National Commission on Fair Housing and Equal Opportunity

The State of Fair Housing in America

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Commissioners:

I. Introduction and Overview

My name is Robert G. Schwemm, and I am the Ashland-Spears Professor at the University of Kentucky College of Law. Last year, I published an article on the efficacy of the Fair Housing Act, which has received a great deal of attention in the fair housing community. Because I am unable to attend the Commission hearing, I wanted to take this opportunity to provide a summary of that article for the Commission's consideration. For a more detailed discussion of the issues I present here, along with citations to sources, please see the original article, "Why Do Landlords Still Discriminate (and What Can Be Done About It)?," 40 J. Marshall L. Rev. 455 (2007); available on the internet at http://papers.ssrn.com/abstract=1002636.

Housing discrimination levels remain virtually unchanged 40 years after enactment of the 1868 Fair Housing Act ("FHA"). This lack of progress is especially significant considering the FHA's strong enforcement scheme created under the Fair Housing Amendments Act in 1988. In contrast to racial discrimination in public accommodation and employment, housing discrimination seems uniquely intractable. This is particularly true in rental housing.

In light of the FHA's disappointing record, we should consider alternative solutions. To be clear, I am not suggesting that the FHA be abandoned. I am in favor of aggressive FHA enforcement. I do suggest, however, that it is time to think creatively and pursue solutions that would complement litigation under the FHA.

II. History of the FHA

The FHA was enacted in 1968 to address the problem of housing discrimination in the United States. 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." 42 U.S.C. § 3604(a). 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." 42 U.S.C. § 3604(b-d). All of the quoted provisions have been a part of the law since the FHA was first enacted in 1968.

Twenty years after the FHA's enactment, Congress responded to evidence that the FHA had not eliminated housing discrimination by strengthening the FHA's enforcement mechanisms. The resulting 1988 Fair Housing Amendments Act ("FHAA") strengthened all three of the FHA's enforcement techniques by: (1) eliminating the punitive damage cap, lengthening the statute of limitations, and making it easier to obtain attorney's fees awards 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. 42 U.S.C. §§ 3610-14. The result was a civil rights law whose enforcement procedures are second to none.

The FHAA's enactment led to a period of increased enforcement activities. For example, the total number of FHA administrative complaints filed with HUD and substantially equivalent state and local agencies rose from 4,422 in 1988 to 7,174 in 1989, and then to 10,184 in 1993, after which the number fell slightly to 9,670 in 1994, before increasing again in the late 1990s. Many of these claims were based on familial status and handicap – the two new protected classes added by the FHAA – but the number of race and national origin claims also rose substantially, from a low of 3,722 in 1989 to a high of 5,062 in 1992, before settling back to 4,807 in 1993 and 4,645 in 1994. The number of national origin complaints also increased substantially after the FHAA's enactment. During the second half of the 1990s, the portion of these totals that involved race and national origin remained fairly steady, at about 43 and 11 percent, respectively. By far the largest category of these race and national origin complaints was in rental housing.

III. Failures of the FHA

The substantial number of FHA complaints over the past four decades seems to have had virtually no impact on rental discrimination rates nationwide. In 1977, 1989, and 2000, HUD conducted nationwide testing studies to measure racial discrimination in housing. The 2000 study showed that, in rental tests, whites were favored over blacks 21.6% of the time and over Hispanics 25.7% of the time. The rate of rental discrimination against Hispanics was actually higher in 2000 than had been shown in the 1989 study, and the 2000 figure for blacks was down only a few percentage points compared to 1989. Furthermore, the 1989 figures were not significantly different from those revealed in 1977.

There is no comparable data available for the years immediately following the FHA's enactment in 1968. Even if discrimination decreased some in this period, 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.

Although HUD testing has demonstrated discrimination in housing sales, discrimination is particularly acute in the rental market. As a group, renters – about one-third of United States households – tend to be younger, poorer, 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 43 percent in 2004, and is expected to exceed 50 percent by 2015. Low-income households are also a rapidly growing segment of the rental market; one in five renter households pays at least half of their income for housing.

Rental housing is a huge industry in the United States, 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. Individuals own more than half of all rental units. Some 4.3 million households earn rental income from a second property, and most of these (nearly 80 percent) have only one rental property. Half of individual rental property owners are fifty-five years old or over. These older owners – and, for that matter, small property owners in general – tend to run their own properties without employing outside agents.

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 market or rental discrimination issues involving income and immigration status, factors which, while not directly addressed by the FHA, often impact minorities far more than whites. On the supply side, the growing number of 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.

III. Reasons Why Rental Discrimination Persist

In light of the failure of FHA enforcement to effect change in discriminatory behavior in rental housing, we need to consider *why* landlords continue to discriminate. We can draw insight on human behavior from psychology, economics, and other social sciences, which can help us direct our efforts more effectively to reduce discrimination in innovative ways.

A. Law and deterrence

Modern thinking about deterrence originates with the work of Jeremy Bentham, who theorized that people would be more effectively deterred from a course of action to the extent that punishment for that behavior is increased. There is, however, little empirical evidence to support this theory, and many scholars have challenged it based on studies of the deterrent effect of both criminal and tort law. At the very least, we should be skeptical of applying a simplistic view of deterrence in the fair housing field.

Psychological studies have shown that punishment of bad behavior is less effective at influencing a person's actions than are rewards for good behavior. Obviously, legal remedies, such as monetary damages, focus on punishment, so imagining how positive reinforcement for potential defendants could be accomplished in the legal system is difficult. Nonetheless, in the quest for greater FHA compliance,

we should at least consider what positive rewards might be possible for law-abiding landlords, even if these rewards are to be generated from outside the legal system.

As for more traditional enforcement techniques, studies have shown that in order to be effective, punishment must be immediate, severe, consistent, and not offset by positive motivations to perform the act being punished. While punishments under the FHA 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 laudable, but unlikely, goal – these psychological insights suggest that FHA enforcement will continue to have little effect on 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.

B. Normative values

A Chicago empirical study examining why people obey laws concluded people are motivated less by self-interest than by their sense of "normative values," such as "the legitimacy of legal authorities and the morality of the law." 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. For example, one option might be to provide positive reinforcement through public service ads featuring racially diverse returning veterans, presenting non-discrimination as a patriotic duty.

C. Law and Economics.

Legal economists such as Judge Richard Posner have argued that market forces will eventually ensure compliance with the FHA, because non-discriminatory landlords will gain a competitive advantage over discriminatory landlords by having a larger pool of potential customers. Posner acknowledges that some people will accept lower profits in order to discriminate, but he argues that the non-discriminatory landlords will, therefore, drive their biased competitors out of the market. Unfortunately, as HUD's testing studies make clear, the reality of current housing discrimination does not support this classical economic theory.

Some modern economists, such as Nobel lauriate Kenneth Arrow, have acknowledged that market factors cannot explain the perseverance of racial discrimination. Arrow recognizes that non-market factors, such as social interaction and networks, play a role in explaining racial discrimination. More recently, behavioral economists have tried to explain human behavior by discerning patterns in the irrational choices people make. For example, people have a bias in favor of the status quo, and people tend to be motivated more by fear of loss than the possibility of gain. Boston University's Glenn C. Loury has applied behavioralist ideas to race-based decision making. Loury's work focuses on the ways in which racial stereotypes are deeply engrained in the collective social consciousness. Unfortunately, if race-based decision-making is as deep-seated and often unconscious as Loury suggests, it is something individuals must work hard to control. Individuals can unlearn stereotypes when they deal regularly with minorities, but such learning is harder when opportunities for learning occur only sporadically, as when a small landlord chooses tenants.

D. Unconscious biases

Over the past two decades, studies have shown that implicit (i.e., unconscious) bias against minorities is widespread among Americans. This implicit bias creates a

negative reaction toward minorities even when the actor is unaware of or uncomfortable with her own racial prejudices. Implicit pro-white bias is so strong in the United States that even blacks tend to demonstrate a stronger association with whites than with other blacks. 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 encounters such as rental interviews, for reasons we are not fully conscious of. As a result, 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.

In the employment discrimination context, scholars have responded to the problem of unconscious bias by advocating removal of structural impediments to equality. Some of these ideas may not be relevant in the housing market, but we should consider possible benefits to a structural approach in housing and begin to recognize that the FHA can play only a partial role in eliminating rental discrimination.

IV. Conclusions

While I have stressed the failures of FHA enforcement activities in this article, I do not 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.

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. As a beginning, we must to try to learn more about why landlords behave as they do and thereby find better ways to influence their behavior.

Thus, it is important not to overlook non-legal solutions inspired by insights from the social sciences, including creating positive sources of encouragement for landlords to treat all potential tenants equally. For example, in the 1990s, HUD entered into "Best Practices" agreements with some industry groups, and more recently, HUD created "Fair Housing Best Practices" awards. If these practices were made to include rental groups and landlords, this could have an impact on discrimination in the rental market. 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. Public awareness campaigns can be effective in this regard. One example might be an ad campaign emphasizing the patriotic imperative of fair housing by featuring military personnel of all races returning from service in Iraq asking their fellow citizens to end racial discrimination.

Whatever the specific ideas, we have to recognize that the battle for fair housing will not be won by focusing strictly on the individual complaints under the FHA, but will instead require a steady and continued struggle on numerous cultural fronts. For example, it is important – as a fair housing matter – to constantly oppose negative media portrayals of racial minorities and to offer positive alternative images. 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.