. at 102.
\item[15] 441 U.S. at 109.
\item[16] 455 U.S. 363 (1982).
\item[17] The Court stated that “A tester who has been the object of a misrepresentation made unlawful under §804(d) has suffered injury in precisely the form the statute was intended to guard against and therefore has standing to maintain a claim for damages under the Act’s provisions.” 455 U.S. at 373-4.
\end{footnotes}
enforce the Fair Housing Act, but as recognized by the Supreme Court, only in pattern and practice cases.\textsuperscript{18}

Under the 1988 Amendments Act, aggrieved parties could still file private fair housing actions in both the state and federal courts, and these judicial enforcement actions were facilitated by the Act’s extension of the statute of limitations to two years.\textsuperscript{19} The Justice Department could continue to initiate pattern and practice cases.\textsuperscript{20} But in addition, enforcement actions could be initiated through a complaint with HUD or a substantially equivalent state agency.

To initiate the administrative process, an “aggrieved person” can file a complaint within one year after an alleged discriminatory housing practice with the HUD Secretary.\textsuperscript{21} An “aggrieved person” is defined as “any person who – (1) claims to have been injured by a discriminatory housing practice; or believes that such person will be injured by a discriminatory housing practice that is about to occur.”\textsuperscript{22} In addition, Congress further expanded the Act to provide that the Secretary could initiate a complaint and that the Secretary could investigate housing practices to determine whether a complaint should be brought.\textsuperscript{23} Where there is a substantially equivalent state or local agency, HUD must refer the matter to it.\textsuperscript{24}

HUD is required to conduct an investigation of the complaint within 100 days, which can be extended.\textsuperscript{25} During that period HUD is required to attempt to conciliate the complaint.\textsuperscript{26} However, if the case is not conciliated and if HUD determines that there is reasonable cause to believe that a discriminatory housing practice has occurred, HUD must issue a finding of cause.\textsuperscript{27}

At this stage the parties have a choice. They can elect to have the matter heard by a HUD Administrative Law Judge (ALJ).\textsuperscript{28} Or they can elect to take the matter to federal court.\textsuperscript{29} If the matter proceeds before a HUD ALJ, action is taken in the name of the Secretary and the matter is pursued on the government’s behalf through the office of HUD’s General Counsel. The complainant has the option to intervene in the proceeding, but the matter proceeds regardless whether the complainant intervenes or is represented by private counsel. If either party elects to go to federal court, the matter is pursued in the name of the United States by the Department of Justice. The complainant may

\begin{itemize}
\item \textsuperscript{18} 409 U.S. at 209. 42 U.S.C. §813 (a).
\item \textsuperscript{19} 42 U.S.C. §3613.
\item \textsuperscript{20} 42 U.S.C. §3614.
\item \textsuperscript{21} 42 U.S.C. §3610(a)(1)(A)(1).
\item \textsuperscript{22} 42 U.S.C. §3602(i).
\item \textsuperscript{23} 42 U.S.C. §3610(a).
\item \textsuperscript{24} 42 U.S.C. §3610(f).
\item \textsuperscript{25} 42 U.S.C. §3610 (a)(1)(B)(iv). Failure to meet the 100 day requirement is not jurisdictional. \textit{Baumgardner, v. HUD}, 960 F.2d 572 (6th Cir. 1992).
\item \textsuperscript{26} 42 U.S.C. §3610(b). The failure of HUD to attempt any conciliation can result in the vacation of a later award and a remand to renew conciliation efforts. \textit{HUD v. Kelly}, 3 F.3d 951 (6th Cir. 1993).
\item \textsuperscript{27} 42 U.S.C. §3610(g).
\item \textsuperscript{28} 42 U.S.C. §3612(b).
\item \textsuperscript{29} 42 U.S.C. §3612(a).
\end{itemize}
intervene and be represented by private counsel.\textsuperscript{30} Whether before the ALJ or in the district court, it is the obligation of the government to vindicate the plaintiff’s rights and to collect compensation and redress on the complainant’s behalf.

Thus while federal court actions by private parties continue to play an important role in fair housing enforcement, Congress expanded enforcement by giving the United States either through HUD or the Department of Justice an important role in bringing enforcement actions. Congress further expanded the enforcement role of HUD by requiring that within 180 days after enactment, it issue rules implementing the Act.\textsuperscript{31}

In addition to the language of the 1988 Fair Housing Amendments Act, its legislative history demonstrates Congress’ intent to expand enforcement of the 1968 Fair Housing Act. The House Report acknowledges that the 1968 Act, by relying almost exclusively on private enforcement, failed to provide an effective enforcement system to make the promises made in that Act a reality.\textsuperscript{32} The Report states:

“Section 810(a) provides for the investigation of an alleged discriminatory housing practice, upon receipt of a complaint by an aggrieved person or on the secretary’s own initiative. The Secretary may also investigate housing practices to determine whether a complaint should be filed.”\textsuperscript{33}

Thus, standing was clearly not intended to be an impediment to a HUD investigation. Indeed, the Secretary was encouraged to investigate even on his or her own initiative.

In introducing the Amendments in the United States Senate, Senator Edward Kennedy of Massachusetts stated that:

“The existing fair housing law is a toothless tiger. It recognizes a fundamental right; but it fails to provide a meaningful remedy.

“Under existing law, HUD may respond to complaints of housing discrimination only by ‘conference, conciliation and persuasion.’ But because HUD lacks real power to enforce the law, would-be violators have little incentive to obey it.

“The Fair Housing Amendments Act of 1988 will put real teeth into the fair housing laws by giving HUD real enforcement authority.”\textsuperscript{34}

Senator Arlen Specter of Pennsylvania added that:

“At the present time, an aggrieved party may file a complaint with the Secretary of Housing and Urban Development setting forth a discriminatory

\begin{itemize}
\item \textsuperscript{30} 42 U.S.C. §3612(c).
\item \textsuperscript{31} 42 U.S.C. §3601 note.
\item \textsuperscript{33} House Report, \textit{supra} n.32, at 33.
\item \textsuperscript{34} 134 Cong. Rec. S10454-5 (Aug. 1, 1988).
\end{itemize}
housing practice. Then there are conciliation efforts, HUD has no authority under existing law to initiate a complaint on its own or to issue a cease and desist order. Its role is simply to conciliate between prospective renters and buyers or landlords and sellers. The conciliation agreements are entirely voluntary. If the conciliation process fails, HUD has no statutory recourse and then only the aggrieved party may file a suit.

“So it is apparent, Mr. President, that under existing law there is no effective remedy.”

Senator Robert Dole of Kansas further explained why broader enforcement mechanisms were so important:

“The Department of Housing and Urban Development which administers the fair housing law, estimates that more than 2 million acts of housing discrimination occur every year – 2 million. Yet HUD receives only 4,000 to 5,000 complaints each year. Something is wrong here.

“Here are some possible reasons for the low number of complaints; Some victims may not even know they have been discriminated against because information about the availability of housing is withheld.

“Another reason for the low number of complaints may be frustration. Frustration due to the even lower number of housing units actually obtained for the victims of discrimination.

“It is a simple fact of life that if you do not deliver the goods, sooner or later, people simply stop coming to you for help.

“In my view a major reason the fair housing law has not been more effective is that it relies on voluntary conciliation and persuasion. In other words, a law without its teeth. It does not have the clout necessary to stop discrimination as it occurs and to assure that housing is still there when a complaint is finally resolved.

“The Secretary of HUD, in testimony last year before the Judiciary Committee, cited a study indicating that a black person seeking to purchase a home had a 48-percent chance of being discriminated against.

“This is unacceptable – especially 20 years after passage of the fair housing law. This Nation should not rest until fair housing is more than a slogan. It should be a reality.”

These comments all reflect the concern that the Fair Housing Act did not have an adequate enforcement mechanism and that complaints to HUD should be facilitated and

encouraged. Nothing was stated about putting any restraints on HUD’s investigative powers. The 1988 Amendments Act was to provide a prompt and efficient enforcement mechanism that would result in a substantial number of complaints being filed and an expeditious method for their resolution.

In adopting regulations to enforce the Act, HUD literally repeated the statutory requirements. The Regulations use the statutory definition of an “aggrieved person.” The preliminary notes to the Regulations state that:

“The Department has consistently interpreted the provision of the fair housing law to permit the filing of a complaint by any person or organization which alleges that a discriminatory housing practice has occurred or is about to occur and which will result in an injury to them.”

The Regulations also provide that once a charge is filed, HUD is a party to the proceeding, although aggrieved persons may seek to intervene in the action.

Consistent with these provisions, the Regulations provide that:

“The Assistant Secretary will receive information concerning alleged discriminatory housing practices from any person. Where the information constitutes a complaint within the meaning of the Fair Housing Act and this part and is furnished by an aggrieved person, it will be considered to be filed under § 103.40. Where additional information is required for purposes of perfecting a complaint under the Fair Housing Act, HUD will advise what additional information is needed and will provide appropriate assistance in the filing of the complaint.”

Thus, the HUD regulations recognize HUD’s broad power and do not restrict who may file a complaint with HUD. HUD is permitted to receive any information concerning alleged discriminatory housing practices from any person. HUD must then investigate to determine whether a complaint should be filed. Significantly, HUD complaints require only:

“(1) The name and address of the aggrieved person.

“(2) The name and address of the respondent.

“(3) A description and the address of the dwelling which is involved, if appropriate.

“(4) A concise statement of the facts, including pertinent dates, constituting the alleged discriminatory housing practice.”

---

37 24 C.F.R. §100.20.
39 24 C.F.R. §104.430.
40 24 C.F.R. §103.10 (emphasis supplied).
41 24 C.F.R. §103.30(c).
It is significant that the Regulation does not require that complainants state their injury.

The preliminary notes to the Regulations provide further support that HUD investigators are to investigate only whether a violation of the Act has occurred or is about to occur and not any resulting injury upon the complainant. The notes state that:

“Contrary to the allegations of the commenters, a fair reading of the regulation clearly demonstrates HUD’s intent to limit the reasonable cause assessment to the issue of whether a discriminatory housing practice has occurred or is about to occur. HUD, by repetition in the regulation, expressed its position that the reasonable cause determination is to be based solely on the issue of liability.”

Once a charge is filed, any subsequent civil action is processed in the Secretary’s name or in the name of the United States of America, although aggrieved parties may request to intervene in HUD ALJ proceedings. Consequently standing is no longer an issue because HUD or the United States has standing to see that the federal law is enforced against a housing provider who has engaged in a discriminatory housing practice.

IV. General Principles of Administrative Standing

Article III case and controversy requirements do not apply strictly before administrative agencies. Administrative agencies are not Article III courts and Congress can provide who has authority to initiate complaints before an administrative body. Thus, when we discuss administrative standing we start with the statute and not with Article III of the United States Constitution. Petitioners may be “interested part[ies]” under the statute and therefore able to petition the agency and yet not have Article III standing to bring an action in federal Court.

The decision of the Federal Circuit in *Richie v. Simpson* is particularly relevant to who can file a complaint with HUD to initiate a fair housing investigation. In this case, the Court of Appeals allowed a self-described “family man” to oppose the registration of the trademarks O.J. SIMPSON, O.J., and THE JUICE before the Trademark Trial and Appeal Board. Richie argued that the registration should not be allowed because the trademarks disparaged his values, especially his values relating to his family. The Court found that his values reflected those of many other individuals and that he had sufficient interest to appear before the Board in opposition to the registration.

Clearly fair housing organizations and advocates acting as private attorneys general have a special interest in seeing that the fair housing laws are enforced. There is no

44 *Brazoria County v. Equal Employment Opportunity Commission*, 391 F.3d 685, 691 (5th Cir. 2004); *Gettman v. Drug Enforcement Administration*, 290 F.3d 430, 433 (D.C.Cir. 2002); *Wilcox Electric, Inc. v. FAA*, 119 F.3d 724, 727 (8th Cir. 1997).
45 See note 41, supra.
reason to do a *Havens*\(^{46}\) inquiry at the administrative level to determine if they have indeed suffered a “diversion of resources” or a “frustration of purpose.” Their allegation that they have an interest in seeing that the values of the Fair Housing Act are implemented is sufficient to qualify them as “aggrieved parties” who can initiate a HUD investigation to rectify a violation of the Act.\(^{47}\) As in *Richie*, fair housing advocates are injured because their very purpose is to oppose housing discrimination. While the United States Supreme Court does not recognize this as an injury that entitles one to sue in the federal courts,\(^{48}\) it nonetheless states a sufficient injury to allow one to complain as an “aggrieved person” to HUD.

If the private attorney general later files an action in federal court, then, of course, standing in the Article III sense is required. If the private attorney general suffered no injury in fact and has no “stake in the outcome of the controversy,” there is no standing in an Article III court even if there was standing before the administrative agency.

V. The Solution to the Question of Standing in Administrative Complaints before HUD

Congress used the same term, “aggrieved party” in both the 1968 Act and the 1988 Amendments Act. However, the context of the two acts is different. In 1968, the emphasis was on private litigation. Even though an administrative remedy was provided, that remedy was really little more than a prelude to a judicial action if the matter was not voluntarily settled by the parties. The emphasis on litigation in the 1968 Act required that complainants meet the minimum standing requirements of Article III.

Congress continued to use the term “aggrieved party” in the 1988 Amendments Act. However, now the administrative process provided a separate and distinct remedy. This remedy was not tied in any way to the requirements of Article III of the Constitution.

Today the administrative process can completely resolve a claim for discrimination in housing. If HUD is not successful in conciliation, the matter proceeds to adjudication before a HUD ALJ where it is prosecuted by a HUD attorney in the name of the Secretary. If the matter proceeds to adjudication in court, it is prosecuted by the Department of Justice in the name of the United States. In either case, the aggrieved

\(^{46}\) See note 16, supra.

\(^{47}\) It is unlikely that the fair housing organization or other private attorney general would abuse the right to file a complaint and try to initiate clearly frivolous investigations. However, HUD could provide rules to discourage such practices if it became necessary. In any event, it is doubtful if the present standing requirement present a real impediment to any individual or group that decides to abuse the process.

\(^{48}\) See, e.g., Allen v. Wright, 468 U.S. 737 (1984) (black parents’ interest in school desegregation does not give them standing to challenge the policies of a segregated private school that their children do not attend or have not applied to); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (environmentalists have no standing as such to enforce the environmental laws or to ensure that the government follows proper procedures under the law); Hein v. Freedom from Religion Foundation, 127 S.C. 2553 (2007) (taxpayers have no standing to object to federal grants given under President Bush’s Faith-Based Initiatives Program as a violation of the establishment clause).
party is not the party in whose name the action is filed, although the aggrieved party is free to intervene as a party.

Congress clearly intended that enforcement of the Fair Housing Act be as broad as the Constitution allows. The Constitution allows the very broadest standing to bring an administrative complaint, not just those who have standing in the Article III sense of the term. Because there has been confusion in the past at the administrative level about the powers of fair housing investigators, HUD should issue a directive requiring investigators to cease inquiring about the standing of persons or groups that file administrative complaints. In doing so, HUD will be acting consistent with Congressional intent and with HUD’s own regulations and will be furthering the goal expressed so well by Senator Walter Mondale in introducing the 1968 Act – to move America from segregated housing to “truly integrated and balanced living patterns.”

---

The Cairo Experience:
Civil Rights Litigation in a Racial Powder Keg

Michael P. Seng

Abstract

The Oregon Law Review originally published this article in its 1982 edition. Please cite this article as 61 Ore L Rev 285 (1982). This article contains page numbers from that edition so the Oregon Law Review may be properly cited, i.e., [285].

Copyright © 1982 Oregon Law Review
The Cairo Experience:
Civil Rights Litigation in a Racial Powder Keg

By
Michael P. Seng

At the junction of the two rivers, on ground so flat and low and marshy, that at certain seasons of the year it is inundated to the house-tops, lies a breeding place of fever, ague, and death . . . A dismal swamp, on which the half-built houses rot away a hotbed of disease, an ugly sepulchre, a grave uncheered by any gleam of promise: a place without one single quality, in earth or air or water, to commend it: such is the dismal Cairo.1

Cairo is situated at the confluence of the Mississippi and Ohio Rivers, at the southern tip of Illinois. It is 400 miles south of Chicago and 160 miles north of Memphis. During the late 1960s and early 1970s, Cairo was the scene of some of the worst racial hostility and violence this country has known.2

In 1969, the Lawyer's Committee for Civil Rights Under Law opened [286] an office in Cairo. The Lawyer's Committee channeled the concerns of Cairo's black citizens from the streets into the courts. This use of litigation to

---

1 C. DICKENS, AMERICAN NOTES 185 (1842).
2 In 1967, Robert L. Hunts, Jr., a black passenger in an automobile stopped by Cairo police for having a defective tail-light, was arrested for being verbally abusive. He was later found hanged in the city jail. Three days of disorder followed. At a coroner's inquest held two months after the incident his death was ruled a suicide.

In 1968, Reverend Larry Potts, a white segregationist Baptist minister, clubbed a 73-year-old black man to death. A coroner's jury absolved Potts, who contended that the man had attempted to rape Potts' wife.

Cairo's white community responded to black disorder by organizing a group known as the "White Hats." Its 600 members were deputized by the sheriff and patrolled the town to keep order. SPECIAL HOUSE COMM. TO INVESTIGATE THE ALLEGATIONS CONCERNING THE COUNTY OF ALEXANDER AND THE CITY OF CAIRO APPOINTED PURSUANT TO HOUSE RESOLUTION No. 118, PRELIMINARY REPORT (1969) [hereinafter cited as HOUSE REPORT 118]. The White Hats were disbanded in 1969 under pressure from the Illinois Attorney General. This step was taken because under Illinois law a sheriff has no authority to maintain a standing force of special deputies. Carpenter's Union v. Citizens' Comm., 244 Ill. App. 540 (1927). The United Citizens for Community Action (UCCA), an affiliate of the White Citizens' Council, was formed as a successor organization.
combat racism and violence has not been entirely successful, but it has established
the framework for an ongoing dialogue as an alternative to street fighting.

This Article outlines the history of Cairo and describes what happened
when the civil rights lawyers came to town. Drawing from litigation aimed at
securing and protecting the right to protest, nondiscriminatory law enforcement,
equal employment, fair housing, and political representation, this Article
illustrates the essential role of federal courts in the civil rights arena. These
examples highlight the need for both accessibility to the federal courts and the
availability of independent legal service organizations to give effect to civil rights.

I.

THE HISTORICAL SETTING

Cairo's founders and promoters had great hopes for the city. Cairo was first established in 1818 as a business trust by a group of eastern merchants. The trust failed and the town was transferred in 1836 to the Cairo City and Canal

3 Civil rights lawyers were not always well-received. Not long after the author first went to Cairo to litigate civil rights problems, he traveled to a small rural community to represent a number of students who had been suspended from the local high school for failure to get haircuts. The federal court ordered the students reinstated. Copeland v. Hawkins, 352 F. Supp. 1022 (E.D. Ill. 1973). A local newspaper commented:

A new creature has appeared on the horizon. He is a much feared and by
many, a much hated sort. Yet, he is a product of our times. We call him the "civil rights lawyer."

This is the villan [sic] who defeats our local lawyers and our laws at their
own game. He comes to town with a bundle of tricks and seemingly limitless
time and efforts to make things go his way. He is the one who wins the court
cases on technicalities. He is the one who puts children back in school and sues
the school for trying to tell the youth how he should groom his hair. He is the
one who is always a thorn in the side of the usual operation of our governmental
system.


4 See notes 22-35 and accompanying text infra.

5 See notes 36-64 and accompanying text infra.

6 See notes 65-90 and accompanying text infra.

7 See notes 91-105 and accompanying text infra.

8 See notes 106-131 and accompanying text infra.


John Lansden went to in Cairo in 1865 after graduating from law school. He founded a law
firm that continued until 1977 under his son and two grandsons. The Lansden family was destined
to play a crucial role in the civil rights struggle of Cairo blacks. Lansden's son successfully argued
People v. Nellis, 249 Ill. 12, 94 N.E. 165 (1911), before the Illinois Supreme Court. See note 36 infra. His grandson, David, was local counsel on the equal pay for teachers and school desegregation cases of the 1940s and 1950s. See notes 15-17 infra. His other grandson, Robert,
was instrumental in bringing the Lawyer's Committee to Cairo in 1969, and served as co-counsel
on many of the Committee's lawsuits.
Company. Throughout this period, the fortunes of the city were closely tied to those of the Illinois Central Railroad. In 1846, the city properties were again transferred to the Cairo City Property Trust, and Cairo continued to be administered as a strictly proprietary venture. Private lots were not sold in the city until 1853, and a civil government was not formed until 1855. Despite the more pretentious claims of its promoters, Cairo was a town of "cardsharps, pickpockets, pimps and prostitutes" until Governor Adlai Stevenson put an end to gambling in the city in the late 1940s.10

Cairo is situated at the confluence of two important waterways, at almost the exact geographical center of the United States. Nevertheless, the town was never to meet its promoters' expectations. Cairo reached its peak population, about 15,000 persons, in 1920; since then it has slumped into decay. Today its population is about 6,000. At the time of the racial disturbances described in this Article, Cairo had the lowest per capita income, the highest rate of unemployment, and the poorest housing of any municipality in Illinois.11

In order to prosper, Cairo had to protect itself from the flood conditions so graphically described by Charles Dickens. The city constructed levees to keep out flood waters, but seepage problems remained. It was not unusual for underground water to shoot up from land enclosed by the levees. Though the seepage problems were solved to some extent by landfill, even today sinkholes form under the city, causing portions of streets and buildings suddenly to subside into the mud beneath. Above all, the floods contribute to a sense of isolation. During floodtimes, Cairo becomes a virtual island linked to the outside world by a single highly-banked highway. Because of the lowness of the land, at floodtime one can stand on Eighth Street and see, over the Ohio levees, barges, or perhaps the Delta Queen, pass by on churning muddy waters eight to ten feet above street level. At these times Cairo is indeed a dismal swamp.

The problems of poverty and isolation in Cairo are exacerbated by rampant racism. Cairo has always been a self-styled "southern town."12 [288] The racial climate in Cairo during pre-Civil War days was shaped by the slave-owning states of Kentucky and Missouri, between which it is wedged. The underground railroad bypassed Cairo, and natives liked to boast that the climate was not suitable for abolitionists.13

In 1860, Cairo had a population of 2,188, of whom only fifty-five were black. This quickly changed when General Ulysses S. Grant established his

---

10 Lukas, Bad Day at Cairo, Ill., N.Y. Times, Feb. 21, 1971, § 6 (Magazine), at 79.
11 HOUSE REPORT 118, supra note 2.
12 A sign at the entrance to the city ironically proclaims that Cairo is "Where Southern Hospitality Meets Northern Enterprise."

In 1910, John Lansden wrote: "Cairo is a southern city, not only geographically but racially. In the latter respect, it is not much more likely to change than in the former." Lansden, supra note 9, at 146.
13 Unpublished research by Fred Bernstein of Cairo, Illinois from comments in the 1854 Cairo Times.
headquarters in Cairo in 1861. Since 1870, when the city's population had grown to 6,267, Cairo's black population has hovered close to forty percent.

Private housing in Cairo, as in most of the South, never has been completely segregated, although virtually everything else was. An additional factor contributing to the polarization of the races in Cairo has been the almost complete fencing out of the black race from the political process. In 1913, Cairo adopted a commission form of government, with city commissioners elected at-large. During the next fifty years, although blacks represented almost forty percent of the population, no black was elected to a city office. Furthermore, blacks were almost totally excluded from any of the appointed boards and commissions in the city and county.

II.

THE STRUGGLE FOR CIVIL RIGHTS

The first major push for racial equality occurred in 1946 when black teachers filed suit in federal court to secure equal pay. Later, in 1952, efforts were begun to integrate Cairo's schools, but separate black schools were not finally abolished until 1967.

14 Both public and private facilities were segregated. Cairo's schools were operated on a dual basis until 1953, see note 16 infra, and its black schools remained exclusively black until 1967. Cairo's public housing was segregated until 1976. St. Mary's Park was segregated until 1962. Seating in the courthouse was segregated until 1963. Almost all public and private offices employed only whites. The municipal swimming pool was closed in 1963 to avoid integration. Places of public accommodation remained segregated until 1962. The Catholic Diocese maintained segregated parishes in Cairo until the late 1960s.

15 Negro City Teachers Ass'n v. Schultz, Civ. No. 968 (E.D. Ill. 1946).

The equal pay case was argued by Thurgood Marshall. Ms. Hattie Kendrick, one of the named plaintiffs, enjoys telling how during the hearing the judge and defense counsel continuously referred to Marshall as a "boy." Defense counsel explained to the court how a comparable case in Tennessee had been handled by a distinguished attorney who knew what he was doing, unlike the "boy" in this case. Defense counsel continued to wax eloquent about the brilliance of the lawyer in the other case. Marshall quietly stood up and thanked counsel for the compliments, then informed the court that he was the brilliant attorney who had handled the Tennessee case. The courtroom exploded with laughter and defense counsel was silent thereafter.

16 The State of Illinois had conducted hearings on Cairo's segregated schools in 1951 pursuant to H.R. RES. 34 (1951), ILL. HOUSE J. 101 (Jan. 1951).

The National Association for the Advancement of Colored People (NAACP) met with the school board on January 15, 1952, and it was agreed that 23 black students would be admitted to white schools. This agreement produced a wave of violence by the white community. The home of a black dentist was fired upon and the home of a black physician was bombed. Bernstein, Let My People Go, E. St. Louis Monitor, Mar. 1, 1973, at 6, cot 1. On February 7, eight members of the NAACP, including their attorney, David Lansden, were arrested and charged with "conspiring to cause or permit children to be placed in such a situation that their lives and health were endangered in that they did feloniously force children to attend school." Id. This matter, together with charges arising out of the bombing incident, was referred to a grand jury; no true bills were returned. Id., Mar. 8, 1973, at 6, col. 1. Thereafter, attorney Lansden was ostracized by the white
In 1969, the black community launched a boycott of local merchants to protest employment discrimination. Effects of the boycott were quickly felt, but the white community remained intransigent. Any possible hope for moderation disappeared in 1971, when members of the United Citizens for Community Action (UCCA), an affiliate of the White Citizens' Council, gained control of the city council. During this period there were some thirty-seven fires of suspicious origin and over 140 days of shooting. It appeared that the white community would suffer bankruptcy or even total annihilation of the town rather than try to come to terms with the black community.

It was during this period that the Lawyer's Committee opened an office in Cairo. The Committee located itself in the library of the Lansden and Lansden community; he and his family were threatened, and rocks and garbage were thrown at his house. Although Cairo's public schools were integrated without a lawsuit, see note 16 supra, education issues formed a major part of the civil rights caseload of both the Lawyer's Committee and its successor, the Land of Lincoln Legal Assistance Foundation. In the years immediately following the integration of the Cairo schools, black students complained of discriminatory harassment, intimidation, and punishment. On February 12, 1970, over 50 black Cairo students filed a complaint with the Illinois Superintendent of Public Instruction concerning discrimination by local school officials. The superintendent earlier had refused to schedule a hearing in Cairo on the complaints because of the violence in the community. Students filed suit to require him to come to Cairo to investigate their charges. Complaint, Ewing v. Page, Civ. No. 70-20 (E.D. Ill. filed Feb. 12, 1970). The suit was later dismissed when the superintendent's successor agreed to hold hearings in Cairo.


On January 8, 1982, the Reagan administration announced that it was reversing an 11-year-old policy and would begin granting tax exemptions to racially discriminatory private schools. After a storm of protest, the White House reversed its position only four days later; it announced that it would seek legislation denying tax exemptions to schools that discriminated. More than half the lawyers in the Civil Rights Division of the Justice Department signed a protest statement, arguing that to grant tax exempt status to discriminatory private schools "violates existing federal civil rights laws as expressed in the Constitution, Acts of Congress, and federal court interpretations thereof." Chicago Tribune, Feb. 3, 1982, § 1, at 3, col. 5.

The boycott was organized by the Cairo United Front, under the leadership of the Reverend Charles Koen. The United Front's goal was to open up 88 jobs for blacks. The UCCA was the successor organization to the White Hats. See note 2 supra.

In 1963, President Kennedy called a meeting at the White House to ask the legal profession to help secure civil rights for blacks. The response was the organization of the Lawyer's Committee;
law firm and quickly became a target for white hostility. Nonetheless the Committee proceeded to funnel blacks' grievances into the federal courts, and both sides gradually stopped shooting and awaited the results.

A. Protecting the Right to Protest

On March 31, 1969, the Cairo United Front started its boycott of white merchants to end employment discrimination. In addition to the boycott, the Front regularly picketed business establishments along Commercial Avenue and held solidarity rallies and protest marches on Saturday afternoons. These activities were opposed by both city and state law enforcement authorities, as well as by local merchants. It is not surprising, therefore, that the first suits filed by the Lawyer's Committee in Cairo were to secure the rights of blacks to air their grievances.

On September 11, 1969, Mayor Stenzel proclaimed that a civil emergency existed in Cairo and issued the following notice:

1. Effective immediately all gatherings of people of two or more individuals is prohibited.
2. It is further ordered that no person shall take part in or become a part of a parade or engage in picketing within the corporate limits of the City of Cairo.
3. No person shall loiter in and upon any public street within the corporate limits of the City of Cairo....

offices were opened in Jackson, Mississippi and later in various cities around the country. The Lawyer's Committee opened its Cairo office in 1969. Shortly after the office was opened it applied for and received federal funding from the Office of Economic Opportunity (OEO). In August 1972, the Cairo office was merged with other OED funded legal services offices in downstate Illinois into the Land of Lincoln Legal Assistance Foundation.

The Cairo office was the only rural project ever attempted by the Lawyer's Committee. The large distance from any major metropolitan area and the relatively low salaries available to pay the lawyers have made it difficult to hire attorneys. Both before and after the merger with the Legal Assistance Foundation, therefore, the Cairo office relied heavily on support from Chicago attorneys.

Although the office had a general strategy to eliminate all forms of officially imposed discrimination in Cairo and to remedy private discrimination to the extent possible, it would be wrong to assume that the office followed any particular blueprint in filing cases. Most often lawsuits were filed in response to particularly egregious events or because of pressures from the client community to remedy matters of particular concern at the moment.

21 On one occasion six sticks of dynamite were thrown into the office; fortunately, the fuse was defective. The office was a target for gunfire; a bullet fired into the office struck and dented a photocopier. In 1971, the UCCA organized a campaign to pressure the governor to halt OED funding. This effort failed.

22 On at least one occasion Cairo merchants went to Mississippi to talk with merchants about the possibility of filing a civil damage action against the boycotters. Such an action had resulted in an award of $1.2 million to Mississippi merchants. See Claiborne Hardware, Inc. v. NAACP, 393 S.2d 1290 (Miss. Ch. C1, 1976). Cairo merchants, however, never filed such an action.
Members of the Front were arrested and charged with violating this proclamation and two city ordinances barring peaceful picketing and assemblies in the city.\textsuperscript{23} The Lawyer's Committee filed suit in United States District Court and secured a temporary restraining order\textsuperscript{24} against the enforcement of these measures.\textsuperscript{25}

During the week of September 29, 1969, Preston Ewing, Jr., an organizer for the Front, gave notice to the city and to state officials that a nonviolent parade would take place on October 4. The parade was to proceed from the Front headquarters to the business district on Commercial Avenue. Ewing informed state and city officials that the parade route would include a four block portion of Washington Avenue, a state highway. He was told that if the marchers either crossed or traveled on Washington Avenue they would be arrested.\textsuperscript{26} The Front decided to hold the march anyway. As the marchers approached Washington Avenue, they were met by all eighteen Cairo police officers and approximately 100 state troopers. When marchers ignored an order to disperse, troopers began chasing the demonstrators, many of whom were women and children. This free-for-all ended with the arrest of about twenty-five persons on charges of obstructing a public highway.\textsuperscript{27}

Not deterred by this confrontation, the Front scheduled another march for the following week and notified city and state officials that they intended to use the same parade route as on October 4. The Lawyer's Committee filed suit in federal court to enjoin the prosecution of the October 4 marchers and to prevent official interference with future parades.\textsuperscript{28} On the morning of the second march,
both sides appeared before federal Judge William G. Juergens; the judge entered an order allowing the marchers to parade two abreast along the previously designated route. The order further provided that "the police shall provide the same reasonable protections to the marchers in the future as they have in the past" and that plaintiffs should give written notice to the Cairo Police Department "at least three and one-half hours prior to the beginning time of said marches or parades."

By agreement in 1971, the preliminary injunction entered in 1969 was made permanent with the modification that plaintiffs give twenty-four hours notice in advance of any march as required by Illinois statute, instead of the three and one-half hour notice requirement of the 1969 order. On appeal, the Seventh Circuit held that the agreed order was proper in all respects except that the district judge should have scheduled a hearing to determine the validity of the twenty-four hour notice requirement. Finally, in December 1973, District Judge Henry S. Wise ruled that six hours notice would give the city sufficient time to provide protection to the marchers. Neither side appealed this order.

Peaceful demonstrations in Cairo offered an effective alternative to violence. Most disturbances occurred only when city or state officials tried to...
interfere with the demonstrators. In fact, on more than one occasion, blacks peacefully picketed to end racial discrimination as members of the American Nazi party or other similar groups demonstrated in favor of white supremacy. The boycott and demonstrations, which continued for several years, drew broad attention to Cairo's racial injustices and provided an effective “safety-valve” to release racial tension. More importantly, they provided a daily reminder to Cairo citizens that their city had not yet come to terms with its racial problems.

B. Enforcing the Law Against the Law Enforcers

Between 1969 and 1972, shootings and arson were almost daily occurrences in Cairo. Violence and lawlessness were not the exclusive province of private individuals – they permeated each and every aspect of the law enforcement and justice agencies in Cairo. Both the sheriff of Alexander County and the state's attorney were organizers of the White Hats. In 1969, a special Illinois House Legislative Committee recommended that a special prosecutor be appointed to investigate the inability of Cairo officials to keep the peace. In 1970, the Cairo Police Department was described in a special survey conducted by the International Association of Chiefs of Police as "ill-trained" and lacking in “the necessary leadership to accomplish its mission." The report concluded that

35 On November 20, 1970, the Cairo City Council passed an ordinance requiring pickets to remain 10 feet apart, and further requiring that no more than two pickets be within a 20 foot radius of the entrance of any premises being picketed. The ordinance covered not only pickets, but also anyone else "stationed" or "posted" by a building to induce others not to enter, or to observe those who entered or patronized the same. Cairo, Ill. Ordinance 630 (Nov. 20, 1970).

On Saturday, December 5, 1970, about 30 peaceful pickets in Cairo's downtown area were arrested by approximately 10 police officers and 40 special deputies wearing helmets and carrying guns and night sticks. A shot was fired and the police proceeded to club and beat the pickets. Twelve members of the Front, including some who had been merely observing the pickets, were arrested and held in the city jail. Police confiscated the cameras of reporters on the scene of the confrontation, and later refused to allow lawyers to see those arrested.

36 Cairo's penchant for violence and lawlessness was not of recent origin. On November 11, 1909, William James, a black man, was lynched for the alleged murder of a young white woman. The sheriff of Alexander County had tried to protect James by taking him to a nearby town but a mob intercepted them, took James from the sheriff's custody, and brought James back to Cairo, where he was lynched. After hanging James the mob shot him, and dragged his body to the scene of the crime. A week later the Illinois Governor declared the office of Alexander County Sheriff vacant on the ground that the sheriff had not done all in his power to prevent the lynching. The Governor's action was taken pursuant to ILL. REV. STAT. ch. 38, § 25-2(b) (1965) under which the lynching of a person in custody is prima facie evidence of a sheriff's failure to perform his duty. The Governor's actions were affirmed by the Illinois Supreme Court in People v. Nellis, 249 Ill. 12, 94 N.E.165 (1911).

37 In 1967, the national guard was called to Cairo as a result of disorders following the hanging of James Hunt. See note 2 supra.

38 HOUSE REPORT 118, supra note 2, at 8.

citizens had little faith in the department, and that members of the department were insensitive to the racial conditions confronting them. In 1973, the United States Commission on Civil Rights recommended that the Illinois General Assembly pass legislation allowing state officials to take over local law enforcement functions in Cairo because local officials had failed to protect the rights of citizens. None of these recommendations was adopted.

Not only did Cairo police officers fail to protect the rights of citizens, they engaged in many acts of police brutality. There was also some evidence that they contributed to the nightly acts of violence which rocked the community. The angle of the over forty bullets fired into St. Columba's church and rectory, the headquarters of the Front, located directly across from the police station, indicated that they had been fired from the cupola at the top of the police station.

In 1970, the state police were called to permanent duty in Cairo. From 50 to 150 state police officers were assigned to Cairo each week. Although the black community initially had respect for the state police, it was not long before the state police were perceived as an occupational army which supported the white power structure. On January 21, and again on February 12, 1971, the state police, together with the city police department and the sheriff's office, conducted raids of Plymouth Court, the segregated, low-income housing project where thirty-five percent of Cairo's black population was housed. The officers, wearing riot-gear, surrounded the project while squads of officers broke down doors and conducted systematic searches of various apartments. The warrants under which the officers purported to act were later held legally insufficient by the county circuit court. The Lawyer's Committee subsequently filed a civil suit for damages.

Under Cairo's commission form of government each city commissioner had exclusive authority over a specific city department. Thus an untrained city commissioner supervised the police department.

40 Id. In late 1969 the city turned down a $75,000 grant to improve police-community relations. See P. GOOD, supra note 17, at 26-35

41 U.S. COMM'N ON CIVIL RIGHTS, CAIRO, ILLINOIS: A SYMBOL OF RACIAL POLARIZATION (1973) [hereinafter cited as RACIAL POLARIZATION].


43 No charges were ever filed as a result of this or any other incidents of gunfire in Cairo against blacks or civil rights workers.

44 The state police remained in Cairo through 1971. At that time the Illinois State Police had virtually no black officers.

When the author left Chicago in 1972 to drive to his new job with the Lawyer's Committee in Cairo, he was stopped on I-57 for a minor traffic violation just south of Champaign, Illinois and about 250 miles north of Cairo. The officer asked the author where he was moving and when he heard the name "Cairo" he began to curse the place, stating that he had been assigned there for several weeks the previous year.
against the officers. The state agreed to settle the case in 1975 by making awards and returning seized items to the plaintiffs.45

Racism permeated every level of the criminal justice system in Cairo.46 One of the first activities of the Lawyer's Committee was to halt all jury trials in Alexander County until a jury list fairly representing the county's racial composition was compiled. This was the only important victory achieved in Cairo without extensive litigation. The first two trials conducted with blacks seated on the juries resulted in acquittals for the defendants. Although Cairo's mayor issued a statement condemning these results, and a local newspaper47 printed the names of all the jurors in an article critical of them, the state's attorney was thereafter induced to dismiss a number of frivolous prosecutions.48

In July 1970, a suit was brought in federal court to attack the unequal administration of justice in Cairo.49 The suit arose after a number of demonstrators were injured when a white man drove his truck into them. The state's attorney refused to allow the injured to sign a complaint against the driver, thus prompting the federal suit.

The complaint in *Littleton v. Berbling*50 alleged that State's Attorney Peyton Berbling, was an organizer and officer of the White Hats, and that he had conducted his office so as to deny plaintiffs equal rights.51 Specifically the complaint alleged that Berbling and his investigator willfully and maliciously refused to initiate criminal prosecutions against white persons upon the complaints of blacks, and listed seven instances involving the named plaintiffs to support this charge. The plaintiffs also asserted that Berbling prosecuted blacks for offenses no white person would ever be prosecuted for, and that he requested higher bonds52 and sentences for blacks than for whites. The police commissioner and police chief were accused of harassing civil rights demonstrators by arresting them and charging them with crimes unwarranted by the facts. Two judges, Michael O'Shea and Dorothy Spomer, were accused of participating in unlawful

46 In 1969, an independent public defender's office was established in Cairo under the auspices of the Illinois Defender Project, with funds from the Illinois Law Enforcement Commission. By giving those accused of crimes a vigorous defense, the office helped to change the one-sided approach to criminal justice that formerly had prevailed in the county. The office continued until 1975, when the influence of local officials succeeded in establishing a locally controlled defender program.
47 The *Tri-State Informer*, a local newspaper sympathetic to the UCCA.
48 More recently, Alexander County jurors have shown a reluctance to convict where there is evidence of police brutality. In 1977, Michael Joiner, a young white man, was charged with resisting a police officer. Evidence was presented that he had been beaten by the police and refused permission to talk to his attorney. A biracial jury found him not guilty. The city later agreed to pay him damages. *Joiner v. Cairo*, Civ. No. 78-2073-B (E.D. Ill. filed Aug. 24, 1978).
50 *Id.*
51 The complaint was premised on 42 U.S.C. § 1983 (1976).
52 Even if criminal charges later are dismissed, Illinois law authorizes the clerk to keep 10% of the bail to cover administrative expenses. ILL. REV. STAT. ch.38, § 110-7(f) (1965).
measures aimed at discouraging the demonstrators, by illegally setting bail, by imposing heavier sentences against blacks, and by requiring blacks to pay the cost of jury trials.\textsuperscript{53} The suit requested an injunction ordering the defendants to [297] cease and desist from these illegal practices.\textsuperscript{54}

The Illinois Attorney General filed a motion to dismiss on behalf of the judges, claiming they were immune from suit for their judicial acts. The state's attorney appeared through private counsel, and filed a similar motion, claiming that he was immune from suit and that the complaint failed to state a cause of action. The district court dismissed the complaints against Berbling, his investigator, and O'Shea and Spomer.

The Court of Appeals for the Seventh Circuit reversed the district court, holding that the defendants were not immune from suit, and that if, after trial, the allegations against the defendants were shown to be true, a proper order could be fashioned to correct the abuses.\textsuperscript{55} The United States Supreme Court reversed; in a remarkable opinion the Court held that the plaintiffs' controversy was not ripe for adjudication.\textsuperscript{56} The Court did not hold that the judges were immune from suit, but did note that equitable considerations would generally preclude any relief against them.\textsuperscript{57}

While the case was proceeding to the Supreme Court, Peyton

\begin{footnotes}
\textsuperscript{53} The prosecutions against the civil rights demonstrators were similar to those used in the early 1960s to harass civil rights workers in the South. See Amsterdam, \textit{Criminal Prosecution Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial}, 113 PA. L. REV. 793 (1965).

\textsuperscript{54} The suit also requested damages against Berbling and his investigator. The suit was filed prior to Imbler v. Pachtman, 424 U.S. 409 (1976), which established that prosecutors could not be sued for damages. No damages were sought against the judges because of the prior Supreme Court decision in Pierson v. Ray, 386 U.S. 547 (1967), holding judges immune from damages. See also Stump v. Sparkman, 435 U.S. 349 (1978) (judge will not be deprived of immunity because the action complained of was taken in error, was malicious, or was in excess of authority, but will be deprived of immunity when he or she has acted in the clear absence of all jurisdiction).


\textsuperscript{56} O'Shea v. Littleton, 414 U.S. 488 (1974). The court noted: "[A]ttempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture.” \textit{Id.} at 497. Neither party had raised the ripeness issue before; Justice Douglas, in dissent, noted:

This is a more pervasive scheme for suppression of blacks and their civil rights than I have ever seen. It may not survive trial. But if this case does not present a "case or controversy" involving the named plaintiffs, then that concept has been so watered down as to be no longer recognizable. This will please the white superstructure, but it does violence to the conception of evenhanded justice envisioned by the Constitution.

\textit{Id.} at 509 (Douglas, J., dissenting).

Of course, had the plaintiffs waited until actions were pending against them, they would have run squarely into Younger v. Harris, 401 U.S. 37 (1971) (federal courts will not enjoin pending state criminal prosecutions except under extraordinary circumstances where the danger of irreparable loss is both great and immediate).

\textsuperscript{57} 414 U.S. at 499. The Court later held that judges in their enforcement capacity were proper defendants in suits for declaratory and injunctive relief. Supreme Court v. Consumers Union, 446
Berbling retired as state's attorney and was succeeded by W.E. Spomer. The Supreme Court remanded the case against State's Attorney Spomer to the Seventh Circuit to determine whether the plaintiffs should be permitted to amend their complaint to include claims for relief against him, or whether the action was moot.

The Littleton litigation can best be seen as a final cry of frustration by the black community. The plaintiffs had nowhere to turn; they viewed law enforcement authorities as part of a scheme to frustrate their rights. Although the Illinois Attorney General has the duty to defend state officials who are sued in civil suits, he also has a duty to protect the civil rights of Illinois citizens. Littleton demonstrated which duty he considered paramount. Not only did the state rush to the aid of the judges, but so did the Illinois Bar Association and the Illinois Judges Association. The defendants and their supporters pressed the broadest argument—that state judges are immune from federal injunctions even if they violate federal civil rights laws. The fact that Cairo's black citizens were not getting a “fair shake” out of the justice system did not matter.

U.S. 719 (1980). Cf. Lyons v. City of Los Angeles, 615 F2d 1243 (9th Cir.), cert. denied, 449 U.S. 934 (1980) (plaintiff who sought to enjoin the city of Los Angeles and four police officers from pursuing policy of using strangleholds in non-life-threatening situations held to have stated a case or controversy within the jurisdiction of the federal courts).

Spomer, Berbling's former law partner and the husband of Circuit Judge Dorothy Spomer, had been Cairo's corporation counsel in 1969. That year the House Investigating Committee had noted that it could appear to outsiders that Cairo was run by a small, closed group of prosperous whites who were closely related by blood and business ties. HOUSE REPORT 11B, supra note 2. While the committee stated that the situation was not unusual for a small town and that there was no conflict of interest in the technical sense, it did give the appearance to blacks of a solid white wall of authority unsympathetic to their problems. Id.

Spomer v. Littleton, 414 U.S. 514 (1974). On remand, the plaintiffs informed the court of appeals that they did not wish to name State's Attorney Spomer as an additional party because he did not appear to be continuing the practices alleged against his predecessor. The injunctive claim against the state's attorney was therefore dismissed. Spomer v. Littleton, Civ. No. 71-1395 (7th Cir. Jan. 29, 1915) (order dismissing claim).

Supreme Court dicta noting that plaintiffs had remedies other than injunctive relief did not comport with reality. State and federal officials showed a remarkable indifference to the problems in Cairo, and when they did intervene it was generally to the detriment to Cairo's blacks. See RACIAL POLARIZATION, supra note 41. The change of venue "remedy" discussed by the Court, O'Shea v. Littleton, 414 U.S. at 502, would not have solved the problems associated with defending wrongful prosecutions and having to post bond to secure one's freedom while the case was pending. See note 52 and accompanying text supra.

ILL. REV. STAT. ch. 14, § 9 (1965) creates a civil rights division in the Illinois Attorney General's office. The Attorney General is charged with preventing discrimination and investigating civil right's violations, and is further authorized to take all steps necessary to enforce Illinois civil rights laws. Id. It is a criminal offense, as well as grounds for removal from office, for any Illinois official to deny or refuse any person equal services because of his race. Id. ch. 38, § 13 (2) (d). This provision imposes a duty on the Attorney General to investigate and prosecute those who violate the statute.

Indeed, the attorneys representing the defendants were so intent on establishing a broad precedent that during oral argument before the Supreme Court, the attorney representing W.C.
Although the plaintiffs lost in the Supreme Court, the _Littleton_ litigation was not without its effect in Cairo. It certainly raised the consciousness of the defendants and their successors in office, and at least while the suit was pending, and in its immediate aftermath, justice was administered more even-handedly. But the long range impact of the litigation is more difficult to assess. If similar abuses take place in the future, the Supreme Court's opinion will make it extremely difficult, if not virtually impossible, for the victims of such misconduct to get relief from the federal courts.63

Cairo exemplified a social structure in which racism and lawlessness permeated every institution, including law enforcement and justice. Yet the victims of this system have been left without a systematic way to deal with the problem should it recur, other than to defend individual criminal prosecutions and now and then to file a police brutality suit.64 [300] So long as effective legal remedies were available, blacks in Cairo were willing to defer to them, but the Cairo experience also indicates that persons will not suffer abuse indefinitely, and

Spomer, fearing the Court might find the action moot, asserted that his client would follow the same illegal practices alleged against his predecessor. Even the Court found this assertion "somewhat extraordinary" and stated in its opinion that it would consider only those assertions pressed by the plaintiffs. Spomer v. Littleton, 414 U.S. 514, 522 n. 10 (1974).

Furthermore, any attorney who decides to sue a judge in the Illinois courts does so at his own risk. After the Supreme Court decided _Littleton_, the public defender for Alexander County, in the course of representing a client; filed suit against the circuit judge in state court. The suit claimed the judge had illegally denied the client bail. The attorney was cited for contempt, and although the contempt citation was initially reversed by the Illinois Appellate Court, People _ex rel_ Kunce _v._ Hogan, 37 Ill. App. 3d 673, 346 N.E2d 456 (5th Dist. 1976), the Illinois Supreme Court reinstated it on the ground that suing a judge on the basis of a proceeding still pending before him is contemptuous per se. People _ex rel_ Kunce _v._ Hogan, 67 Ill. 2d 55, 364 N.E.2d 50 (1977), _cert. denied_, 434 U.S. 1023 (1978).

Remedies are available today that were not available at the time of the Supreme Court's decision in _Littleton_. Municipalities are no longer immune from suit under 42 U.S.C. § 1983 (1976). Owen _v._ City of Independence, 446 U.S. 993 (1980); Monell _v._ New York City Dept. of Social Servs., 436 U.S. 658 (1978). The City of Cairo recently was unsuccessful in its motion to have the city dismissed as a defendant in a police brutality case, Joiner _v._ City of Cairo, Civ. No. 78-2073-B (E.D. Ill. Sept. 26, 1979), and ended up settling with the plaintiff. However, the requirement imposed by the United States Supreme Court that the civil rights deprivation result from official policies or customs of the city still makes recovery difficult. See Seng, _Municipal Liability for Police Misconduct_, 51 MISS.L.J. 1 (1980). In its 1973 Cairo report, the U.S. Commission for Civil Rights had recommended that Congress abrogate "municipal immunity under 42 U.S.C. § 1983. RACIAL POLARIZATION, _supra_ note 41, at 18.

New provisions in Illinois law may provide additional remedies against public officers who practice racial discrimination. The Illinois Human Rights Act, ILL. ANN. STAT. ch. 68, §§ 1-101-9 to -102 (Smith-Hurd 1980), gives the Human Rights Commission authority over state and local government officials who deny persons "the full and equal enjoyment of the accommodations, advantages, facilities or privileges of the Official's office or services or of any property under the Official's care because of unlawful discrimination." _Id._ § 5-102(C). Upon proof of a violation by a preponderance of the evidence, the commission may award affirmative relief as well as damages, _id._ § 8-108, and may recommend that public officials be disciplined or discharged, _id._ § 8-109. It is too early to predict whether this statute will be enforced strictly, but Illinois' past record does not give much cause for optimism.

63

64

[300]
that if effective legal remedies are not available, they will vent their frustration in less socially desirable ways.

C. Securing Equal Employment

It is idle to argue whether Cairo's racial problems stemmed from its economic problems or whether its economic problems stemmed from its racial problems. The two were inseparable and each aggravated the other. Neither could be solved in isolation; in toto, however, the problems were too immense for any local agency to deal with. Civil rights litigation helped to provide blacks with equal access to a few jobs in the community, but in itself litigation cannot reverse the economic stagnation that has plagued the community throughout most of its existence.65

In 1970, Cairo ranked first in poverty in Illinois. Some thirty percent of its population received welfare assistance.66 At least in part as a result of longstanding discrimination in the community, blacks continue [301] to be disproportionately represented on the welfare rolls. The white community's resentment over this contributes to racial antagonism.67 A large number of poor whites, many from the bordering states, compete with blacks for the few jobs available in Cairo, and this further contributes to racial strife.68 The 1969 Illinois House reported that “[t]he atmosphere in which black children grow up in Cairo is one of dependency and hopelessness.”69 As with so many small communities, the ablest of Cairo's young citizens grow up, graduate from school, and move away.

The boycott begun by the Cairo United Front identified equal employment as its major objective.70 The Lawyer's Committee' and its successor Legal

65 For at least the past 30 years, Cairo has faced a declining population. It has little industry and virtually no growing businesses. The E.L. Bruce Company, the last large manufacturer of hardwood flooring, closed its doors in Cairo in February 1971. The Burkhart Company, which makes seat padding, is the largest employer in Cairo. The number of its employees fluctuates, however, and many of its employees live in the surrounding states.

The prospect for better employment in the future does not look encouraging. Cairo needs more unskilled jobs in the private sector, and these do not appear to be forthcoming. In 1976, city fathers heralded a bright future when Bunge Corporation located a large grain elevator complex in Cairo. The project occupies much of the limited waterfront property in the city. However, the plant as constructed is fully automated and the people of Cairo have received virtually no jobs in return.

Economic growth in a city such as Cairo can be measured only by the number of jobs created for local residents. Until Cairo officials recognize that economic progress must benefit the entire community, neither Cairo's economic status, nor the status of Cairo's black community, is likely to improve.

66 RACIAL POLARIZATION, supra note 41, at 6.
67 See HOUSE REPORT 118, supra note 2.
68 See id.
69 Id.
70 See text accompanying note 22 supra.
Assistance Foundation had a constant caseload of employment discrimination charges before the Illinois Fair Employment Practices Commission (F.E.P.C.), the Equal Employment Opportunity Commission (E.E.O.C.), and the courts. Gradually blacks gained employment in the banks and offices about town. Because most businesses in town are small, owner-operated enterprises with few employees, however, downtown Cairo is still virtually all-white.

In 1969, employment discrimination suits were filed against the Alexander County Housing Authority and the Cairo Public Utility Commission. The Alexander County Housing Authority operated public housing in the county on a segregated basis. When suit was filed, only three of the Authority's seventeen employees were black. One of these blacks, Brady Buckley, served as a management aid for Pyramid Court, the all-black family project, and for Butler Homes, an all-black project for the elderly, but he had no authority in any of the white projects. The other two black employees served as custodians. The suit against the Housing Authority was settled in 1974. At that time, five of the Authority's sixteen employees were black. It was agreed that a black person would be hired to fill the position of Leasing and Occupancy Clerk, that Brady Buckley would be given expanded administrative responsibilities, and that black workers would be considered in the future as supervisory employees.

After the consent decree was entered, the Federal Department of Housing and Urban Development (H.U.D.) provided funds to the Housing Authority to modernize its two formerly segregated multifamily projects. The Authority proceeded to award contracts without consideration of any employment opportunities for the tenants. The tenants of Pyramid Court refused to allow the contractor into the project until representatives from H.U.D. came to Paducah, Kentucky, to meet with the tenants, the Housing Authority, and the contractor. The parties agreed that tenants would be given priority in hiring. As a result, a number of tenants were admitted into the local construction unions and had employment at least during the period that the modernization work continued. The tenants also organized a not-for-profit construction company and subcontracted to do some of the modernization work.

The Cairo Public Utility Commission was a municipally owned utility. In 1969, the Commission employed approximately twenty-five persons; all were white except one man who worked as a groundskeeper. Many of the Commission's employees were skilled workers hired through union apprentice

---

71 See note 20 supra.
72 The FEPC has been succeeded by the Illinois Human Rights Commission. See note 64 supra.
75 See text accompanying notes 95-96 infra.
programs. The office workers were required to pass an unvalidated pre-employment test. Most of the Commission's employees had been employed by it for more than twenty years, and turnover was rare. However, by 1976, the Commission had hired three blacks. A consent decree entered that year provided that the next office employee hired would be black, and that thereafter one of the next two office employees hired would also be black.77 The Commission abandoned its pre-employment test and agreed actively to recruit a black to fill an existing vacancy for an apprentice operator in the sewage plant.78

The police department was the city agency most visible to blacks, and also the agency that caused the most friction with the black community. In 1969, the department was criticized by the International Association of Police Chiefs for its insensitivity to the black community.79 In 1970, two of the city's three black officers resigned because of the adverse conditions for blacks on the force.80

Police officers were appointed by a three person Board of Fire and Police Commissioners. In May 1969, Julius Oats, a black, filed an application with the Board to take the police examination. He passed both [303] the oral and written examinations and was placed on the eligibility list. In August 1969, he was informed that his name was being removed from the eligibility list because an F.B.I. check had revealed that he was once charged with being a deserter from the United States Army, and that a disorderly conduct charge had been filed against him in 1968 in Chicago. Oats had not been convicted of either offense.81

The Lawyer's Committee filed charges of racial discrimination on his behalf before the Illinois F.E.P.C. A hearing examiner recommended the complaint be dismissed, but the Commission reversed and ordered the city to offer Oats employment and to pay him back wages. The city filed a complaint for administrative review before the Circuit Court of Alexander County, and that court reversed the Commission because there was no evidence that the city used a different standard for blacks than for whites. Oats and the F.E.P.C. appealed to the Illinois Appellate Court, which reversed the circuit court in 1974.82 The appellate court held that the city's policy of excluding persons from employment because of their arrest records constituted illegal race discrimination regardless of the city's lack of a discriminatory motive or the evenness of application of the policy. The court relied on E.E.O.C. rulings and F.B.I. statistics in concluding that arrest record hiring criteria have an inherently discriminatory impact upon

78 See id.
79 See notes 39-40 and accompanying text supra.
80 See P. GOOD, supra note 17, at 31.
81 Indeed it was revealed later that the Army had routinely charged Oats with desertion when they more properly should have charged him with being absent without leave; the Army discharged Oats "under honorable circumstances."
black job applicants. The city filed a motion for rehearing, but before the court ruled on the motion, the city agreed to pay Oats $12,500 to cover his back pay.83

In 1973, the city had approximately 130 employees, but only twelve were black, and of these, ten were street or garbage workers. About ninety-six percent of the city's payroll and annual expenses went to whites, and only four percent to blacks.84 The police department had seventeen officers, of whom two were black. The city had thirteen firefighters, but it had never hired a black in the fire department.85 Prompted by the United States Commission on Civil Rights,86 the E.E.O.C. launched an investigation of Cairo's employment practices in 1973. In 1974, it returned charges against the city,87 and an attempt at conciliation was commenced. In December 1975, a number of Cairo [304] blacks, fearing that the E.E.O.C. was not effectively representing their interests, asked for permission to intervene in the conciliation process. This petition was never acted upon. In February 1976, the city agreed to maintain a seventeen percent black workforce. The fire department would employ two blacks and the police department three.88

The lawsuits and economic pressures brought to bear on the white community by blacks did produce some jobs for Cairo's black citizens. In 1972, most public offices in the area were still white.89 Under pressure, such agencies as Public Aid, the Department of Children and Family Services, and the Mental Health Department added blacks to their staffs, thus increasing their credibility in the black community. Although litigation helped to change the all-white complexion of many offices, each case took years to complete, and even then the gains were only modest. An equal employment strategy can succeed only if jobs themselves exist, and in Cairo there were simply not enough jobs to go around.90

D. Facilitating Fair Housing

Perhaps the most outwardly depressing aspect of Cairo is its housing. Despite a few postbellum mansions and some magnificent old magnolia trees, the town in 1970 had the appearance of utter neglect and decay. At least one-half of

83 At that time Oats no longer desired employment as a Cairo police officer.
84 ILLINOIS ADV. COMM. TO U.S. CIVIL RIGHTS COMM'N, A DECADE OF WAITING IN CAIRO 9 (1975) [hereinafter cited as A DECADE OF WAITING].
85 In 1971, the city had turned down a Department of Labor grant of $137,000 under a program, called "Public Service Careers," designed to train and upgrade city employees. See P. GOOD, supra note 17, at 67.
86 RACIAL POLARIZATION, supra note 41, at 24.
87 E.E.O.C. Charge No. TCH4C-0241.
88 The 17% figure accepted by the E.E.O.C. did not accord with the city's population, which was 38% black, or the county's population, which wall 28% black. The E.E.O.C. apparently accepted 17% as representative of the black workforce in the county.
89 The city previously had employed three black police officers in 1910, so there was no real net gain in that department.
90 See P. GOOD, supra note 11, at 66.
91 The limited usefulness of existing employment discrimination laws is discussed in D. BELL, RACE, RACISM: AND AMERICAN LAW 589-665 (2d ed. 1980).
Cairo's housing was substandard and in need of major repair. Nearly every block of the city contained one or more abandoned buildings – although it was sometimes difficult to differentiate which buildings were abandoned and which ones were still being used to house families. Unpainted and unheated frame houses with broken porches, windows, and doors were the rule and not the exception in Cairo.

Between 1960 and 1972, fewer than a dozen new homes were constructed in Cairo. During hearings before the Civil Rights Commission in 1972, then Mayor Walder testified that the city had no plans for improving the housing situation. Not only did Cairo officials have no plans for improvement, they actually tried to block efforts to alleviate the shortage of decent homes in the city.

In 1969, the State of Illinois made $5 million available to build new housing in Cairo, and the biracial, not-for-profit Egyptian Housing Development Corporation was formed to implement the project. Van Ewing, the director of this corporation, appeared before the City Council on numerous occasions to ask the city to sell land on which the group could build houses; each time the city refused. The corporation was able, however, to purchase other land, and between 1972 and 1976, constructed nearly 160 sorely needed homes for low-income Cairo residents.

Apart from a few exceptional older homes and the houses later constructed by the Egyptian Housing Development Corporation, the best housing in Cairo for low-income persons was the public housing administered by the County Housing Authority. Cairo had two large multi-family projects which had been built in the 1940s and several smaller projects built for elderly persons. When the family projects were built in the 1940s, the federal government directed that they be segregated and specified different standards of quality for the white and black projects. Pyramid Court, the black project, had approximately 237 units, and Elmwood Place, the white project, had 159. The Authority continued to operate these projects on a segregated basis even after H.U.D. changed its policies in 1966

---

91 A DECADE OF WAITING, supra note 84, at 18. Cairo ranked second in Illinois in substandard housing units.
92 In the mid-1970s, Cairo did receive some funding to demolish some of the abandoned buildings in the city. While the program helped to improve the appearance of the town, it did nothing to improve the substandard housing in which persons actually lived.
93 The city opposed the project, at least in part, because it was supported by the United Front. See P. GOOD, supra note 17, at 62; A DECADE OF WAITING, supra note 84, at 18.
94 The project provided not only homes, but also badly needed employment for area craftsmen and laborers. It was projected that the new housing would result in more than $37,500 in new property taxes every year and that the building program would circulate about $9,840,000 in new money throughout the local economy.
95 It was ironic that public housing was segregated although most private neighborhoods were not completely segregated. See A DECADE OF WAITING, supra note 84, at 17.
to specifically forbid segregation in public housing. Neither H.U.D. nor the State of Illinois, whose laws also forbade segregated public housing, intervened.96

In 1969, the Lawyer's Committee filed suit against the Authority to end segregation in its various projects.97 Four years later, the Justice Department filed its own suit to end the segregation.98 The two suits were consolidated and a consent decree entered in October 1974.99 The decree forbade the Authority from segregating tenants on the basis of race and required it to take some modest steps to integrate the projects.100 Tenants were permitted to apply for a transfer to a project where their race did not predominate. New applicants were placed in projects where their race did not predominate, and if they refused, lost their place on, and were moved to the end of, the waiting list. Elmwood Place was to be considered integrated when it had thirty-nine black tenants, and Pyramid Court when it had seventy-one white tenants.101 Elmwood Place was integrated quickly and without incident; today it appears to be a stable biracial community. At one time after the order was signed, as many as ten white families resided in Pyramid Court; today, however, only a handful remain.102

96 In 1973, the U.S. Commission for Civil Rights severely castigated H.U.D. for failing to take any steps to compel the Authority to comply with federal fair housing laws and regulations. RACIAL POLARIZATION, supra note 41; at 25.
97 Amended Complaint, Young v. Alexander County Hous. Auth., Civ. No. 69157 (E.D. Ill. filed May 11, 1970). The suit also asked that the Authority be required to hire blacks, that blacks be appointed to the five member Authority, and that the Authority modify some of its admissions policies.
100 Id.

In a separate consent decree of the same date, the Authority agreed with the plaintiffs in the Young case to adopt various amendments to its admission policies. Applicants were to receive written notice of their eligibility for housing and were to be informed of their right to a hearing if they were found ineligible. A point system was created to determine the priority of persons on the Authority's waiting list. Id. This decree did not end disputes over the Authority's admission procedures, however, and in 1978 the Legal Assistance Foundation again sued the Authority. Amended Complaint, Ayers v. Shumaker, Civ. No. 78-2028B (E.D. Ill. filed June 11, 1979). A consent decree issued in that case specified even more detailed procedures to be used by the Authority in considering the applications of prospective tenants. Consent Decree, Ayers v. Shumaker, Civ. No. 78-2028B (E.D. Ill. Aug. 21, 1980).

101 The Authority's affirmative obligations were to cease when the requisite number of minority tenants was reached in each of the projects, or in two years, whichever came first. The Legal Assistance Foundation had suggested that the order would be more effective if a H.U.D. representative was assigned to Cairo to help implement the order and to explain it to the residents. It was felt that this would placate local fears better than the system of written notices specified in the order. The Legal Assistance Foundation also suggested that the 50 vacant units in Pyramid Court be rehabilitated immediately so that a block of white families could be moved at once, rather than one at a time. These suggestions were not accepted by the Justice Department.
102 Because Pyramid Court was the scene of many racial confrontations between 1969 and 1972, black and white families alike expressed reluctance to live there. Shortly after the first white
The consent decree ended the Authority's official policy of segregation on the basis of race. The effects of this policy had been more than merely symbolic. The projects had not been maintained equally and city services, especially police protection, had not been provided equally to the area in which Pyramid Court was located. Hence the integration order had the effect of directly raising the standard of living for many black Cairo families.

Most importantly, the consent decree induced H.U.D. to grant the Authority modernization funds to be used for badly needed repairs in Pyramid Court and Elmwood Place, and for additional improvements to Pyramid Court to make that project comparable to Elmwood Place. However, the modernization program also opened up new areas of dispute between the tenants and the Authority. The tenants had formed a union and under H.U.D. guidelines the Authority was to consult with the union on all phases of the modernization program. This the Authority refused to do until the tenants of Pyramid Court blocked construction and forced H.U.D. to call a meeting between all concerned parties to negotiate an agreement. After negotiation, the Authority agreed to consult with the tenants on all policy questions and an affirmative action program was adopted to give hiring preference to tenants for work done in the projects.103

The most serious problem to arise from the modernization work concerned the future of the almost fifty units in Pyramid Court that the Authority had allowed to sit vacant and which now were wholly uninhabitable. The Authority wanted to tear down eight buildings in Pyramid Court to alleviate overcrowding and to provide parking and recreational space for the project's residents. The tenants objected. Because of the severe shortage of low income housing and the long waiting list for public housing the tenants wished that the units be rehabilitated to serve additional families. The Authority threatened to cease modernization work and return the remaining funds to H.U.D. unless some buildings were torn down to reduce the density of the project.104 H.U.D. refused to intervene and eventually a compromise was reached under which all but four Pyramid Court buildings were refurbished.105

families moved into Pyramid Court, there were several incidents in which all of the project's street lights were shot out.

At the expiration of the two-year period during which the Authority had an affirmative obligation to integrate the housing projects, the Legal Assistance Foundation, on behalf of the private plaintiffs in Young, asked that the order be extended to allow more time to integrate Pyramid Court. The Justice Department refused to join the private plaintiffs in this request and the order was allowed to expire.

103 See notes 73 & 75-76 and accompanying text supra.
104 Because the 50 vacant units were uninhabitable as they existed, if the modernization work had been stopped, no new units would have been made available for those on the waiting list. Further, in light of the past history of local officials turning down federal funds, see, e.g., notes 40 & 83 supra, it was conceivable that the Authority would refuse funds to refurbish the projects.
105 The United Front vehemently objected to this compromise and hired its own attorney to file suit in federal court to block the demolition. Chairs v. Alexander County Hous. Auth., Civ. No. CV-77-2048B (E.D. Ill. filed June 1, 1977). Their request for an injunction was denied, and the project refurbishment eventually was completed according to the compromise terms.
Especially since 1974, public housing matters have occupied a disproportionate amount of time for legal services attorneys in Cairo. Federal programs appear to be the only answer to Cairo's shortage of low income housing. The Lawyer's Committee and the Legal Assistance Foundation tried to force those programs to conform to federal constitutional and statutory requirements. Litigation solved some problems, but the day-to-day monitoring of the system is never-ending. Efforts to fully untangle the maze of conflicting policies operating on the local and national levels, and housing problems, will no doubt continue to vex local attorneys for the immediate future.

E. Ensuring Political Representation

Before the 1970s, blacks were noticeably under-represented in Cairo's political process. Although they made up approximately forty percent of the population, few blacks had been appointed to city and county boards and commissions, and no black had ever been elected to a city office. Complete discretion in appointing board and commission representatives was, in part, responsible for the disproportionate representation. Cairo's commission form of government, with city commissioners elected at-large, was also responsible. Four suits, filed between 1969 and 1973, helped ensure greater black representation in the political process.

In Hollis v. Emerson, and Young v. Alexander County Housing Authority, both filed in 1969, the Lawyer's Committee requested the district court to order the appointment of blacks to the Utilities Commission and Housing Authority in numbers proportionate to the percentage of blacks in the population. Ewing v. Walder, filed in 1972, made a similar request respecting all remaining city and county boards and commissions.

When the agreement to integrate the housing projects was reached in 1974, the attorney for the county agreed to a stipulation of fact on the appointments count. Plaintiffs' attorney submitted a proposed order to

---

106 In 1969, an Illinois House of Representatives Special Committee recommended that blacks be appointed to city and county boards and commissions; HOUSE REPORT 118, supra note 2, at 9. The United States Commission on Civil Rights made a similar recommendation in 1973. RACIAL POLARIZATION, supra note 41, at 22.
110 See notes 97-100 and accompanying text supra.
111 The attorneys stipulated that blacks made up 38% of the Cairo population and 28% of the Alexander County Population, and that blacks made up 62% of the public housing population, occupying 52% of the public housing units. The attorneys also stipulated that until 1972 no black person had ever been appointed to the five member Housing Authority, although the percentage of blacks who were qualified and willing to serve on the Authority mirrored their representation in the community.
the district judge, who entered the order in October 1974.\textsuperscript{112} The order provided that the chairman of the Alexander County Board and his successors in office would appoint and maintain a Housing Authority with at least two black members.\textsuperscript{113} The order also provided that notice of all vacancies on the Authority would be publicized at least forty-five days in advance and that interested persons could submit names of possible appointees.

The ice was now broken and in August 1975, the county agreed to settle \textit{Ewing v. Walder}. The chairman of the County Board agreed in a consent order that he and his successors would appoint a specified number of blacks to each county commission.\textsuperscript{114} The county also agreed to public notice of vacancies so that interested persons could submit their names for consideration.

The city initially refused to discuss a similar resolution until the Ewing case was set for trial on September 2, 1975. The city then agreed to a decree requiring appointment of a specified number of blacks to city boards and commissions.\textsuperscript{115}

\textit{Hollis v. Emerson} was resolved in February 1976. The city agreed to an order that required the appointment of a black to the four member Public Utilities Commission and provided that all future appointments would be made so that at least one member of the commission was black.\textsuperscript{116}

[310] While these orders do not assure blacks a controlling vote on any of the boards or commissions, they do provide blacks with a voice to help shape future city and county policies.\textsuperscript{117} The local newspaper praised both the city and


\textsuperscript{113} \textit{Id.} \ See also notes 97-102 and accompanying text supra.

\textsuperscript{114} The order required the appointment of one black to the five member County Building Commission, four blacks to the ten member County Welfare Commission, two blacks to the five member County Land Commission, one black to the four member County Health Department, and one black to the five member Airport Commission. Consent Order, Ewing v. Walder, Civ. No. 72-119-D (E.D. Ill. Aug. 13, 1975) (order settling the case only as to Alexander County).

\textsuperscript{115} The city agreed to appoint at least two blacks to the nine member library board, one black to the five member Police Pension Board, one black to the three member Board of Fire and Police Commissioners, and three blacks to the seven member Board of Zoning Appeals. Consent Order, Ewing v. Walder, Civ. No. 72-119-0 (E.D. Ill. Sept. 2, 1975).

Unlike the order against the county, which provided that blacks would be appointed when the next vacancy occurred, the city promised to make all appointments within 30 days. Also unlike the order against the county, which bound the present county board and its successors, the order against the city was binding only until the next city election in April 1979. The district court retained jurisdiction over the case, noting that if future mayors and city councils failed to appoint blacks in accordance with the order the matter would be advanced for trial.


\textsuperscript{117} In his memoirs, Justice William O. Douglas expressed strong support for black representation on local school boards. He noted that the school desegregation decrees approved by the Supreme Court were almost always administered by all-white school boards, and stated that the Court should have directed lower federal courts to approve only those school plans submitted by integrated school boards. W. DOUGLAS, THE COURT YEARS, 1939-1975, at 149-50 (1980).
the county for compromising and for making new advances to achieve racial
harmony in the community.118

On November 5, 1973, six blacks, represented by the Legal Assistance
Foundation, filed the suit of Kendrick v. Walder119 which sought a declaration
that the commission form of government in Cairo was unconstitutional. Under
this system, adopted in 1913,120 five city commissioners, each in charge of a
specific city department, were elected at-large. Before the commission form
of government was adopted, blacks had been elected to the City Council;121 since
1913,122 however, no black had been able to win an election to city office.123

The complaint in Kendrick v. Walder alleged that Cairo was a racially
polarized community and that under the at-large system of electing public
officials Cairo's blacks were effectively fenced out of the political process.124 The
complaint detailed the history of segregation and racial antagonism in the
community. The plaintiffs asserted that black candidates and voters had been
unable to form political coalitions with white candidates and voters, that black
residents of Cairo shared a common munity of interest based upon race, poverty,
and the legacy of racial discrimination, and that the at-large voting system had
furthered racial discrimination in the community. The city moved to dismiss the
complaint, and in January 1975, the district court held that the complaint failed to
state a cause of action upon which relief could be granted.125 Plaintiffs appealed
to the United States Court of Appeals for the Seventh Circuit, which reversed the
district court and remanded the case for trial.126 The Seventh Circuit recognized
that "the use of an at-large system of voting, not in itself unfair to any individual
voter, when imposed on a community with a history and legacy of discrimination
against an identifiable group may operate to deny that group an opportunity for
effective participation in the electoral system."127 The court also noted that the

118 A Step Forward, Cairo Evening Citizen, Sept. 9, 1975, at 2, col. 1. The newspaper queried why
the national media did not cover Cairo when it took a "step forward" by settling the lawsuit, when
the national media had given extensive coverage to the racial strife in Cairo.
119 527 F.2d 44 (7th Cir.1975).
120 The commission form of government is authorized by Illinois law. ILL. REV. STAT. ch. 24, §§
4-3-2 to -5 (1965).
121 From 1885 to 1901, there was always at least one black city councilman. J. LANSDEN, supra
note 9.
122 When the commission form of government was adopted in 1913, local political and press
support was premised on the need to eliminate corruption in city government. However, John
Lansden commented in his 1910 history of Cairo that Cairo blacks were "bought and sold at
election times until the elective franchise in their hands seem[ed] to be a travesty." J. LANSDEN,
supra note 9, at 146. It is more likely, therefore, that the adoption of the commission form of
government was intended to effectively disenfranchise Cairo's black voters. The commission form
of government certainly ensured a future of "white man's elections" in Cairo. Id. at 181.
123 In 1969, Norman Seavers, a black man, was appointed to fill a city council vacancy.
126 527 F 2d 44 (7th Cir. 1975).
127 ld. at 49.
adoption of the at-large system by a referendum vote of the people of Cairo did not defeat plaintiffs' equal protection claim because the citizens of Cairo could not, by majority vote, dilute the plaintiffs' votes.128

Five years later, in March 1980, the district court entered a consent decree which abolished the at-large voting election system.129 The city was divided into five wards, at least two of which are predominantly black. Candidates must reside in the ward from which they are elected. The order also allows for a sixth council member to be elected at-large. Because the next election was not scheduled until April 1983, the order also provided that a special election would be held to determine the council members from the predominantly black second and third wards. In November 1980, two blacks were elected to the City Council.130

Ewing and Kendrick may well prove to be the most significant suits filed in Cairo. They ensure that blacks will have at least some voice in community decisions. While these cases cannot guarantee that discrimination will not occur in the future, they do guarantee that blacks will have representatives within the political process to keep them informed. With a representative government at the core of our system, [312] effective political participation by minority groups must be protected.131 Ewing and Kendrick probably offer the best guarantee against another breakdown of law and order in Cairo.

III.

THE LESSONS OF CAIRO

Whether it was protecting the right to protest or securing other civil rights, the federal judiciary was the most effective referee of Cairo's racial problems. No other court or agency had such broad jurisdiction or power, nor commanded the necessary respect to ensure that its decisions would be implemented. The federal injunctions averted potentially violent confrontations. Federal injunctive relief also effectively terminated a number of state court prosecutions under statutes and

---

128 Id. at 50-51.
130 Whether these orders would have been approved by the Supreme Court is questionable. In Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974), the Court evidenced reluctance to interfere with the discretionary appointment of public officials. Id. at 618-29. Furthermore, just a few months after the Kendrick settlement was approved, the Supreme Court held that federal courts should not dismantle an at-large election system without proof that it was "purposefully" adopted or maintained to discriminate on the basis of race. City, of Mobile v. Bolden, 446 U.S. 55 (1980).
131 John Hart Ely has demonstrated that "the duty of representation that lies at the core of our system requires more than a voice and a vote." J. ELY, DEMOCRACY AND DISTRUST; A THEORY OF JUDICIAL REVIEW 135 (1980). He therefore urges that "[t]o the extent that there is a stoppage, the system is malfunctioning, and the Court should unblock it without caring how it got that way." Id. at 136.
ordinances unconstitutional on their face or as applied. The preliminary orders in each of the protest cases filed by the Lawyer's Committee, however, were entered before the Supreme Court decision in *Younger v. Harris*. The *Younger* decision and its progeny, through abstention principles, have effectively closed the lower federal courts to those seeking injunctive or declaratory relief with respect to pending state prosecutions. The Cairo experience calls into question the comity and federalism concerns that provide the doctrinal basis for *Younger*-type abstention. Had the federal judicial forum been closed, it is difficult to imagine any acceptable end to the shootings and other violence that were a regular occurrence in Cairo.

Most other Cairo cases, like the protest cases, were brought before the Supreme Court's recent retrenchment in the civil rights area. Cairo's at-large election system was dismantled just months before the Supreme Court's decision in *City of Mobile v. Bolden*. Cairo's housing and employment cases were settled just before the Court enunciated its view that only “purposeful” discrimination is unlawful in these areas.

Despite the New Federalism, the first lesson to be learned from the Cairo lawsuits is that federal courts can play an important role in solving racial problems; however, the federal courts must be open to provide prompt and effective relief to civil rights litigants. This means that the courts must take a liberal view of the standing of private litigants to initiate lawsuits. Private litigants must also be allowed to intervene to protect their own interests in actions

---

132 Whether the state court would have accepted the demonstrators' constitutional arguments is at least questionable. The local prosecutor and judges, as elected officials who lived in Cairo, were certainly subject to local pressures and were closely tied to the local white power structure. See generally Amsterdam, supra note 53. Federal judges were not subject to such pressures; they neither resided nor held court in Cairo. As a practical matter, the local judges probably were not completely unhappy to have the federal judges assume the burden of deciding the validity of arrests and the constitutionality of particular statutes or ordinances.


At the time the Cairo orders were entered the controlling precedent in the area of federal court injunctions against state criminal proceedings was *Dombrowski v. Pfister*, 380 U.S. 479 (1965). In *Dombrowski*, the Court had held that federal courts properly could enjoin certain state court prosecutions against civil rights demonstrators. The efficacy of federal court proceedings was severely limited by the *Younger* decision. The *Younger* Court held that equitable considerations, as well as considerations of comity and federalism, prevented federal courts from enjoining pending state court prosecutions unless the state proceedings constituted bad faith harassment.

134 446 U.S. 55 (1980). See also note 130 supra.


137 Recent Supreme Court decisions indicate that plaintiffs in some of the Cairo cases might well have faced serious challenges to their standing to litigate had their cases been brought today. See, e.g., Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975).

For a discussion of ripeness problems, see note 56 supra.
initiated by the government. The Cairo experience demonstrates that state and federal officials are slow to act, and that when they do act, it is generally only to achieve the most minimal concessions. Therefore, it is imperative that Congress provide for, and that the courts recognize, the right of litigants to initiate private actions under federal regulatory schemes and that mandamus or injunctive remedies be available against officials who fail to perform their statutory or constitutional duties. Courts should be concerned more about the practical consequences of official action and less about the subjective motivations of public officials. Cairo blacks were effectively excluded from the political process regardless of the subjective motivations of the voters who enacted the at-large voting system in 1913. For the courts to adhere to any other standard belies reality. In addition, courts must be allowed broad discretion to fashion effective decrees. Affirmative remedies must be available, and, even more importantly, decrees must provide for ongoing checks and for permanent structural changes when necessary to ensure that past illegal practices will not recur.

The second lesson to be learned from the Cairo experience is that continued federal funding must be available for legal services programs free from political and local control. The Cairo lawsuits would not have been filed under a judicare system operated by local attorneys or under a legal services system administered or otherwise controlled by the local bar or politicians. Although the Lansden brothers fought many courageous battles on behalf of civil rights as private attorneys, they did so at a price few other lawyers would be willing to pay. Furthermore, part-time legal aid lawyers with private practices could not

---


139 See Legal Aid Soc’y v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974) (claims against federal compliance agencies fell within ultra vires exception to sovereign immunity bar).

140 In fact, racial discrimination is best demonstrated by proof of a long-term pattern and practice of racial bias, and by connecting current action with that long term pattern. See, e.g., White v. Register, 412 U.S. 755 (1973); Gomillion y. Lightfoot, 364 U.S. 339 (1960).

Furthermore, focusing on purposefulness tends to turn a lawsuit into a personal vendetta. Plaintiffs cannot succeed showing that defendants’ actions are wrong by demonstrating an objective discriminatory effect; rather, plaintiffs must show that defendants are bigots, and thus defendants’ actions are wrong a fortiori. If the purpose of a lawsuit is to open a dialogue between the plaintiffs and the defendants, the dialogue will be furthered by focusing on objective criteria and not upon that particular motivation which may have inspired the defendants’ conduct. The Cairo lawsuits were most successful when plaintiffs and defendants each thought they had won something. The recent Supreme Court decisions requiring proof of discriminatory intent are more likely to promote dissension than to draw people together. See R. NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 248-49 (1960).


142 See notes 9 & 16 supra.
maintain the caseload handled by the Cairo office, which kept a minimum of three attorneys busy full-time.\textsuperscript{143}

**CONCLUSION**

When the Lawyer's Committee arrived in Cairo in 1969, the community was being destroyed by racism and violence. The Committee was able to channel the grievances of black citizens into the courts. For those who believe that litigation is an effective alternative to street fighting, the strategy of the Lawyer's Committee must be regarded as a success. The lawsuits initiated by the Lawyer's Committee, and its successor, [315] the Land of Lincoln Legal Assistance Foundation, largely achieved the limited goals sought.

This is not to say that all is well today in Cairo—the community continues to contend with the twin legacies of poverty and racism. Though the lawsuits have not reversed economic stagnation in the community,\textsuperscript{144} they have established the framework for an ongoing dialogue. If this dialogue continues and if the community can forget old antagonisms, the future need not be as bleak as past events would seem to portend.

Lawsuits have made a difference in Cairo. They have not produced a color-blind society, but they have helped blacks participate equally in society. Those who would disparage "judicial activism" or the ability of law to effect social change only need look to Cairo and consider the alternatives.

\textsuperscript{143} In 1975, the office was assigned a fourth attorney under the Reginald Heber Smith Program. Even with four attorneys there were few evenings or weekends that the attorneys did not work. The serious abuses that occurred in Cairo necessitated that at least one attorney be "on-call" at all times in case of disorder.

\textsuperscript{144} In the long run, it is possible that harmonious interracial relations will encourage business to locate in Cairo, or at least that businesses will no longer shy away from Cairo because of fears of racial turbulence. Cairo need not be “a grave uncheered by any gleam of promise.” C. DICKENS, *supra* note 1, at 185.
WHY DO LANDLORDS STILL DISCRIMINATE (AND WHAT CAN BE DONE ABOUT IT)?

Robert G. Schwemm

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.

Copyright © 2007 John Marshall Law Review
WHY DO LANDLORDS STILL DISCRIMINATE 
(AND WHAT CAN BE DONE ABOUT IT)?

By
Robert G. Schwemm*

*455

1968: “It is the policy of the United States . . . to provide for fair housing throughout the United States.”
2003: “Irrational prejudice is still encountered in real estate markets . . . .”

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

---

* Copyright 2007 Robert G. Schwemm. Ashland Professor, University of Kentucky College of Law. I thank Ruth Baer, Chris Brancart, Mary Davis, Alex Polikoff, John Relman, and Sarah Welling for their helpful ideas and comments on this paper.
1 Fair Housing Act, 42 U.S.C. § 3601 (2000); see also infra note 4.
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]knowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure”).
and enforcement of the 1968 *456 Fair Housing Act (“FHA”), 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. 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. Additional phases of this study found similar rates of rental discrimination against other ethnic minorities. 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).

Margery Austin Turner et al., Discrimination in Metropolitan Housing Markets: National Results from Phase 1 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. Furthermore, the 1989 figures were not significantly different from those revealed in the first of these nationwide studies, which was done in 1977. 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.

Comparable figures are not available for the late 1960s when the FHA first went into effect but presumably rental 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. 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].


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.


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”).

---

40 J. Marshall L. Rev. 455
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.\textsuperscript{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.\textsuperscript{13} But, unlike *459 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 FHA\textsuperscript{14} 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

\begin{footnotesize}
\textsuperscript{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).


\textsuperscript{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. Dept. 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 Schewerm, supra note 5, at § 7.3 (discussing the FHA's goal of integration).
between whites and minorities. 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.” Throughout the FHA’s tenure, the Supreme Court has affirmed that it carries out a “policy that Congress considered to be of the highest priority.”

B. The FHA’s Basic Prohibitions and Enforcement Techniques

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.” 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” 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.” 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. 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).
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.
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 Act—also bans racial discrimination in housing, and this law, whose prohibition of “racial” discrimination covers Hispanics and virtually all dark-skinned persons as well as blacks, is not subject to the FHA’s exemptions (e.g., a “Mrs. Murphy” landlord who discriminates against a Hispanic thereby violates the 1866 Act even though her apartment is exempt from the FHA).

As the 1977 HUD testing study showed, however, the FHA and other relevant laws did not eliminate housing discrimination against racial and ethnic minorities. Congress’ response was to consider ways to strengthen the FHA, which was seen as “ineffective because it lacks an effective enforcement mechanism.” The result was the 1988 Fair Housing Amendments Act (“FHAA”), in which Congress sought to provide the FHA with “an effective enforcement system” in order to make its promise of nondiscrimination “a reality.” 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. The result was a civil rights law whose enforcement procedures are second to none.

---

28 Id. § 1982.
31 See, e.g., Schwemm, supra note 5, at § 27:2, n.6.
32 Wienk et al., supra note 8.
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 FHAA\(^{43}\)--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

---


\(^{39}\) 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).

settling back to 4,807 in 1993 and 4,645 in 1994. The number of national origin complaints also 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. Rental claims accounted for a large portion of the 1989-1994 complaints.

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. 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. 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. Thus, even in this period of somewhat reduced complaint levels, the number of rental


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.


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).
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 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.
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.
enforcement—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. Thus, the 2005-2006 levels were similar to those common in the early 1990s.

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, a slight dip for race and a slight increase for national origin compared with these rates in the late 1990s. 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”).


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, a slight reduction for both categories compared with the late 1990s.

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). 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. 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. Of the nine HUD settlements, three involved race (which produced a total of $22,500 for the complainants), and none involved national origin. Thus, administrative cases achieved substantially less overall relief in 2006 than they did in 1994.

---

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. During the 2000-2005 period, private lawsuits resulting from such complaints recovered over $63,000,000 from 882 concluded cases, which meant that filings per-year and recoveries per-case were somewhat down from the 1990s. 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). National origin accounted for four percent of the cases. Rental transactions were involved in more than seventy-seven percent of the cases.

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. 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.

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

---


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.


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, there is substantial evidence that rental discrimination against racial and ethnic minorities continues unabated. 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”).

“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. 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.

As a group, renters “tend to be younger, have lower incomes, [and] are more likely to be minorities or immigrants.” 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. Half of all minority households are renters, 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.


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 Long 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. 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.

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. Rental costs have increased faster than inflation over the past decade and now stand at an all-time high. One in five renter households pays at least half of their income for housing.

The inventory of rental units stood at 37.2 million in 2003. 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. More than one third of renters live in single family homes. As for the remaining two thirds who live in 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.

---

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

---

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, Supbrime 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, 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. 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. The agents targeted for these tests were randomly selected based on housing ads appearing in the metropolitan area's major Sunday newspaper. Only ads for certain types of rental housing were considered (e.g., for non-luxury, non-subsidized units intended for year-round occupancy). Another requirement was that the ads must have been placed by a real estate agency, rental property management company, or locator service, which had the effect of eliminating most FHA-exempt units. 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. 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). Based on an evaluation of these factors, each paired test was classified in one of three categories: white-favored; minority-favored; or equal treatment. 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.

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; (2) the preliminary telephone-contact stage, where discrimination is a frequent phenomenon in today's housing markets; (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.

See supra notes 102-04 and accompanying text.

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. 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); 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.


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. 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.

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.

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.” 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 “[w]hen the agent is Hispanic, the white [tester] is more likely to receive favorable treatment than the black teammate”).
discrimination in the rental market. Discrimination rates might also rise with the age of the rental agent, although studies focusing on this factor have reached somewhat different results.

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," but the 2000 HUD study did not confirm this, and indeed showed that discrimination in providing information about apartment-application fees was higher for female than male Hispanics. The 1977-based study also found that older testers and those purporting to have children encountered less discrimination, although the latter finding conflicts with a 1980s rental study. This later study also found that rental "discrimination declines when the [tester's] assigned role includes a college education."  

**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 "older 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 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


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 confirmed the view of previous commentators that “discrimination can have several different causes.”

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. This question may be somewhat related to the question of why people discriminate, but the two questions are not the same, and indeed their relationship is not easy to gauge. 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, 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, some lack of awareness about discrimination laws may well exist among current landlords and their agents. In any

---

138 Id.
139 Id. at 7-13.
141 See Abravanel, supra note 11, at 3 n.5 (“It 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. 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. Meanwhile, government officials and private FHA litigants continue to proclaim that their latest lawsuit will “send a strong message” to potential discriminators. #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).

suits are brought.\textsuperscript{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.\textsuperscript{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 factors \textsuperscript{*485} 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.

\textsuperscript{149} See supra notes 6-8 and accompanying text; supra Part II.B.

\textsuperscript{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”).

\textsuperscript{*485}
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, 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.

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. Deterrence in tort law—whose analogy to fair housing is supported by the Supreme Court’s determination to treat FHA violations as torts—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.
negligently inflicted injuries. 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.”

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. 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.

*487

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”). 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.

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. Dept' 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.  

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. 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. 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.

---

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 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 of—they will also presumably continue to see no obvious alternatives for obtaining these benefits.

C. Why Do People Obey Laws?

Of course, people do not obey laws simply out of a fear that disobedience will result in swift and sure punishment. 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. 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. Rather, people focus on "normative issues," such as "the legitimacy of legal authorities and the morality of the law." 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").
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. 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

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, was published five years after the passage of the 1968 FHA and is now in its sixth edition. Economics, as explained by Posner, is “the science of rational choice,” and it views people as “rational maximizers” of their “satisfactions.” 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.” 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.”

169 Id. at 6.


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)).
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 VII\(^{179}\)—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.


\(^{181}\) 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
phrase without showing any awareness of HUD's intervening studies showing ongoing high levels of sales discrimination against black home buyers.\textsuperscript{183} 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.”\textsuperscript{184}

As we have seen, Posner is correct that discrimination is more common in rentals than sales,\textsuperscript{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,\textsuperscript{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.\textsuperscript{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 \textsuperscript{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

\begin{footnotes}
\item[\textsuperscript{183}] See supra notes 6-8 and accompanying text.
\item[\textsuperscript{184}] Posner, supra note 170, at 687.
\item[\textsuperscript{185}] See supra notes 6-9, 11-12, 48 and accompanying text; supra text accompanying notes 69 and 80.
\item[\textsuperscript{186}] See supra notes 134-36 and accompanying text.
\item[\textsuperscript{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).
\end{footnotes}
minorities if he perceives that his white tenants will respond by moving out.\textsuperscript{188} But, as we have seen, the HUD studies do not support this as a basis for rental discrimination.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{195}

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

\textsuperscript{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).
\textsuperscript{189} See supra text accompanying notes 137-38.
\textsuperscript{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.
\textsuperscript{192} Kenneth J. Arrow, What Has Economics to Say About Racial Discrimination?, 12 J. Econ. Persp. 91 (1998).
\textsuperscript{193} Id. at 93.
\textsuperscript{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.
\textsuperscript{195} Arrow, supra note 192, at 93.
\textsuperscript{196} Id. at 96.
discrimination, and he suggests that “beliefs and preferences may themselves be the product of social interactions unmediated by prices and markets.” 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”--but “perhaps less so for housing.”

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.” 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.”

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

One example is that people have a bias in favor of the status quo (i.e., we prefer things to stay relatively the same). Another is that people are generally “loss averse” (i.e., we are motivated more by fear of loss than by the prospect of gain). A third is that our decision-making is affected by how choices are worded or presented, a concept known as “framing.” 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”).


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.


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).

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

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. However this question is ultimately resolved, it is clear to these researchers that human decision-making is not driven entirely by economic forces.

---


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
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:

[Isn'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.\footnote{221}

*499 Because Loury views the cognitive behavior he describes as “deep-seated,”\footnote{222} he is at pains not to criticize it as racism,\footnote{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,”\footnote{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).\footnote{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.”\footnote{226} He views “the classic racial discrimination problem” as having “declined sharply in the United States in the past half-century,”\footnote{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.... Each act of [discrimination] by an auto salesperson simultaneously reflects and reinforces the cultural beliefs on which it is premised.... In 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.


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.\textsuperscript{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,”\textsuperscript{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.\textsuperscript{230} For this, he says we need to challenge racial stigma by coming to believe in the “equal humanity” of blacks.\textsuperscript{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

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.\textsuperscript{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.\textsuperscript{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”).\textsuperscript{234} The Race IAT has been administered to tens of thousands of people in the United States, over eighty percent of whom exhibit

\textsuperscript{228} Id. at 101.
\textsuperscript{229} Id. at 168.
\textsuperscript{230} Id. at 167-68.
\textsuperscript{231} Id. at 87-90.
\textsuperscript{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.\textsuperscript{235} These results show that our unconscious racial attitudes “may be utterly incompatible with our stated conscious values.”\textsuperscript{236} For example, even people who profess strongly egalitarian views often exhibit pro-white implicit biases.\textsuperscript{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.\textsuperscript{238} Indeed, the concept of favoring “ingroup” members over outsiders seems so natural as to suggest it may have evolutionary roots.\textsuperscript{239} In any event, the phenomenon has been well documented.\textsuperscript{240} Furthermore, there are psychological incentives that

\begin{itemize}
  \item Gladwell, supra note 234, at 84; see also Bagenstos, supra note 233, at 7 (noting that “[white 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))).
  \item “Similar results have been obtained in terms of White Americans' implicit attitude toward other ethnic groups such as Latinos.” Id.
  \item Gladwell, supra note 234, at 85.
  \item 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)].
  \item 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].
  \item 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”).
  \item 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
\end{itemize}
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. See, e.g., Henri Tajfel, Cognitive Aspects of Prejudice, 4 J. Soc. Issues 79, 83-85 (1969).

Further, it is well established that implicit racial bias is reinforced by racial isolation and reduced by interaction with diverse groups. 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).

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. See Gladwell, supra note 234, at 85.

In other words, American blacks “often harbor the same stereotypes about their own group as [whites] harbor about them.” 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.”

*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. This is not to
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.
Psychol. Sci. 315, 318 (2000)).

See, e.g., Bagenstos, supra note 233, at 42-43 (“Discrimination actuated by implicit bias in 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,
statutes designed to curb intentional action, as a practical matter, can have no real impact on

44
40 J. Marshall L. Rev. 455
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. Unconscionable biases ‘sneak up’ on a decisionmaker.”

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. Noting that psychologists had shown that unconscious bias is a pervasive aspect of American life, 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.”

But how can this be done? The FHA outlaws practices undertaken “because of race” 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.”).
accomplish its goals only by eliminating discrimination prompted by conscious prejudice.\textsuperscript{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.”\textsuperscript{257}

In the past decade, a number of legal scholars concerned with employment discrimination have responded to Professor *506 Lawrence's challenge by examining how implicit-bias discrimination contributes to workplace inequality and may be countered.\textsuperscript{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.\textsuperscript{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.\textsuperscript{260}

\begin{flushright}
\footnotesize
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).
\textsuperscript{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).
\textsuperscript{257} Bagenstos, supra note 233, at 3, 42-43.
\textsuperscript{258} For a review of this literature, see id. at 4-20.
\textsuperscript{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).
\textsuperscript{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”).
\end{flushright}
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.\textsuperscript{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.\textsuperscript{262} Furthermore, the structural approach in \textit{e.g.} employment has generally focused on how employees are dealt with after they are hired (e.g., harassment issues and the “glass ceiling” phenomenon),\textsuperscript{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.\textsuperscript{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.\textsuperscript{265}

\textbf{F. Summary}

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

\textsuperscript{261} See supra notes 6-9 and accompanying text; supra notes 85, 119-20, 122.
\textsuperscript{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).
\textsuperscript{263} See Bagenstos, supra note 233, at 10-12.
\textsuperscript{264} See supra notes 6-9 and accompanying text and Part IV.A.
\textsuperscript{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 rent discrimination so that all of their comrades-in-arms can have a fair shot at the American dream.

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: “Stereotypical 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.” 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 awareness . . . .\textsuperscript{268}

**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.\textsuperscript{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

\textsuperscript{268} Conley & O’Barr, supra note 221, at 11.
\textsuperscript{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”).