by federal fair housing law. For example, many state laws prohibit discrimination on the basis of marital status, age, or source of income, while an increasing number of state and local laws prohibit discrimination because of sexual orientation. In addition, state and local laws may apply to housing that is exempt from the federal *Fair Housing Act*, such as owner-occupied three-unit buildings or claims that are barred by the federal statute of limitations but timely under state or local law. Finally, as we shall see, courts also respond to discrimination in housing through the traditional tools of equity.

§1.2 The *Fair Housing Act*

Fair Housing Act

42 U.S.C. §§3601-3605, 3607, 3613, 3617, 3631

§3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§3602. Definitions

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(h) "Handicap" means, with respect to a person—

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance as defined in section 802 of Title 21.

(i) "Aggrieved person" includes any person who—

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

§3603. Effective dates of certain prohibitions

(b) Exemptions

Nothing in section 3604 of this title (other than subsection (c)) shall apply to—

(1) any single-family house sold or rented by an owner: *Provided*, That such private individual owner does not own more than three such single-family houses at any one time: *Provided further*, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of 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 and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title, or

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

§3604. Discrimination in sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce, or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

(A) that buyer or renter;

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(A) that buyer or renter;

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes—

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted;

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that—

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(7) As used in this subsection, the term "covered multifamily dwellings" means—

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

§3605. Discrimination in residential real estate-related transactions

(a) *In general.* It shall be unlawful 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.

(b) *Definition.* As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance—

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

§3607. Exemption

(a) Religious organizations and private clubs

Nothing in this title shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

(b) Numbers of occupants; housing for older persons; persons convicted of making or distributing controlled substances

(1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this title regarding familial status apply with respect to housing for older persons.

(2) As used in this section, "housing for older persons" means housing—

(A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or

(B) intended for, and solely occupied by, persons 62 years of age or older; or

(C) intended and operated for occupancy by persons 55 years of age or older, and—

(i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;

(ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and

(iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall—

(I) provide for verification by reliable surveys and affidavits; and

(II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

(3) Housing shall not fail to meet the requirements for housing for older persons by reason of:

(A) persons residing in such housing as of the date of enactment of this Act who do not meet the age requirements of subsections (2)(B) or (C): *provided,* That new occupants of such housing meet the age requirements of subsections (2)(B) or (C); or

(B) unoccupied units: *provided,* That such units are reserved for occupancy by persons who meet the age requirements of subsections (2)(B) or (C).

(4) Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of Title 21.

(5)(A) A person shall not be held personally liable for monetary damages for a violation of this title if such person reasonably relied, in good faith, on the application of the exemption under this subsection relating to housing for older persons.

(B) For the purposes of this paragraph, a person may only show good faith reliance on the application of the exemption by showing that—

(i) such person has no actual knowledge that the facility or community is not, or will not be, eligible for such exemption; and

(ii) the facility or community has stated formally, in writing, that the facility or community complies with the requirements for such exemption.

§3613. Enforcement by private persons

(a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(b) Appointment of attorney by court

Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may—

(1) appoint an attorney for such person; or

(2) authorize the commencement or continuation of a civil action under subsection (a) of this section without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

§3617. Interference, coercion, or intimidation; enforcement by civil action

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

§3631. Violations; penalties

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(a) any person because of his race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(1) participating, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate —

shall be fined under Title 18 or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under Title 18 or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under Title 18 or imprisoned for any term of years or for life, or both.

§1.3 Advertising and the Reach of the *Fair Housing Act*

Fair Housing Council of San Fernando Valley v. Roommate.com, LLC

666 F.3d 1216 (9th Cir. 2012)

ALEX KOZINSKI, Chief Judge:

There's no place like home. In the privacy of your own home, you can take off your coat, kick off your shoes, let your guard down and be completely yourself. While we usually share our homes only with friends and family, sometimes we need to take in a stranger to help pay the rent. When that happens, can the government limit whom we choose? Specifically, do the anti-discrimination provisions of the *Fair Housing Act* ("FHA") extend to the selection of roommates?

Facts

Roommate.com, LLC ("Roommate") operates an internet-based business that helps roommates find each other. Roommate's website receives over 40,000 visits a day and roughly a million new postings for roommates are created each year. When users sign up, they must create a profile by answering a series of questions about their sex, sexual orientation and whether children will be living with them. An open-ended "Additional Comments" section lets users include information not prompted by the questionnaire. Users are asked to list their preferences for roommate characteristics, including sex, sexual orientation and familial status. Based on the profiles and preferences, Roommate matches users and provides them a list of housing-seekers or available rooms meeting their criteria. Users can also search available listings based on roommate characteristics, including sex, sexual orientation and familial status.

The Fair Housing Councils of San Fernando Valley and San Diego ("FHCs") sued Roommate in federal court, alleging that the website's questions requiring disclosure of sex, sexual orientation and familial status, and its sorting, steering and matching of users based on those characteristics, violate the *Fair Housing Act*, 42 U.S.C. §3601 et seq., and the *California Fair Employment and Housing Act* ("FEHA"), Cal. Gov't Code §12955. [T]he district court held that Roommate's prompting of discriminatory preferences from users, matching users based on that information and publishing these preferences violated the FHA and FEHA, and enjoined Roommate from those activities. Roommate appeals the grant of summary judgment and permanent injunction.

If the FHA extends to shared living situations, it's quite clear that what Roommate does amounts to a violation. The pivotal question is whether the FHA applies to roommates.

I

The FHA prohibits discrimination on the basis of "race, color, religion, sex, familial status, or national origin" in the "sale or rental *of a dwelling*." 42 U.S.C. §3604(b) (emphasis added). The FHA also makes it illegal to

> make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental *of a dwelling* that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Id. §3604(c) (emphasis added). The reach of the statute turns on the meaning of "dwelling."

The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." *Id.* §3602(b). A dwelling is thus a living unit designed or intended for occupancy by a family, meaning that it ordinarily has the elements generally associated with a family residence: sleeping spaces, bathroom and kitchen facilities, and common areas, such as living rooms, dens and hallways.

It would be difficult, though not impossible, to divide a single-family house or apartment into separate "dwellings" for purposes of the statute. Is a "dwelling" a bedroom plus a right to access common areas? What if roommates share a bedroom? Could a "dwelling" be a bottom bunk and half an armoire? It makes practical sense to interpret "dwelling" as an independent living unit and stop the FHA at the front door.

There's no indication that Congress intended to interfere with personal relationships *inside* the home. Congress wanted to address the problem of landlords discriminating in the sale and rental of housing, which deprived protected classes of housing opportunities. But a business transaction between a tenant and landlord is quite different from an arrangement between two people sharing the same living space. We seriously doubt Congress meant the FHA to apply to the latter. Consider, for example, the FHA's prohibition against sex discrimination. Could Congress, in the 1960s, really have meant that women must accept men as roommates? Telling women they may

not lawfully exclude men from the list of acceptable roommates would be controversial today; it would have been scandalous in the 1960s.

While it's possible to read dwelling to mean sub-parts of a home or an apartment, doing so leads to awkward results. And applying the FHA to the selection of roommates almost certainly leads to results that defy mores prevalent when the statute was passed. Nonetheless, this interpretation is not wholly implausible and we would normally consider adopting it, given that the FHA is a remedial statute that we construe broadly. Therefore, we turn to constitutional concerns, which provide strong countervailing considerations.

II

The Supreme Court has recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the *Bill of Rights*." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). Courts have extended the right of intimate association to marriage, child bearing, child rearing and cohabitation with relatives. *Id.* While the right protects only "highly personal relationships," *IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1193 (9th Cir. 1988) (quoting *Roberts*, 468 U.S. at 618), the right isn't restricted exclusively to family, *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545. The right to association also implies a right *not* to associate. *Roberts*, 428 U.S. at 623.

To determine whether a particular relationship is protected by the right to intimate association we look to "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 546. The roommate relationship easily qualifies: People generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from the critical aspects of the relationship, such as using the living spaces. Aside from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms.

Because of a roommate's unfettered access to the home, choosing a roommate implicates significant privacy and safety considerations. The home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. Roommates also have access to our physical belongings and to our person. As the Supreme Court recognized, "[w]e are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings." *Minnesota v. Olson*, 495 U.S. 91, 99 (1990). Taking on a roommate means giving him full access to the space where we are most vulnerable.

Equally important, we are fully exposed to a roommate's belongings, activities, habits, proclivities and way of life. This could include matter we find offensive

(pornography, religious materials, political propaganda); dangerous (tobacco, drugs, firearms); annoying (jazz, perfume, frequent overnight visitors, furry pets); habits that are incompatible with our lifestyle (early risers, messy cooks, bathroom hogs, clothing borrowers). When you invite others to share your living quarters, you risk becoming a suspect in whatever illegal activities they engage in.

Government regulation of an individual's ability to pick a roommate thus intrudes into the home, which "is entitled to special protection as the center of the private lives of our people." *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring). "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home." *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). Holding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles. This would be a serious invasion of privacy, autonomy and security.

For example, women will often look for female roommates because of modesty or security concerns. As roommates often share bathrooms and common areas, a girl may not want to walk around in her towel in front of a boy. She might also worry about unwanted sexual advances or becoming romantically involved with someone she must count on to pay the rent.

An orthodox Jew may want a roommate with similar beliefs and dietary restrictions, so he won't have to worry about finding honey-baked ham in the refrigerator next to the potato latkes. Non-Jewish roommates may not understand or faithfully follow all of the culinary rules, like the use of different silverware for dairy and meat products, or the prohibition against warming non-kosher food in a kosher microwave. Taking away the ability to choose roommates with similar dietary restrictions and religious convictions will substantially burden the observant Jew's ability to live his life and practice his religion faithfully. The same is true of individuals of other faiths that call for dietary restrictions or rituals inside the home.

The U.S. Department of Housing and Urban Development recently dismissed a complaint against a young woman for advertising, "I am looking for a female christian roommate," on her church bulletin board. In its Determination of No Reasonable Cause, HUD explained that "in light of the facts provided and after assessing the unique context of the advertisement and the roommate relationship involved . . . the Department defers to Constitutional considerations in reaching its conclusions." *Fair Hous. Ctr. of W. Mich. v. Tricia*, No. 05-10-1738-8 (Oct. 28, 2010) (Determination of No Reasonable Cause).

It's a "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (internal quotation marks omitted). Because the FHA can reasonably be read either to include or exclude shared living arrangements, we can and must choose the construction that avoids raising constitutional concerns. Reading

"dwelling" to mean an independent housing unit is a fair interpretation of the text and consistent with congressional intent. Because the construction of "dwelling" to include shared living units raises substantial constitutional concerns, we adopt the narrower construction that excludes roommate selection from the reach of the FHA.

III

Because we find that the FHA doesn't apply to the sharing of living units, it follows that it's not unlawful to discriminate in selecting a roommate. As the underlying conduct is not unlawful, Roommate's facilitation of discriminatory roommate searches does not violate the FHA.

Notes and Questions

1. What did Congress mean by "dwelling"? The U.S. Department of Housing and Urban Development (HUD), the agency Congress tasked with interpreting the *Fair Housing Act,* has long taken the position that it does not violate the advertising provision of the act, 42 U.S.C. §3604(c), to express a preference with regard to *sex* if one is not advertising for a "separate unit." HUD apparently continues to believe that expressed preferences will violate §3604(c) if based on other categories such as race, religion, national origin, disability, or familial status. Memorandum from Roberta Achtenberg, Assistant Secy. for Fair Hous. & Equal Opportunity, U.S. Dept. of Hous. & Urban Dev., to Fair Hous. & Equal Opportunity Dirs. & Staff (Jan. 9, 1995), *available at http://portal.hud.gov/hudportal/documents/hud doc?id=DOC_11870.pdf.*

The Ninth Circuit in *Roommate.com* went further, holding that the statute does not apply at all to roommate situations because of the statute's definition of the term "dwelling." Do you find Chief Judge Kozinski's reasoning persuasive? The court does not address the portion of the statutory definition of dwelling that applies the act to "any . . . portion" of a building. Does the opinion make that language irrelevant?

In the portion of the *Roommate.com* decision addressing constitutional avoidance, the two examples that Chief Judge Kozinski gave involve gender and religion. Would the same concerns hold if someone refused to accept a paying roommate — as a tenant, subtenant, or co-tenant — because of that person's race? Does the text of the *Fair Housing Act* provide any reason to distinguish race from other protected categories?

Other types of living arrangements have also raised questions about the scope of the term "dwelling" in the *Fair Housing Act.* In *Lakeside Resort Enterprises, LP v. Board of Supervisors of Palmyra Township,* 455 F.3d 154 (3d Cir. 2006), the court considered whether a drug- and alcohol-treatment facility constituted a "dwelling" subject to the act. Citing the reference to a dwelling as including a place "intended for occupancy as . . . a residence," §3602(b), the court concluded that the issue turns on "whether the facility is intended or designed for occupants who intend to remain" there for "any significant period of time," and would view the residence "as a place to return to." 455 F.3d. at 158. Although the residents would on average stay only for slightly more than two weeks, because the facility was intended for longer stays, and the residents treated it like a home, the court found that the act applied. *Id.* at 160. Similar controversies

have arisen over homeless shelters. *Compare Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101 (D. Idaho 2010) (homeless shelter not a "dwelling" under §3602(b)), *with Boykin v. Gray*, 895 F. Supp. 2d 199 (D.D.C. 2012) (homeless shelter is covered by the act).

What indications are there in the text of the statute about how broadly or narrowly Congress intended the term "dwelling" to be interpreted? If a constitutionally based right of intimate association is one reason to read "dwelling" narrowly, as the court in *Roommate.com* found, what associational interests might suggest a *broader* reading of the *Fair Housing Act*?

2. Intimate association and freedom of speech. The FHA includes a number of exemptions, including for "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." §3603(b)(2). This exemption, however, does not apply to §3604(c)'s restrictions on discriminatory advertisements and other statements. As a result, §3604(c) has a broader application than the remaining substantive prohibitions in §3604.

In *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), Judge Easterbrook noted that many people who advertise housing for sale or rent qualify for the exemptions in §3603(b). To Judge Easterbrook, the fact that §3604(c) continues to apply independently to create liability in these circumstances raises free speech concerns. *Id.* at 668 ("[A]ny rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment"). *Compare, e.g., United States v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005) (finding housing information provider's statements that violated §3604(c) to be commercial speech not protected by the first amendment).

Why do you think the *Fair Housing Act* covers a broader scope of communications in §3604(c) than its direct provisions on sale or rental of housing? Do you agree with Judge Easterbrook that the act's regulation of discriminatory speech as an independent basis for liability presents a conflict with the first amendment? *See generally* Robert G. Schwemm, *Discriminatory Housing Statements and Section 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187 (2001).

3. The FHA and on-line advertising. In many parts of the country, housing transactions are increasingly advertised on the Internet. These on-line advertisements, just as with statements posted on physical bulletin boards, are generally covered by §3604(c), even if the underlying transaction falls within the FHA's exemption in §3603(b). A review of roughly 10,000 Craigslist postings in 10 cities found that "a significant number of on-line housing ads—roughly several hundred on any given day—violate [§3604(c)]." Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 Ind. L. Rev. 1125, 1127-1128 (2010). This study found that the vast majority of the postings were for roommates, and expressed preferences on the basis of familial status. Does *Roommate.com* change this conclusion?

If a newspaper prints a discriminatory advertisement from a third party, the paper is potentially liable under §3604(c). For on-line advertising, however, the *Communications Decency Act of 1996* (CDA), 47 U.S.C. §230(c)(1), states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Thus, Craigslist was not liable under §3604(c) for discriminatory roommate advertisements posted on its web site. *Chicago Lawyers' Committee, supra.* The CDA's exemption does not to apply where an on-line service provider is itself "responsible, in whole or in part for the creation or development" of the discriminatory information, 47 U.S.C. §230(f)(3). In an earlier round of the *Roommate.com* case, the company was found not to come within this exception when it created questionnaires that asked users to identify themselves by sex, sexual orientation, and marital status and to express their preferences in those categories. *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.*, 521 F.3d 1157 (9th Cir. 2008). Moreover, the company used that information to create profiles that provided the users' relevant information and preferences, and it channeled searches and sent e-mails based on the discriminatory preferences its forms had elicited. *Id.*

4. Subtle signaling. Advertisements that limit housing to whites clearly violate §3604(c). Can a housing provider *indirectly* demonstrate an interest in customers of a certain race or other protected class?

In *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991), the court held that a newspaper's practice of publishing real estate advertisements almost always showing white models in a city with a significant population of African Americans and other minorities might violate the *Fair Housing Act* by showing a discriminatory preference. The district court held that the ultimate issue for the fact finder was whether "[t]o an ordinary reader the natural interpretation of the advertisements published [in the newspaper] is that they indicate a racial preference in the acceptance of tenants." In affirming the lower court's opinion, the Second Circuit explained, in an opinion by Judge Ralph Winter:

> Section 3604 (c) states in pertinent part that it is unlawful: "To . . . publish . . . any . . . advertisement, with respect to the sale or rental of a dwelling that indicates any preference . . . based on race." Beginning our analysis with the statutory language, the first critical word is the verb "indicates." Giving that word its common meaning, we read the statute to be violated if an ad for housing suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question. Moreover, the statute prohibits all ads that indicate a racial preference to an ordinary reader whatever the advertiser's intent.
>
> The next question is whether and in what circumstances the use of models may convey an illegal racial message. Advertising is a make-up-your-own world in which one builds an image from scratch, selecting those portrayals that will attract targeted consumers and discarding those that will put them off. Locale, setting, actions portrayed, weather, height, weight, gender, hair color, dress, race and numerous other factors are varied as needed to convey the message intended. A soft-drink manufacturer seeking to envelop its product in an aura of good will and harmony may portray a group

> of persons of widely varying nationalities and races singing a cheerful tune on a mountaintop. A chain of fast-food retailers may use models of the principal races found in urban areas where its stores are located. Similarly, a housing complex may decide that the use of models of one race alone will maximize the number of potential consumers who respond, even though it may also discourage consumers of other races.
>
> In advertising, a conscious racial decision regarding models thus seems almost inevitable. All the statute requires is that in this make-up-your-own world the creator of an ad not make choices among models that create a suggestion of a racial preference. The deliberate inclusion of a black model where necessary to avoid such a message seems to us a far cry from the alleged practices that are at the core of the debate over quotas. If race-conscious decisions are inevitable in the make-up-your-own world of advertising, a statutory interpretation that may lead to some race-conscious decisionmaking to avoid indicating a racial preference is hardly a danger to be averted at all costs.

Id. at 999-1001.

Professor Lior Strahilevitz has argued that as direct statements of discrimination have become less common, housing providers have turned to other methods to signal racial preferences. Strahilevitz argues that providers, thwarted by civil rights laws, have developed the strategy of providing unnecessary amenities not because they are what people actually want, but rather because they send messages to prospective residents. He cites the example of golf courses as a particularly racially polarizing amenity that signals exclusion. *See* Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 Va. L. Rev. 437 (2006). How should fair housing advocates respond to this kind of subtle signaling? How, if at all, should the law address it?

5. Other prohibited communications. The *Fair Housing Act* regulates other communications related to housing. For example, the act makes it unlawful to misrepresent the availability of housing. 42 U.S.C. §3604(d). It likewise prohibits inducing or attempting to induce people to sell or rent "by representations regarding the entry or prospective entry into the neighborhood" of people of a particular protected category. *Id.* §3604(e). This latter provision was passed to remedy the practice of "blockbusting," where brokers would try to convince white residents to sell by invoking fears about neighborhood integration.

Problems

1. You are the lawyer for a newspaper that runs housing advertisements, some of which include pictures. Your client is worried about cases holding publishers liable for publishing advertisements with only white models. Does every advertisement have to include models of different races? Formulate a general policy for the newspaper on how to handle this issue to avoid violating the *Fair Housing Act*.

2. Two men post an advertisement seeking a third roommate who will sign the lease (upon the landlord's approval). While interviewing potential roommates, they tell a recent immigrant from Mexico who applies that they do not want to live with him because of where he comes from. Are they entitled to the exemption in §3603(b)(2)?

3. An owner places an advertisement in the newspaper stating: "Shopping center in white community looking for tenants." Has the owner violated the *Fair Housing Act*?

4. Does §3604(c) apply to a Facebook posting for a roommate? A real estate broker's Twitter feed? What else might you need to know to answer this question?

5. In *Roommate.com*, Judge Kozinski discusses reasons for allowing roommates to discriminate on the basis of sex or religion. Does banning advertising of those preferences constitute as grave an intrusion on the roommates' freedom of association as banning advertising on the basis of race, national origin, disability, or familial status?

§2 INTENTIONAL DISCRIMINATION OR DISPARATE TREATMENT

§2.1 Discrimination on the Basis of Race

Asbury v. Brougham

866 F.2d 1276 (10th Cir. 1989)

Map: 7329 Troup Avenue, Kansas City, Kansas

JAMES A. PARKER, District Judge.

Plaintiff Rosalyn Asbury brought suit under 42 U.S.C. §1982[2] and the *Fair Housing Act*, 42 U.S.C. §3601 *et seq.* (FHA), claiming that the defendants refused to rent or to allow her to inspect or negotiate for the rental of an apartment or townhouse at Brougham Estates in Kansas City. Defendants Leo Brougham, individually and doing business as Brougham Estates and Brougham Management Company, and Wanda Chauvin, his employee, appeal a jury verdict awarding Asbury compensatory damages of $7,500 against them upon a finding that the defendants discriminated against her on the basis of race and/or sex. Leo Brougham appeals from the jury verdict awarding punitive damages in the amount of $50,000 solely against him.

I. Sufficiency of Evidence Supporting a Finding of Racial Discrimination in Violation of §1982 and FHA

42 U.S.C. §1982 and the FHA both prohibit discrimination on the basis of race. In order to prevail on a claim made under these statutes, plaintiff must prove a

2. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." — EDS.

discriminatory intent. A violation occurs when race is a factor in a decision to deny a minority applicant the opportunity to rent or negotiate for a rental, but race need not be the only factor in the decision. In addition, §3604(d) of the FHA specifically prohibits dissemination of false information about the availability of housing because of a person's race. Accordingly, failure to provide a minority applicant with the same information about availability of a rental unit or the terms and conditions for rental as is provided to white "testers," results in false information being provided and is cognizable as an injury under the FHA.

A. Asbury's Prima Facie Case Under §1982 and FHA

The three-part burden of proof analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a Title VII employment discrimination case, has been widely applied to FHA and §1982 claims. Under the *McDonnell Douglas* analysis, plaintiff first must come forward with proof of a *prima facie* case of discrimination. Second, if plaintiff proves a *prima facie* case, the burden shifts to defendants to produce evidence that the refusal to rent or negotiate for a rental was motivated by legitimate, non-racial considerations. Third, once defendants by evidence articulate non-discriminatory reasons, the burden shifts back to plaintiff to show that the proffered reasons were pretextual.

The proof necessary to establish a *prima facie* case under the FHA also establishes a *prima facie* case of racial discrimination under §1982. In order to establish her *prima facie* case, plaintiff had to prove that:

(1) she is a member of a racial minority;
(2) she applied for and was qualified to rent an apartment or townhouse in Brougham Estates;
(3) she was denied the opportunity to rent or to inspect or negotiate for the rental of a townhouse or apartment; and
(4) the housing opportunity remained available.

A review of the evidence in this case shows that plaintiff established her *prima facie* case. Defendants stipulated that Asbury is black. Plaintiff testified that on February 23, 1984, she went to Brougham Estates with her daughter to obtain rental housing. At the rental office at Brougham Estates, Asbury encountered Wanda Chauvin, the manager, and explained to Chauvin that she was being transferred to Kansas City and needed to rent housing. Asbury told Chauvin that she needed to secure housing by the middle of March or the beginning of April. In response, Chauvin said there were no vacancies, but told Asbury she could call back at a later time to check on availability. Chauvin provided no information concerning availability of rental units that would assist Asbury in her efforts to rent an apartment or townhouse at Brougham Estates. Asbury asked for the opportunity to fill out an application, but Chauvin did not give her an application, again stating that there were no vacancies and that she kept no waiting list. Asbury also requested floor plans or the opportunity to view a model unit, and Chauvin refused. Instead, Chauvin suggested Asbury inquire at the Westminister Apartments, an apartment complex housing mostly black families. Although Chauvin did not ask Asbury

about her qualifications, plaintiff was employed with the Federal Aviation Authority at a salary of $37,599. Based on her salary, defendants concede that Asbury would likely be qualified to rent an apartment or townhouse at Brougham Estates.

Although there was a conflict in the evidence as to the availability of housing at the time Asbury attempted to inspect and negotiate for rental, there was abundant evidence from which the jury could find that housing was available. Defendants testified that families with a child are housed exclusively in the townhouses at Brougham Estates, and that there were no townhouses available on the date Asbury inquired. Asbury introduced evidence suggesting that both apartments and townhouses were available and, in addition, that exceptions previously had been created to allow children to reside in the apartments.

On February 24, 1984, the day after Asbury inquired about renting, Asbury's sister-in-law, Linda Robinson, who is white, called to inquire about the availability of two-bedroom apartments. The woman who answered the telephone identified herself as "Wanda" and invited Robinson to come to Brougham Estates to view the apartments. The following day, February 25, 1984, Robinson went to the rental office at Brougham Estates and met with Wanda Chauvin. Chauvin provided Robinson with floor plans of available one- and two-bedroom apartments at Brougham Estates. Robinson specifically asked Chauvin about rental to families with children, and Chauvin did not tell Robinson that children were restricted to the townhouse units. Robinson accompanied Chauvin to inspect a model unit and several available two-bedroom apartments. Upon inquiry by Robinson, Chauvin indicated that the apartments were available immediately and offered to hold an apartment for her until the next week.

Asbury also provided evidence indicating that townhouses were available for rent. On February 1, 1984, Daniel McMenay, a white male, notified Brougham Estates that he intended to vacate his townhouse. On April 4, 1984, Brougham Estates rented the townhouse vacated by McMenay to John Shuminski, a white male. On March 10, 1984, Randall Hockett, a white male, also rented a townhouse at Brougham Estates. In addition, Asbury provided computer data sheets generated by Brougham Estates which indicated that a third townhouse was unoccupied at the time of her inquiry on February 23, 1984 and remained vacant as of April 10, 1984. There was also evidence that a building which included townhouse units had been closed for the winter but would be available for rent beginning in the spring. On February 22, 1984, one day prior to Asbury's inquiry into vacancies, James Vance, a white male, paid a deposit for a townhouse which he occupied when the building opened on April 10, 1984. Since Asbury testified that she told Chauvin she did not need to occupy a rental unit until the beginning of April, the jury could have concluded that at least one of the townhouses which was subsequently rented to the white males was available at the time Asbury inquired. Although defendants took the position at trial that the townhouses were closed or out of order for repair and therefore not available to rent, the jury was free to accept the evidence of availability presented by the plaintiff.

Since Asbury met her burden of proving a *prima facie* case of racial discrimination, the burden shifted to defendants to prove a legitimate, non-discriminatory reason for denial of housing.

B. *Failure of Proof of Legitimate, Non-Discriminatory Reason for Rejection*

Defendants claimed their legitimate, non-discriminatory reasons for rejecting Asbury arose out of the policies at Brougham Estates that families with one child could rent townhouses but not apartments, and that families with more than one child were not permitted to move into Brougham Estates. Defendants further argued that they made no exceptions to these rules. Defendants contended that in accordance with these rental policies, no appropriate housing was available for Asbury when she inquired. However, plaintiff introduced evidence indicating that exceptions to these rules had been made on several occasions; families with children had rented apartments, and families with more than one child had been permitted to move into Brougham Estates. Asbury was not provided information about the terms and conditions that gave rise to an exception to the policy concerning children being restricted to the townhouses. The jury could therefore find that defendants' reasons for denying Asbury the opportunity to negotiate for rental were not legitimate and non-discriminatory.

Defendants also argue that evidence of a high percentage of minority occupancy in Brougham Estates conclusively rebuts the claim of intentional racial discrimination. Although such statistical data is relevant to rebutting a claim of discrimination, statistical data is not dispositive of a claim of intentional discrimination. Moreover, there was other evidence from which the jury could have determined that race was a motivating factor in defendants' decision to refuse to negotiate with Asbury for a rental unit.

II. *Sufficiency of Evidence Supporting Punitive Damages Award*

Defendant Brougham contends that there was insufficient evidence supporting the jury's award of punitive damages against him because he never met or dealt with the plaintiff, the actions of Chauvin should not be attributed to him, and he did not promulgate any discriminatory policies or procedures.

Punitive damages may be awarded against a defendant "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). The jury has discretion to award punitive damages to punish outrageous conduct on the part of a defendant and to deter similar conduct in the future.

Plaintiff advanced two theories supporting Brougham's liability for punitive damages: (1) Brougham's own discriminatory conduct in establishing rental policies, procedures and rules; and (2) his authorization or ratification of discriminatory conduct by Chauvin, his employee. We find sufficient evidence to establish liability under either theory.

In this case, Asbury presented evidence that Leo Brougham was the managing partner of Brougham Estates and Brougham Management Company. Brougham established all policies, rules and rental procedures for Brougham Estates. Chauvin worked for Brougham who instructed her about the rental policies and procedures. Among the policies and procedures implemented by Brougham were the requirements that

Chauvin routinely and untruthfully tell people over the phone that there were no vacancies, whether or not vacancies existed, but that Chauvin then encourage the individuals to come in, inspect the premises and discuss upcoming vacancies. Brougham established the requirement of visual observation of a prospective tenant. Although a policy that prospective tenants must be visually scrutinized is not necessarily improper, under the circumstances of this case, the jury could have inferred that the policy operated to screen prospective tenants on the basis of race and that, at a minimum, Brougham was callously indifferent to this result of his policy. Indeed, this policy had given rise to several administrative complaints by single black females prior to Asbury's inquiry about a vacancy. Brougham was aware of previous claims of discriminatory practices in the rental of units at Brougham Estates.

Another policy established by Brougham was that a family with a child could occupy only a townhouse. Chauvin was advised of this policy. Brougham testified that he made no exceptions to the policy, and he testified specifically that no tenant or prospective tenant with a child could obtain permission to be excepted from the rule. Plaintiff, however, produced evidence that exceptions had been created on occasion. Those exceptions had been authorized by Brougham and had been made on an individual basis. From the evidence presented, the jury could have determined that the policies established and implemented by defendant Brougham directly fostered the discrimination which Asbury experienced, that Brougham should have been aware that this might occur, and that Brougham was recklessly or callously indifferent to it happening.

Plaintiff also offered evidence tending to prove that Brougham ratified Chauvin's actions. [After investigating, Brougham] determined [that] Asbury had only one child and therefore fit within the residential policies of Brougham Estates. Furthermore, the jury could have drawn the inference that Brougham's failure to apologize or otherwise remedy the situation, after personally investigating Asbury's claim of discrimination at Brougham Estates, was an acceptance and ratification of Chauvin's treatment of Asbury.

Having reviewed the record in this case, we find that there was substantial evidence supporting and a reasonable basis for the jury's verdict awarding both compensatory and punitive damages, and we affirm the district court's decision to deny defendants' motion for a new trial.

Notes and Questions

1. Who is liable and standards of liability. Although *Asbury* states that plaintiffs must prove discriminatory intent under the *Fair Housing Act*, most courts to have considered this issue as well as the U.S. Department of Housing and Urban Development (HUD) have concluded that plaintiffs may also raise claims that assert a disparate impact on the basis of a protected category. *See generally* 24 C.F.R. §§100.1-100.500 (HUD's FHA regulations).[3] **Disparate treatment** claims involve intentionally treating

3. The Supreme Court recently granted certiorari on the question whether the *Fair Housing Act* allows for claims based on disparate impact. *See* §3.2, below.

members of the protected class differently from others so as to deny particular persons housing opportunities. **Disparate impact** claims allege that a defendant's actions have a disproportionate, exclusionary effect on members of a protected group that is not justified by legitimate government or business objectives. We will consider the standards that govern claims asserting disparate impact in §3, below.

In disparate treatment cases, if a plaintiff can demonstrate to the finder of fact sufficient direct evidence of discriminatory intent, such as a statement by a defendant expressing racial animus in the context of a housing decision, then the court need not engage in the three-part framework that *Asbury* described. *See, e.g., Lindsay v. Yates*, 498 F.3d 434, 440 n.7 (6th Cir. 2007). These kinds of cases are relatively uncommon, however, so most disparate treatment claims must rely on circumstantial evidence.

For such discriminatory intent claims, *Asbury* describes the traditional elements of a *prima facie* case under the *Fair Housing Act*.[4] If the plaintiff can produce evidence of the various elements of the *prima facie* case, the burden shifts to the defendant to show a nondiscriminatory reason for the differential treatment. If the defendant fails to assert any such justification and the fact finder is persuaded that the plaintiff has proven the *prima facie* case, the plaintiff is likely to prevail. If the defendant articulates and produces evidence of nondiscriminatory reasons for its actions, the plaintiff must then show that those reasons are pretextual. If the plaintiff does so, the jury may (but is not required) to conclude that the real reason for the denial was discriminatory. What reasons did defendant articulate in *Asbury*? Are they legitimate under the current statute as amended in 1988? How did the plaintiff attempt to show that the proffered reasons were not legitimate and nondiscriminatory?

As *Asbury* demonstrates, employers are generally vicariously liable for the acts of their employees; thus landlords or real estate brokerage firms may be liable if their agents engage in discriminatory conduct. *See Holley v. Crank*, 400 F.3d 667, 674-675 (9th Cir. 2004). However, officers of corporations are not generally personally liable unless they acted as an employee or agent of the corporation to direct or approve those discriminatory practices. *Meyer v. Holley*, 537 U.S. 280 (2003).

ELEMENTS

For disparate treatment cases without direct evidence and disparate impact cases, courts often follow a three-part framework, although the specific details at each stage vary depending on the nature of the claim: Generally, a claimant must first establish a ***prima facie* case**. If so, the party charged with discriminating has the opportunity to demonstrate **legitimate nondiscriminatory reasons** for her action. Finally, the claimant has the opportunity to show that those reasons are merely a **pretext**.

2. **Remedies.** Under the *Fair Housing Act*, aggrieved persons may file a lawsuit in federal court for injunctive relief and for compensatory and punitive damages, 42

4. Note that this test applies only to claims based on the defendant's "refusal to sell" or "refusal to lease" to the plaintiff. A landlord who selectively takes a particular apartment off the market, refusing to rent it to anyone so as to avoid renting it to a member of a protected class, may be violating the statute on the ground that such conduct constitutes a "refusal to deal" or "otherwise make[s] unavailable or den[ies]" housing because of race. 42 U.S.C. §3604(a).

U.S.C. §3613. Originally, there had been a $1,000 limit on punitive damages, but this cap was eliminated by the *Fair Housing Amendments Act of 1988*, which also extended the statute of limitations from six months to two years.

Aggrieved persons may choose instead to file a complaint with HUD, which has the power to investigate and mediate the dispute, as well as to hear and adjudicate the complaint. If HUD has certified a state agency as competent to adjudicate fair housing disputes, HUD will often refer the complaint to that state agency rather than handle the complaint itself. *See* §3610(f). If HUD itself investigates the complaint and finds reasonable cause to believe a violation of the law has been committed, it must issue a "charge" on behalf of the aggrieved person, explaining "the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred." §3610.

When a charge is filed, either the complainant or the respondent may elect to have the complaint heard in federal court rather than in an administrative proceeding held by HUD through an administrative law judge (ALJ). *See* §3612(a). If this option is chosen, HUD will authorize the United States Attorney General to file the lawsuit in federal district court, which is entitled to grant both compensatory and punitive damages, as well as injunctive relief. *See* §3612(o). If no party elects to go to federal court, HUD will conduct a hearing if the complainant so desires. *See* §3612(b). The ALJ is empowered to issue injunctive relief as well as assess damages ranging from $10,000 to $50,000 based on the timing and number of prior offenses. *See* §3610(g)(3). Either the plaintiff or the defendant may appeal the ALJ's finding to federal court. *See* §3612(i).

In addition to the foregoing, the Attorney General is empowered to bring lawsuits against persons who have engaged in a "pattern or practice of resistance to the full enjoyment of any rights" granted by the act under §3614.

Are the remedies provided by the FHA adequate? Professor Robert Schwemm, one of the leading authorities on fair housing law, notes that racial discrimination by landlords "remains at alarmingly high levels." Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. Marshall L. Rev. 455, 509 (2007). *See also* Margery Austin Turner et al., U.S. Dept. of Hous. & Urban Dev., *Housing Discrimination Against Racial and Ethnic Minorities* (2013) (national discrimination study indicates that although overall discrimination against minorities has declined compared to similar studies over four decades, subtle discrimination persists, particularly in terms of the number of units shown to minority renters and home buyers). Many discrimination victims fail to report violations or pursue claims. Moreover, the delay and expense of litigation seriously undermine the deterrent value of the FHA.

In addition, 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." *Id.* Research by cognitive psychologists has shown that many people are influenced by unconscious racial bias. *See* Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit*

Bias and the Resilience of Spatial Colorlines, in *Implicit Racial Bias Across the Law* (2012); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987). *See also* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 Cal. L. Rev. 1063, 1066 (2006) (arguing that the presence of implicit bias creates discrimination by causing merit to be mismeasured). What avenues might work to solve the problems of explicit and implicit racial bias?

3. **Racial steering.** Many cases brought under the *Fair Housing Act* concern claims against realtors who have engaged in "racial steering." This practice involves showing minority customers housing in certain areas and white customers housing in other areas. It also involves not telling minority customers about the availability of housing in certain areas. Such practices violate the act by "otherwise mak[ing] unavailable" housing because of race, *United States v. Mitchell*, 580 F.2d 789, 791-792 (5th Cir. 1978), and violate the express prohibition against discrimination in "real estate-related transactions" in 42 U.S.C. §3605, which prohibits discrimination by real estate brokers. Steering may also fall afoul of the act's prohibition against "mak[ing] . . . any statement . . . with respect to the sale and rental of a dwelling that indicates any preference, limitation, or discrimination" on the basis of a protected class, 42 U.S.C. §3604(c), a prohibition that includes oral statements.

4. **Testers.** Gathering evidence of FHA violations often involves the use of "testers." Testers are "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). Testing is done, for example, by using one or more persons to pose as a potential buyer in seeking assistance from a realtor. The plaintiff in *Asbury* used a form of testing when her sister-in-law approached the defendant landlord and asked for housing in the same complex in which the plaintiff had been denied housing. Testers may approach a realtor who has told an African American customer that no housing is available in a certain area; if the realtor shows houses in that area to the white buyer that were not shown to the African American buyer, it may be possible to draw an inference that the realtor was discriminating against the initial buyer on account of her race. Similarly, a white tester may approach a seller to see whether the seller offers different terms than were offered to a prior potential African American purchaser.

5. **Standing.** Who has **standing** to bring a lawsuit under the *Fair Housing Act*? Those who are denied housing opportunities in violation of the act clearly may sue to vindicate their rights. It is also clear that the statute protects whites who are denied housing because of their association with minorities, *Littlefield v. Mack*, 750 F. Supp. 1395 (N.D. Ill. 1990) (white plaintiff was evicted from her apartment and harassed by defendant landlord because her boyfriend was African American and because they had a child), as well as minorities who are even visiting non-minority renters, *see Lane v. Cole*, 88 F. Supp. 2d 402, 406 (E.D. Pa. 2000) (black invitee who is excluded or coerced into leaving an apartment rented by a white tenant has standing). White persons

are also entitled to bring an action against a realtor who engaged in racial steering on the ground that they have been denied the "right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." *Havens Realty Corp. v. Coleman*, 455 U.S. at 376-377. The Supreme Court also held in *Havens* that testers have standing to bring claims in federal court under the *Fair Housing Act* against realtors and sellers who have engaged in racial discrimination. Finally, the Court held that an organization devoted to promoting equal access to housing could bring a lawsuit against a realtor who engaged in steering if it could demonstrate that the defendant's steering practices caused the organization to devote extra resources to identify available housing and counteract the defendant's steering practices. *Id.* at 379.

6. Unlawful harassment and retaliation. Section 3617 of the *Fair Housing Act* makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of" any "right granted or protected" by the act. Harassment and retaliation claims brought under this provision "account for a significant portion of all FHA claims." Robert G. Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case Out of It?*, 61 Case West. Res. L. Rev. 865, 865-866 (2011). Such claims can also give rise to criminal liability. *See id.* at 866 n.11 (citing *United States v. Jackson*, No. 3:10-CR-00120-KLH (W.D. La. 2010), where a defendant pled guilty to an FHA violation after placing a hangman's noose in a home's carport).

Many cases under §3617 involve harassment or intimidation by neighbors. For a period of time, the Seventh Circuit took a narrow view of §3617 (and the FHA's primary protection under §3604), following Judge Posner's opinion in *Halprin v. Prairie Single Family Homes of Dearborn Park Association*, 388 F.3d 327 (7th Cir. 2004), on the theory that the act applies to people seeking housing, not activity that occurs after acquisition. Five years later, however, the Seventh Circuit reversed course in *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (en banc), holding that §3617 applies to interference with rights protected by the act even after someone has obtained housing. For a discussion of neighbor harassment and the role it plays in perpetuating residential segregation, *see* Jeannine Bell, *Hate Thy Neighbor: Move-in Violence and the Persistence of Residential Segregation in American Housing* (2013).

7. The *Civil Rights Act of 1866*. *Asbury* involved claims under both the *Fair Housing Act* and §1982. Section 1 of the *Civil Rights Act of 1866*, passed pursuant to the thirteenth amendment and reenacted in 1870 after passage of the fourteenth amendment, provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. §1982. For more than a century, §1982 was interpreted as prohibiting states from passing statutes that deprived African Americans of the capacity to buy or lease real property. The act was interpreted, however, not to encompass discrimination by private housing providers unless mandated by state legislation. This situation changed in 1968 with *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), where the Supreme Court held that §1982 applied

to private acts of discrimination as well as to discriminatory state action. Today almost all cases brought under the *Fair Housing Act* also allege a violation of §1982.[5]

Problem

A landlord who owns and lives in a two-story house rents the second floor as a separate apartment. She refuses to rent to an African American family. Does the family have a claim against the landlord under §1982 or is the landlord entitled to discriminate under §3603(b)(2)? What arguments can you make on both sides of this question? *See Morris v. Cizek*, 503 F.2d 1303 (7th Cir. 1974); *Gonzalez v. Rakkas*, 1995 WL 451034 (E.D.N.Y. 1995) (§1982 claim available).

§2.2 Integration and Nondiscrimination

United States v. Starrett City Associates

840 F.2d 1096 (2d Cir. 1988)

Map: (Spring Creek Towers)
1201-1310 Pennsylvania Avenue,
Brooklyn, New York

ROGER J. MINER, Circuit Judge.

Appellants [Starrett City Associates, Starrett City, Inc., and Delmar Management Company (collectively "Starrett")] constructed, own and operate "Starrett City," the largest housing development in the nation, consisting of 46 high-rise buildings containing 5,881 apartments in Brooklyn, New York.

Starrett has sought to maintain a racial distribution by apartment of 64% white, 22% black and 8% hispanic at Starrett City. Starrett claims that these racial quotas are necessary to prevent the loss of white tenants, which would transform Starrett City into a predominantly minority complex. Starrett points to the difficulty it has had in attracting an integrated applicant pool from the time Starrett City opened, despite extensive advertising and promotional efforts. Because of these purported difficulties, Starrett adopted a tenanting procedure to promote and maintain the desired racial

5. In addition, *Title VI* of the *Civil Rights Act of 1964* provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d. *Title VI* is narrower than the *Fair Housing Act* in the categories it protects and covers only programs and activities, including housing benefits, considered to be Federal financial assistance. However, because *Title VI* covers areas beyond housing, there are a few areas where *Title VI* may provide broader coverage than the *Fair Housing Act*. *See, e.g.*, April Kuehnhoff, *Holding on to Home: Preventing Eviction and Termination of Tenant-Based Subsidies for Limited English Proficiency Tenants Living in Housing Units with HUD Rental Assistance*, 17 Geo. J. on Poverty L. & Pol'y 221, 234 (2010) (noting that *Title VI*, but not the *Fair Housing Act*, has produced regulations and guidance for language access for limited English proficient groups).