

A HOME OF ONE'S OWN: THE FAIR HOUSING AMENDMENTS ACT OF 1988 AND HOUSING DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES

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INTRODUCTION

The word "community" has many definitions, applications, and values associated with it.¹ It is a concept as well as an ideal. The goal of the deinstitutionalization movement, which began in the 1960s and which continues today, was to return people with mental disabilities to the community.² For at least three decades, our explicit national

1. See, e.g., Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of Community*, 25 IND. L. REV. 685, 715 (1992) (arguing that Declaration of Independence and Bill of Rights are based on individual rights, not values of community, and that judicial doctrines imply that "community as a value is . . . subversive of" individualism); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 686 n.4 (1992) (noting that most discussion in legal literature focuses on values of "community" rather than "reflecting upon the phenomenon" of community); Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1504 (1986) (arguing that community exists when and where individuals act against their own interests for common good). At least one commentator has observed:

To ask whether a society is a community is not simply to ask whether a large number of its members happen to have among their various desires the desire to associate with others or to promote communitarian aims—although this may be one feature of a community—but whether the society itself is a society of a certain kind, ordered in a certain way, such that community describes its basic structure and not merely the dispositions of persons within the structure. For a society to be a community in this strong sense, community must be constitutive of the shared self-understandings of the participants and embodied in their institutional arrangements, not simply an attribute of certain of the participants' plans of life.

MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 173 (1982).

2. See Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. & TR. J. 413, 416 (1986) (explaining that goal of deinstitutionalization is "to shift the focus of treatment" to

policy has been to provide care and treatment in the community for people with mental disabilities.³ President Kennedy declared in 1963 that “[w]e must act . . . to retain in and return to the community the mentally ill and mentally retarded [in order] to restore and revitalize their lives.”⁴

Much has been written about deinstitutionalization, from the meaning of the term⁵ to judgments about its success or failure.⁶ These issues will not be revisited here. Rather, the purpose of this Article is to explore whether people with mental disabilities have achieved true integration into our residential communities. Fifteen years after President Kennedy’s declaration, the President’s Commission on Mental Health reported that “ghettos” of the mentally disabled “destroy the residential character of the affected neighborhoods and subvert the right of handicapped persons to live in normal residential surroundings.”⁷ Today, thirty years after the enactment of the Civil Rights Act of 1964,⁸ discrimination against people with mental disabilities continues.

This Article explores our nation’s tradition of housing discrimination against people with mental disabilities and the strategies used to overcome such discrimination. Part I briefly reviews the history of access to housing by people with mental disabilities. Part II discusses the legislative antecedents to the Fair Housing Amendments Act of

“home environs”).

3. See *infra* notes 15-20 and accompanying text (discussing national policy of deinstitutionalization).

4. Special Message to Congress on Mental Illness and Mental Retardation, PUB. PAPERS 137 (Feb. 5, 1963).

5. See Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375, 378 (1982) (defining deinstitutionalization as “movement of patients from state psychiatric hospitals to alternative community facilities”); see also Mary L. Durham, *The Impact of Deinstitutionalization on the Current Treatment of the Mentally Ill*, 12 INT’L J.L. & PSYCHIATRY 117, 119 (1989) (stating that goal of deinstitutionalization is “to reduce the inpatient population of public mental hospitals, reserving hospitalization as an option for the most severely impaired patients who were mentally ill and dangerous”).

6. See, e.g., ANN B. JOHNSON, *OUT OF BEDLAM: THE TRUTH ABOUT DEINSTITUTIONALIZATION* 118-20 (1990) (stating that deinstitutionalization did not actually work as planned); Durham, *supra* note 5, at 122 (“Deinstitutionalization has now been labeled as a failure by many families, clinicians, researchers, and policymakers.”) (citations omitted); Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 81 (1991) (“Deinstitutionalization is society’s ‘whipping boy.’ Heuristically, we perceive it as a massive social failure”) (footnote omitted); Rhoden, *supra* note 5, at 375 (“Deinstitutionalization, once hailed as an ideal social reform, is now decried as a near disaster.”). *But see* Perlin, *supra*, at 89 (“[T]here coexists an ample, largely uncontradicted but regularly ignored body of evidence that indicates that a well-conceived deinstitutionalization program . . . has a positive and significant effect”).

7. 4 PRESIDENT’S COMM’N ON MENTAL HEALTH, REPORT TO THE PRESIDENT FROM THE PRESIDENT’S COMMISSION ON MENTAL HEALTH 1390 (1978).

8. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 and 42 U.S.C.).

1988 (FHAA),⁹ including Executive Order 11,063,¹⁰ the Fair Housing Act of 1968,¹¹ the Civil Rights Act of 1866,¹² and section 504 of the Rehabilitation Act of 1974.¹³ Part III discusses the FHAA, which represents the boldest action by the Federal Government to prohibit discrimination against people with disabilities. The FHAA marks the first federal initiative to explicitly prohibit discrimination, in private as well as public housing, against people with disabilities, including people labeled mentally ill or people with developmental disabilities. Part III compares the FHAA with section 504 of the Rehabilitation Act, which also prohibits discrimination in housing, but only by programs receiving federal financial assistance.

Part III also reviews specific provisions of the FHAA, including its prohibition against the use of zoning laws and restrictive covenants to exclude people with mental disabilities from residential communities. In addition to reviewing state laws enacted to preempt local exclusionary zoning ordinances, this Part analyzes selected court challenges to local zoning decisions as well as recent cases brought by the United States Department of Justice and private groups to enforce provisions of the FHAA. The Article concludes with a discussion of the need to amend state fair housing laws to conform to the federal FHAA and proposes strategies to further promote the integration of people with mental disabilities and to assist them in securing homes of their own.

I. A BRIEF HISTORY OF HOUSING FOR PEOPLE WITH MENTAL DISABILITIES

A person's quality of life depends largely on where he or she lives. Where a person works often depends on the location of his or her home. The school a child attends and the quality of education received are often determined by a child's home address. The neighborhood in which a child grows up can influence the values and behavior of the individual throughout his or her life.

For people with mental illness, mental retardation, or developmental disabilities, the choice of housing has been severely limited, often regardless of the individual's financial resources. In many states,

9. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3601-3619, 3631 and 28 U.S.C. §§ 2341-2342 (1988)).

10. Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963), *reprinted as amended in* 42 U.S.C. § 1982 (1988).

11. Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 801-819, 82 Stat. 73, 81-89 (codified as amended at 42 U.S.C. §§ 3601-3619 (1988)).

12. 42 U.S.C. § 1982 (1988).

13. 29 U.S.C. § 794 (1988).

people with mental disabilities have been, and continue to be, restricted to the least attractive parts of a community—to neighborhoods where housing is relatively inexpensive and often unsafe.¹⁴

People with mental disabilities have a history of inadequate housing. Until the middle part of this century, they were often locked away in large facilities in remote areas.¹⁵ Since the 1960s, this nation has increasingly accepted the notion that training, treatment, and habilitation of people with mental disabilities is generally more effective when provided in small, community-based programs rather than in large, isolated institutions. For example, in 1961 the Joint Commission on Mental Illness and Health¹⁶ recommended that action be taken to both improve conditions in state hospitals¹⁷ and develop community alternatives to state hospitals.¹⁸ Furthermore, Congress, courts, and states called for deinstitutionalization and the development of community programs for people with mental illness and developmental disabilities.¹⁹ As a result, the number of people with mental disabilities in institutions has dwindled during the past two decades.²⁰

But the community mental health and deinstitutionalization movements of the 1960s and 1970s²¹ have not yet realized their potential. Although most people labeled mentally disabled may no

14. See Rhoden, *supra* note 5, at 388 (reviewing criticism of community residences and concluding that many are located within “decayed” urban areas).

15. See Peter Margulies, *The Newest Equal Protection: City of Cleburne and a Common Law for Statutes and Covenants Affecting Group Homes for the Mentally Disabled*, 3 N.Y.L. SCH. HUM. RTS. ANN. 359, 360 (1986) (recounting how “[u]ntil the 1960s, [the mentally disabled] were confined in large state institutions, and suffered under complementary regimes of brutality and neglect”) (footnote omitted).

16. The Joint Commission on Mental Illness and Health was a quasi-governmental, interdisciplinary body whose members were chosen by the National Institute of Mental Health. Its mandate was to assess the Nation’s mental health needs and develop methods of meeting those needs. The Commission published its recommendations in JOINT COMM’N ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH (1961).

17. JOINT COMM’N ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH xvi (1961).

18. *Id.* at xiv.

19. See Rhoden, *supra* note 5, at 383, 385-87 (noting that “[o]nce deinstitutionalization became a recognized social policy, legislatures acted to aid and encourage it” and discussing importance of “judicial preference for community treatment” in facilitating deinstitutionalization).

20. See Stephen L. Mikochik, *Advancing Deinstitutionalization*, 65 N.D. L. REV. 143, 143 (1989) (describing shift of “countless retarded persons” from institutions to community residences); Rhoden, *supra* note 5, at 378 (describing decline in institutional populations due to deinstitutionalization as “massive”).

21. See Rhoden, *supra* note 5, at 402 (highlighting increase in “pace of deinstitutionalization” in 1960s and 1970s); Leslie H. Powers, Note, *Less Equal than Others: Persons with Mental Retardation, Equal Protection and Deinstitutionalization*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 81, 83 (1989) (noting that “1960’s and 1970’s brought a renewed interest in the fate of the mentally retarded population”).

longer be subjected to the egregious mistreatment and abuse that characterized earlier decades, they still suffer from stigmatization and discrimination.²² They are viewed as unwelcome intruders in most communities, as evidenced by the large number of court cases brought to keep group homes for people with mental disabilities out of single-family neighborhoods.²³

Certainly, the civil rights revolution of the 1960s had a marked effect on the rights of people with disabilities in general²⁴ and people with mental disabilities in particular.²⁵ A national policy of deinstitutionalization has allowed many individuals to leave state mental hospitals and training centers.²⁶ Yet, despite years of this national policy, people with mental disabilities have not been truly integrated into our communities.²⁷

One explanation for the continued segregation of people labeled mentally disabled is the historic lack of federal leadership and financial resources. By some accounts, the Federal Government has actively promoted, or at least permitted, the segregation of people with mental disabilities.²⁸ For example, prior to the enactment of the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963,²⁹ the Federal Government

22. See Margulies, *supra* note 15, at 387 ("Fear of this vulnerable population is still commonplace . . . Hostility and distrust of the mentally disabled currently are most pervasive in the area of housing."); Perlin, *supra* note 6, at 138 (arguing that "social attitudes" about homeless mentally ill are "born in bias [and] honed by the thoughtless acceptance of stereotypes").

23. See Arlene S. Kanter, *Recent Zoning Cases Uphold the Establishment of Group Homes for the Mentally Disabled*, 18 CLEARINGHOUSE REV. 515 (1984) (reviewing court decisions involving use of local zoning laws to prevent establishment of community residences); Salsich, *supra* note 2, at 422-23 & n.50 (noting legal challenges to attempts to include group homes within zoning definition of "family").

24. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 132 (1990) ("In the 1960's the rhetoric of equal rights appeared in declarations for women, for children, and ultimately for persons with disabilities.") (footnotes omitted).

25. See Margulies, *supra* note 15, at 361.

26. See *supra* note 20.

27. See, e.g., Margulies, *supra* note 15, at 362 (noting difficulty that mentally handicapped have in acquiring housing in communities); Rhoden, *supra* note 5, at 391 (discussing "transinstitutionalization" where "patient often moves from one inadequate environment to the next").

28. Cf. James A. Kushner, *The Role of the Federal Government, in THE FAIR HOUSING ACT AFTER TWENTY YEARS* 48, 48 (Robert G. Schwemm ed., 1989) (arguing that "federal government's historically dominant role in segregating the nation, resisting the dismantlement of apartheid, and ignoring pervasive patterns of housing discrimination eclipses [previous] largely symbolic efforts").

29. Pub. L. No. 88-164, 77 Stat. 282 (1963), *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 902(e)(2)(B), 95 Stat. 357, 560.

provided neither the leadership nor the financial resources necessary for the development of community living options.³⁰

The Federal Government eventually made some efforts to provide leadership and the resources needed to integrate people with mental disabilities into residential neighborhoods. Congress attempted to create an alternative to institutionalization, for example, by amending the Medicaid program to reimburse states for certain home- or community-based services for people with mental disabilities.³¹ Federal agencies also have begun to fund demonstration projects to promote successful models for housing for people with special needs.³² Further, twenty years after the passage of the first Fair Housing Act, Congress finally passed the Fair Housing Amendments Act of 1988³³ to prohibit housing discrimination against people with disabilities.

A second explanation for the continued segregation of people with mental disabilities is the complacency, and even complicity, of state and local governments in regard to discrimination against people with mental disabilities. Most state and local governments have failed to

30. See PHIL BROWN, *THE TRANSFER OF CARE: PSYCHIATRIC DEINSTITUTIONALIZATION AND ITS AFTERMATH* 43 (1985) (describing Act as "first time that a federal program provided ongoing support for a nationwide health service program"). Under the Act, Community Mental Health Centers (CMHCs) were eligible to receive federal funding if they offered certain services, including inpatient care, outpatient care, emergency services, partial hospitalization, consultation, and education. *Id.* at 42. The Act envisioned a nationwide network of CMHCs providing comprehensive services and individual case management for areas of 75,000 to 200,000 people. *Id.* It also urged coordination between federal, state, and local health planning agencies, welfare departments, and urban renewal agencies. *Id.* Yet of the 2500 CMHCs anticipated by the Act, fewer than 700 have been built, serving less than half of the nation. 2 TASK PANEL REPORTS, *PRESIDENT'S COMMISSION ON MENTAL HEALTH* 319 (1978).

31. In 1981, the Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, §§ 2176, 2177(a), 95 Stat. 357, 812-13 (1981), amended the Medicaid statute to provide a new funding source for medical and nonmedical community services as alternatives to institutions. The Community Services Waiver Provision, 42 U.S.C. § 1396n(c), allows states to apply for a waiver of certain Medicaid requirements in order to offer home- and community-based services. To qualify for the waiver, a state must show that the services are needed by certain individuals to avoid institutional care. *Id.* § 1396n(c)(1). The state must establish that "but for the provision of such services the individuals would require the level of care provided in a hospital or skilled nursing facility or intermediate care facility, the cost of which would be reimbursed under the state [Medicaid] plan." *Id.* But the Health Care Financing Agency responsible for administering Medicaid has refused to approve such Medicaid waivers to states seeking to expand Medicaid services or to shift to Medicaid the cost of existing services. See Arlene S. Kanter, *Homeless Mentally Ill People: No Longer Out of Sight and Out of Mind*, 3 N.Y.L. SCH. J. HUM. RTS. 331, 344 (1986).

32. See Community Investment Corporation Demonstration Act, 42 U.S.C. § 5305(a)(5) (1988) (authorizing reimbursement for removal of barriers to mobility and accessibility to handicapped and elderly).

33. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3601-3619, 3631 and 28 U.S.C. §§ 2341-2342 (1988)).

fund innovative quality housing adequately³⁴ and have succumbed to the prejudices and fears of potential neighbors by enacting and enforcing exclusionary zoning ordinances and restrictive covenants.³⁵

Providers of services to people with mental disabilities also must share some of the blame in promoting segregation of people with mental disabilities. These providers continue to view housing as part of the service continuum rather than as a person's "home." Service providers have developed housing programs based on general models, often without giving attention to individual needs or desires.³⁶ Group homes and other "congregate living facilities" have been viewed as the best alternative to institutionalization.³⁷ Such homes, however, are often simply an extension of the institutions left behind. Group homes, halfway houses, quarterway houses, and board and care homes are hardly "homes" at all. Like institutions, they segregate people with disabilities and confine them with little, if any, attention to individual choice.³⁸ The residents of such homes are seldom asked where or with whom they want to live.³⁹

The language surrounding deinstitutionalization reveals the lack of emphasis on individual choice. The places where people with mental disabilities have lived are called "congregate living facilities,"⁴⁰ "community residences,"⁴¹ "residential living environments,"⁴²

34. See Durham, *supra* note 5, at 128 (noting increasing pressure on policymakers to reverse process of integrating mentally ill into communities); see also Salsich, *supra* note 2, at 417 (describing reaction of neighbors to influx of mentally disabled into neighborhood as NIMBY, or Not in My Back Yard, syndrome).

35. See Margulies, *supra* note 15, at 363 (noting that many cities and towns have zoning ordinances that exclude persons with mental disabilities); Salsich, *supra* note 2, at 429 (arguing that restrictive covenants can prevent successful implementation of state policies favoring deinstitutionalization of persons with mental disabilities).

36. See Julie A. Racino et al., *Introduction*, in HOUSING, SUPPORT, AND COMMUNITY: CHOICES AND STRATEGIES FOR ADULTS WITH DISABILITIES 1-3 (Julie A. Racino et al. eds., 1993) [hereinafter HOUSING, SUPPORT, AND COMMUNITY].

37. See Margulies, *supra* note 15, at 363 (stating that "[s]mall congregate facilities in the community with resident staff are the[] best alternative to institutionalization or homelessness" for people with mental disabilities); Salsich, *supra* note 2, at 416 (noting that "centerpiece of [the deinstitutionalization] effort is the group home").

38. See Susan O'Connor & Julie A. Racino, "A Home of My Own": *Community Housing Options and Strategies*, in HOUSING, SUPPORT, AND COMMUNITY, *supra* note 36, at 137-38.

39. See Julie A. Racino & Pamela Walker, "Whose Life Is It Anyway?": *Life Planning, Choices, and Decision Making*, in HOUSING, SUPPORT, AND COMMUNITY, *supra* note 36, at 57.

40. For examples of statutes using "congregate living facilities" to describe housing for the deinstitutionalized mentally ill, see FLA. STAT. ch. 400.401 (1990 & Supp. 1992); R.I. GEN. LAWS § 40.1-25-2 (1990).

41. For examples of statutes using "community residences" to describe housing for deinstitutionalized mentally ill, see CONN. GEN. STAT. § 8-3E (1989 & Supp. 1993); D.C. CODE ANN. § 32-1301 (1981); N.H. REV. STAT. ANN. § 135-C:26 (1990); N.J. REV. STAT. § 30:11B-1 (1981 & Supp. 1993); N.Y. MENTAL HYG. LAW § 41.33 (McKinney 1988).

42. See *Crowley v. Knapp*, 288 N.W.2d 815, 821 (Wis. 1980) (explaining that purpose of group home for "retarded citizens" is to provide "residential living environment").

“community living arrangements,”⁴³ and “community care facilities.”⁴⁴ Noticeably absent in these varied descriptions is the simple word “home.”

A home has many meanings—a domicile, a dwelling, or the “focus of domestic affections.”⁴⁵ To most, home simply connotes the place where one belongs and feels safe. Yet for people with mental disabilities, a home has been just one more service to accept or refuse. Where do people with mental disabilities *want* to live? Have they ever been asked?⁴⁶ How can laws be used to help them realize their own desires?

This Article does not seek to explain or even identify all of the complex social, legal, political, philosophical, and financial issues surrounding housing for people with mental disabilities. Nor does this Article provide solutions to many of the economic, employment, and health-related challenges now facing people labeled mentally ill or developmentally disabled. Rather, this Article seeks to trace the way in which federal and state laws have been used to exclude people with mental disabilities from living next door to you and me. Specifically, this Article explores ways to avoid repeating our history of degrading and dehumanizing people with mental disabilities by denying them the basic right to live where and how they choose.

II. A HISTORY OF FEDERAL LAWS PROHIBITING HOUSING DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES

On September 12, 1988, Congress passed the Fair Housing Amendments Act of 1988,⁴⁷ which amended the Fair Housing Act of 1968,⁴⁸ to prohibit discrimination against people with disabilities in public as well as private housing.⁴⁹ The FHAA represents the

43. For examples of statutes using “community living arrangements” to describe housing for deinstitutionalized mentally ill, see CAL. WELF. & INST. CODE § 4832 (West 1984); HAW. REV. STAT. § 334-103 (1985 & Supp. 1992); ILL. REV. STAT. ch. 210, para. 135/10 (1993).

44. For examples of statutes using “community care facilities” to describe housing for deinstitutionalized mentally ill, see CAL. WELF. & INST. CODE § 4801 (West 1984 & Supp. 1993); ILL. REV. STAT. ch. 20, para. 1705/18.2 (1993).

45. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1082 (1986).

46. See Don Aucoin, *Clients Give DMH Some Pointers*, BOSTON GLOBE, June 15, 1993, at 17-18 (describing first meeting between members of clubhouse for people with mental illnesses and representative of State Department of Mental Health in precedent-setting effort by state to systematically ask mentally ill people which services they need and want).

47. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3601-3619, 3631 and 28 U.S.C. §§ 2341-2342 (1988)).

48. Pub. L. No. 90-284, §§ 801-819, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (1988)).

49. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1621-1622 (codified at 42 U.S.C. §§ 3604-3606 (1988)) (amending Fair Housing Act to include handicapped as protected class).

Federal Government's most important step forward in removing barriers faced by people with disabilities in their effort to live as equal members of society. Prior to its enactment, no federal law specifically prohibited discrimination against people with disabilities in private and public housing.⁵⁰ Before discussing the FHAA, however, it is important to understand the historical context in which it arose. The following section therefore reviews the federal antidiscrimination laws that preceded the enactment of the FHAA.

A. *Executive Order 11,063*

The first major federal initiative prohibiting housing discrimination was Executive Order 11,063,⁵¹ which President Kennedy signed in 1962.⁵² This Executive order prohibited discrimination in federally operated or assisted housing on the basis of race with respect to the sale, lease, rental, or other disposition of residential property and related facilities owned, operated, or financially assisted by the Federal Government.⁵³ Noticeably absent from the protection of the Executive order were people with disabilities.

The Attorney General was authorized to bring civil or criminal actions to remedy violations of rules, regulations, and procedures issued pursuant to the Executive order upon the recommendation of an executive department or federal agency.⁵⁴ The scope of the order, however, was extremely limited.⁵⁵ It covered less than one percent of the nation's housing because most housing was financed by private lending institutions that were not covered by the Executive order.⁵⁶ In 1968, two events dramatically affected the prohibition against discrimination in housing: the passage of the Fair Housing Act of 1968 and the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*,⁵⁷ which held that § 1982 of the Civil Rights Act of 1866⁵⁸

50. Cf. *infra* Part II.A-D (discussing federal attempts before FHAA to prevent housing discrimination against people with disabilities).

51. Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963), *reprinted as amended* in 42 U.S.C. § 1982 (1988).

52. *Id.*

53. *Id.* § 101, 3 C.F.R. at 653, *reprinted as amended* in 42 U.S.C. § 1982.

54. *Id.* § 303, 3 C.F.R. at 655, *reprinted as amended* in 42 U.S.C. § 1982.

55. Lisa J. Laplace, Note, *The Legality of Integration Maintenance Quotas: Fair Housing or Forced Housing?*, 55 BROOK. L. REV. 197, 206 n.32 (1989).

56. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 23 (1983) (noting that "order had no application to housing that was conventionally financed"); Robert F. Drinan, *Untying the White Noose*, 94 YALE L.J. 435, 437 (1984) (book review) (describing Executive Order 11,063 as "pathetically weak" because it covered few housing units).

57. 392 U.S. 409 (1968).

58. 42 U.S.C. § 1982 (1988).

protected racial minorities from discrimination in private as well as public housing.⁵⁹

B. Title VIII of the Civil Rights Act of 1968: The Fair Housing Act of 1968

Congress expanded the scope and protections of Executive Order 11,063 by enacting the Fair Housing Act of 1968 as title VIII of the Civil Rights Act of 1968.⁶⁰ The Fair Housing Act of 1968 established a system of administrative enforcement, involving the Federal Government and state and local fair housing agencies,⁶¹ and a system of judicial review.⁶² The Act created these systems to handle claims alleging discrimination in housing and housing-related transactions on the basis of race, color, religion, or national origin.⁶³ In 1974, Congress amended the Act to prohibit discrimination on the basis of gender as well.⁶⁴ Neither the original Fair Housing Act nor the 1974 amendments, however, prohibited discrimination against people with disabilities.

The Fair Housing Act of 1968, together with its 1974 amendments, enunciated, for the first time, "the policy of the United States to provide within constitutional limitations, for fair housing throughout the United States."⁶⁵ The Act was broader than Executive Order 11,063 because it prohibited discrimination based not only on race but also on color, religion, national origin, and, eventually, gender.⁶⁶ Further, the Fair Housing Act reached private⁶⁷ as well as public housing⁶⁸ and specifically covered discrimination in financing,⁶⁹ advertising,⁷⁰ and brokerage services.⁷¹ As originally enacted, the

59. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

60. Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended in scattered sections of 18, 25, and 42 U.S.C.).

61. See Pub. L. No. 90-284, § 810, 82 Stat. 73, 85 (1968) (repealed 1988) (creating procedure by which Secretary of Housing and Urban Development was to consider claims of housing discrimination, including mandatory deferral to state and local agencies that provide "substantially equivalent" rights and remedies).

62. See Pub. L. No. 90-284, § 810(d) & 812, 82 Stat. 73, 86, 88 (repealed 1988) (providing civil remedy to enforce Act); *id.* § 813, 82 Stat. at 88 (current version at 42 U.S.C. § 3614 (1988)) (providing for suits by Attorney General to enforce Act).

63. See 42 U.S.C. §§ 3604-3606 (1988) (barring discrimination in sale, rental, financing, and brokerage of housing on basis of race, color, religion, or national origin).

64. Housing and Community Development Act of 1974, Pub. L. No. 93-383, sec. 527, § 808(b)(3), 88 Stat. 633, 729 (codified at 42 U.S.C. § 3606 (1988)).

65. 42 U.S.C. § 3601 (1988).

66. *Id.* §§ 3604-3606.

67. *Id.* § 3603(a)(1)(B)-(D).

68. *Id.* § 3603(a)(1)(A), (D).

69. *Id.* § 3605.

70. *Id.* § 3604(c).

71. *Id.* § 3606.

Fair Housing Act also prohibited practices such as "blockbusting," the practice of convincing owners to sell property on the grounds that minorities are about to move into the neighborhood,⁷² and "steering," the practice of directing prospective home buyers into neighborhoods in which members of their racial, ethnic, or religious group already live.⁷³

In short, the Fair Housing Act of 1968 made unlawful all practices and transactions that would deny housing to members of the protected groups.⁷⁴ Like most legislation, the Fair Housing Act was the result of compromise.⁷⁵ Under the law, "aggrieved persons" could file complaints with the Department of Housing and Urban Development (HUD) alleging the existence of a "discriminatory housing practice."⁷⁶ The Fair Housing Act required HUD to investigate the complaint within thirty days of receiving it and then to either pursue or dismiss the complaint.⁷⁷ If HUD elected to pursue the complaint, however, the statute authorized HUD to engage only in "conference, conciliation and persuasion," not litigation.⁷⁸ As part of the compromise that effected passage, sponsors of the bill were forced to deny HUD a mechanism for enforcing the law's anti-discrimination provisions relating to the sale or rental of housing.⁷⁹ Consequently, HUD was only left with the power to mediate disputes between a landlord or seller and individuals who believed that they

72. *Id.* § 3604(e); see *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 117 (5th Cir. 1973) (describing § 3604(e) as "anti-blockbusting" provision of the Fair Housing Act").

73. 42 U.S.C. § 3604 (1988); see *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 94 (1979).

74. One could argue that the Act was, and continues to be, too selective in its coverage. The Act, which fails to protect low-income people in general, fails to benefit a large number of people in need of "fair housing" protection because they are homeless or forced to live in substandard housing. According to the Department of Housing and Urban Development's (HUD) own figures, one in five poor people are forced to live in substandard housing. E.J. Dionne, Jr., *Poor Paying More for Their Shelter*, N.Y. TIMES, Apr. 18, 1989, at A18. Yet, the Supreme Court has held that the Constitution does not create a right to housing, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972), and that discrimination against poor people does not violate the Equal Protection Clause, *Maier v. Roe*, 432 U.S. 464, 471 (1977).

75. See Robert G. Schwemm, *The Limits of Litigation Under the Fair Housing Act of 1968*, in THE FAIR HOUSING ACT AFTER TWENTY YEARS, *supra* note 28, at 43, 44 (describing "Dirksen Compromise," which eliminated ability of HUD to issue cease and desist orders and "result[ed] in an agency procedure that provides for absolutely no sanctions against a recalcitrant defendant").

76. See 42 U.S.C. § 3602(f) (1988) (defining acts unlawful under 42 U.S.C. §§ 3604-3606, 3617 (1988) as discriminatory housing practices).

77. Fair Housing Act of 1968, Pub. L. No. 90-284, § 810, 82 Stat. 73, 85 (repealed 1988).

78. See *id.* (requiring "informal methods" of dispute resolution).

79. See Schwemm, *supra* note 75, at 44-45. In the original bill that later became the Fair Housing Act, HUD had the power to order property owners to "cease and desist" discriminatory practices. *Id.* This power was eliminated in the final version of the Act in an effort to garner more support for the Act's passage. *Id.*

had suffered discrimination. Although the Department of Justice was authorized to bring suits against offending landowners,⁸⁰ its hands were tied as well. Under the original law, the Department of Justice could bring suit only to remedy an established pattern or practice of discrimination.⁸¹

From 1968 to 1988, criticism of the law focused principally on its lack of enforcement.⁸² In fact, one commentator characterized the term "federal fair housing enforcement effort" as an oxymoron.⁸³ Commentators have claimed that the statutory limits to HUD's enforcement powers have limited the law's potential.⁸⁴ Critics of the Fair Housing Act also viewed its \$1000 cap on punitive damages⁸⁵ as too low to serve as a deterrent.⁸⁶ Finally, commentators considered the Act's reliance on private enforcement to attack patterns of discrimination and segregation as unworkable.⁸⁷

The failings of the Fair Housing Act were not limited to its remedial scheme. One of the most significant limitations of the original version of the Act was that it exempted a large percentage of the Nation's housing units. For example, the Act did not cover transactions relating to the sale of single-family homes that did not involve a broker or commercial advertising,⁸⁸ accommodations provided by private clubs,⁸⁹ noncommercial housing operated by

80. Fair Housing Act of 1968, Pub. L. No. 90-284, § 813, 82 Stat. 73, 88 (repealed 1988).

81. *Id.* Under the original Fair Housing Act, plaintiffs could bring suits for equitable relief or damages. *Id.* § 810(d), 82 Stat. at 86. Overall administration of the Act, however, was and remains the responsibility of HUD, which has authority to investigate and conciliate complaints of housing discrimination. 42 U.S.C. §§ 3608a, 3608c (1988). Both the original Act and current law authorize the Attorney General to litigate on behalf of private persons where there is an established pattern or practice of housing discrimination and to obtain actual and punitive damages and injunctive relief. 42 U.S.C. § 3614(b) (1988).

82. See Kushner, *supra* note 28, at 48-52.

83. Kushner, *supra* note 28, at 48.

84. See Kushner, *supra* note 28, at 48 (stating that "[c]ritiques of the federal fair housing enforcement effort invariably focus on the incredibly low numbers of cases and complaints handled" by HUD and Department of Justice); Schwemm, *supra* note 75, at 44 (criticizing Fair Housing Act for restricting HUD's enforcement powers).

85. Fair Housing Act of 1968, Pub. L. No. 90-284, § 812(c), 82 Stat. 73, 88 (1968).

86. See Schwemm, *supra* note 75, at 46 (arguing that punitive damages cap "serves to protect the most egregious violators from feeling the full force of an appropriate judgment").

87. See Schwemm, *supra* note 75, at 45-47 (discussing "serious drawbacks" of reliance on private enforcement including lack of citizen knowledge about rights protected by Fair Housing Act and lack of economic incentive to pursue private litigation). See generally ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION 1-1 to 26-30 (1993) (discussing litigation under Fair Housing Act). A further limitation in the original version of the law provided that "aggrieved persons" who decided to bring suit themselves were denied court costs and attorneys fees unless a court concluded that the petitioner was financially unable to assume payment of the attorneys fees. Fair Housing Act of 1968, Pub. L. No. 90-284, § 812(c), 82 Stat. 73, 88 (repealed 1988).

88. 42 U.S.C. § 3603(b)(1) (1988).

89. *Id.* § 3607(a).

religious groups,⁹⁰ and owner-occupied rental housing containing four or fewer units.⁹¹ These exemptions remain in effect under the amended Act.⁹²

Despite, or perhaps because of, these limitations, the Fair Housing Act has spurred some litigation and much debate. Some commentators may claim that the Act has had the dramatic effect of integrating neighborhoods, while others claim that segregation and discrimination in housing remain as prevalent today as in years past.⁹³ One fact, however, remains beyond dispute. Without the Fair Housing Act of 1968, states, localities, and individuals would have felt even greater freedom to discriminate against people covered by the Act⁹⁴—perhaps in the way that they have felt free to discriminate against people with disabilities, who are not even mentioned in the Act.⁹⁵

C. Section 1982 of the Civil Rights Act of 1866

Section 1982 of the Civil Rights Act of 1866 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.”⁹⁶ In 1968, just two months after Congress enacted the original Fair Housing Act, the Supreme Court held in *Jones v. Alfred H. Mayer Co.*⁹⁷ that racial discrimination in real estate transactions violated the Civil Rights Act of 1866.⁹⁸

The Court in *Mayer* distinguished § 1982 from the Fair Housing Act of 1968.⁹⁹ Unlike the Fair Housing Act, § 1982 creates a private

90. *Id.*

91. *Id.* § 3603(b)(2).

92. *Id.* §§ 3603(b)(1)-(2), 3607(a).

93. See Guido Calabresi, *Preface*, in THE FAIR HOUSING ACT AFTER TWENTY YEARS, *supra* note 28, at 7, 8 (describing consensus of participants in Fair Housing Act symposium that “the act has not met the high expectations its supporters had for it”).

94. See Drew S. Days III, *Overview*, in THE FAIR HOUSING ACT AFTER TWENTY YEARS, *supra* note 28, at 27, 28 (emphasizing failures of federal fair housing effort but conceding that “there have been successes in providing decent homes for many Americans previously denied such access because of their race or national origin or some other irrelevant characteristic”).

95. See *supra* note 14 and accompanying text (discussing history of housing discrimination against mentally handicapped). In 1980, the House of Representatives voted to extend the Fair Housing Act to protect handicapped people, but the bill failed to pass the Senate. See H.R. REP. NO. 711, 100th Cong., 2d Sess. 14 (1988), *reprinted in* 1988 U.S.C.A.N. 2173, 2175.

96. 42 U.S.C. § 1982 (1988).

97. 392 U.S. 409 (1968).

98. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436-37 (1968). According to the Supreme Court, § 1982 is a valid exercise of congressional power under the Thirteenth Amendment to eliminate the “badges and incidents of slavery [including] all racial discrimination in private as well as public housing.” *Id.* at 413.

99. *Id.* at 413-17.

right of action and therefore does not require enforcement action by a federal agency.¹⁰⁰ Further, punitive damages may be awarded under § 1982,¹⁰¹ whereas they were not available under the original Fair Housing Act. Section 1982, however, protects fewer people than the Fair Housing Act does: § 1982 applies only to housing discrimination based on race¹⁰² and does not cover discrimination based on religion or national origin, which were all covered by the Fair Housing Act.¹⁰³ Like the Fair Housing Act, § 1982 also does not address the rights of people with disabilities.

D. Section 504 of the Rehabilitation Act of 1973

The Rehabilitation Act of 1973,¹⁰⁴ the first federal law to address the rights of people with disabilities,¹⁰⁵ prohibits discrimination against people with disabilities in a variety of contexts, including housing.¹⁰⁶ Congress passed the Rehabilitation Act to create equal protection for people with disabilities and considered the measure a "necessary step toward universal equal rights."¹⁰⁷ As one Senator

100. See 42 U.S.C. § 1983 (1988) (creating private cause of action to remedy civil rights violation).

101. See *Hamilton v. Svatik*, 779 F.2d 383, 389 n.4 (7th Cir. 1985) (holding that "there is no limit on the amount of punitive damages that can be awarded under 42 U.S.C. § 1982").

102. See 42 U.S.C. § 1982 (1988) (granting all citizens same property rights possessed by white citizens).

103. See 42 U.S.C. §§ 3604-3606 (1988) (barring discrimination in sale, rental, financing, and brokerage of housing on basis of race, color, religion, national origin, or gender).

104. 29 U.S.C. §§ 791-796i (1988).

105. See *Shirey v. Devine*, 670 F.2d 1188, 1193 (D.C. Cir. 1982) (describing Rehabilitation Act as "first major federal statute designed to provide assistance to the whole population of handicapped persons").

106. See 29 U.S.C. § 793 (1988) (requiring government contractors to make affirmative attempts to employ individuals with handicaps in carrying out all federal government contracts in excess of \$2500); 29 U.S.C. § 794 (barring discrimination on basis of handicap in any federal executive branch or U.S. Postal Service program or in any program receiving federal technical assistance). Section 504 is patterned after title VI of the Civil Rights Act of 1964, as amended, and title IX of the Education Amendments of 1972. S. REP. NO. 1297, 93d Cong., 2d Sess. 39 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6390. It has been referred to as "a part of the general corpus of discrimination law." U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 142 (1983). As one court has observed: "Recognizing the parallels between the discrimination suffered by the handicapped and other minority groups manifested particularly through their segregation from the rest of society, members of Congress sought to combat the problem through a remedy which had proven successful in the past, civil rights legislation." *Garrity v. Gallen*, 522 F. Supp. 171, 205 (D.N.H. 1981) (footnote omitted).

107. 124 CONG. REC. 38,552 (1978) (statement of Sen. Cranston). Other proposed titles for the Rehabilitation Act, such as the "Bill of Rights for Handicapped Persons" and the "Civil Rights Act for the Handicapped," indicate the importance of § 504 to the legal protection of persons with handicaps. *Id.*; see Harold S. Levine, Note, *Defining the Rights of Handicapped Under Section 504 of the Rehabilitation Act of 1973*: Southeastern Community College v. Davis, 24 ST. LOUIS U. L.J. 159, 159-60 (1979) (discussing importance of Rehabilitation Act to handicapped community).

proclaimed, "The time has come when we can no longer tolerate the invisibility of the handicapped in America."¹⁰⁸

Section 504 of the Rehabilitation Act prohibits essentially all forms of discrimination against a wide class of people with disabilities; it applies, however, only to discrimination by federally financed agencies.¹⁰⁹ To bring a successful claim under section 504, a plaintiff must establish that: (1) the challenged program or activity receives federal financial assistance;¹¹⁰ (2) she or he is an "individual with handicaps" under the Act;¹¹¹ (3) she or he is "otherwise qualified" for that specific program or activity;¹¹² and (4) she or he was excluded from the program solely on the ground of her or his handicap.¹¹³

Section 504's prohibition of discrimination applies to virtually all persons and entities receiving federal funds in any amount or form.¹¹⁴ The purpose of the federal assistance need not be connect-

108. 118 CONG. REC. 525 (1972) (statement of Sen. Humphrey).

109. 29 U.S.C. § 794(a) (1988) ("No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); *see also infra* note 114 (quoting regulation that determines applicability of § 504). For example, § 501 is an affirmative action program for handicapped applicants in federal jobs or employees working for the Federal Government, 29 U.S.C. § 791 (1988), and § 503 requires federal contractors to take affirmative steps to hire people with handicaps. 29 U.S.C. § 793 (1988).

110. 29 U.S.C. § 794(a) (1988).

111. *Id.* The phrase "individual with handicaps" is defined in 29 U.S.C. § 706(8) (1988).

112. *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1385 (10th Cir. 1981).

113. *Id.*

114. *See* 24 C.F.R. § 8.3 (1993) (outlining breadth of § 504). HUD's own § 504 regulations define "recipient" as follows:

[A "recipient" is] any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended for any program or activity directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. An entity or person receiving housing assistance payments from a recipient on behalf of eligible families under a housing assistance payments program or a voucher program is not a recipient or subrecipient merely by virtue of receipt of such payments.

Id. Only three categories of recipients are exempt: (1) ultimate beneficiaries of federal assistance programs, such as Social Security recipients, 20 U.S.C. § 1687 note (1988); (2) recipients of government procurement contracts who, in return for supplying goods to the government, receive payments rather than financial assistance, 24 C.F.R. § 8.3 (1993); and (3) recipients of insurance or guaranty contracts. *Id.*

"Federal financial assistance" is defined as follows:

[A]ny assistance provided or otherwise made available by the Department through any grant, loan, contract or any other arrangement, in the form of:

(a) Funds;

(b) Services of Federal personnel; or

(c) Real or personal property or any interest in or use of such property, including:

(1) Transfers or leases of the property for less than fair market value or for reduced consideration; and

ed to the alleged discriminatory activity.¹¹⁵ In the housing area, nonprofit organizations that construct or substantially rehabilitate rental housing for people with mental disabilities are common recipients of federal financial assistance for housing development under section 202 of the National Housing Act.¹¹⁶ In 1982, for example, a federal district court in New Jersey held that plaintiffs with mental illness seeking restitution for alleged housing discrimination under section 202 had a cognizable claim under section 504 of the Rehabilitation Act.¹¹⁷

Two additional housing programs for people with mental disabilities are also subject to section 504's prohibition against discrimination: (1) the assisted housing program of the United States Housing Act of 1937, which provides rent subsidies for a wide variety of existing

(2) Proceeds from a subsequent transfer or lease of the property if the Federal share of its fair market value is not returned to the Federal Government.

Federal financial assistance includes community development funds in the form of proceeds from loans guaranteed under section 108 of the Housing and Community Development Act of 1974, as amended, [42 U.S.C. § 5308 (1988)] but does not include assistance made available through direct Federal procurement contracts or payments made under these contracts or any other contract of insurance or guaranty.

24 C.F.R. § 8.3 (1992).

115. See *Glanz v. Vernick*, 756 F. Supp. 632, 636 (D. Mass. 1991) (rejecting claim that § 504 does not apply where federal funds are not used to discriminate); cf. *Grove City College v. Bell*, 465 U.S. 555, 571 n.21 (1984) (applying federal discrimination protection to all activities of program receiving federal funds); *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1047-49 (5th Cir. 1984) (applying § 504 to all hospital programs receiving Medicare and Medicaid payments), *cert. denied*, 469 U.S. 1189 (1985).

116. 12 U.S.C. § 1701q (1988). Under § 202, HUD may issue long-term, low-interest loans to eligible developers seeking to provide housing for elderly or handicapped persons with incomes insufficient to pay for private rental rates. *Id.*

117. *Edge v. Pierce*, 540 F. Supp. 1300, 1303-05 (D.N.J. 1982); see also *Dempsey v. Ladd*, 840 F.2d 638, 639-41 (9th Cir. 1987) (upholding decision to exclude mentally disabled residents from § 202 housing project); *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1356 (10th Cir. 1987) (upholding summary judgment in favor of landlord who had refused to admit chronically mentally and developmentally disabled persons to federally funded housing project); *Brecker v. Queens B'nai B'rith Hous. Dev. Fund*, 798 F.2d 52, 56 (2d Cir. 1986) (upholding landlord's decision to provide housing to one § 202-eligible group but not others); *Almonte v. Pierce*, 666 F. Supp. 517, 530 (S.D.N.Y. 1987) (limiting application of § 202 to individuals that are "mobility impaired").

Although these cases were decided before the effective date of the FHAA, they have now been codified in title VI of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, §§ 601-685, 106 Stat. 3672, 3802-32 (codified at scattered sections of 12 and 42 U.S.C.A. (West Supp. 1993)). At first glance, this new law appears to benefit people with disabilities; however, its segregated approach to housing is discriminatory. Title VI of the Housing and Community Development Act of 1992 provides that, in certain circumstances, public and subsidized housing units must be reserved for elderly and disabled residents. 42 U.S.C.A. §§ 13611-13612 (West Supp. 1993). The FHAA seeks to promote the inclusion of people with disabilities into nonsegregated housing, without regard to their disabilities. The effect of title VI is to create segregated disabled-only or disabled and elderly-only housing, which would contravene the very purpose and language of the FHAA. The proposed HUD regulations implementing title VI have not yet been issued, and advocates for people with disabilities are hopeful that the regulations will ameliorate the effect of the law on limiting integrated housing opportunities for people with disabilities. See HOUSING L. BULL., Jan.-Apr. 1993, at 1, 1-6.

housing options;¹¹⁸ and (2) HUD's assistance to mentally disabled persons in general low-income housing programs.¹¹⁹ Although both programs provide federal assistance directly to the eligible resident with a disability rather than to the sponsor or manager of the housing project, *Grove City College v. Bell*¹²⁰ supplies the judicial precedent necessary to apply section 504's prohibition.

In *Grove City College*, the Supreme Court defined the scope of "federal financial assistance"¹²¹ to include any specific program within a college, for example, that accepts no direct federal assistance but that enrolls students who receive federal grants earmarked for educational purposes.¹²² Thus, under *Grove City*, a tenant who receives federal financial assistance is protected against discrimination under section 504.

Congress further clarified the scope of the "federal financial assistance" requirement in 1988 when it amended section 504. This amendment makes clear that where a part of an institution or program receives federal financial assistance, the *entire* institution or program is prohibited from discriminating.¹²³ Thus, if a landlord or seller receives federal financial assistance, then a victim of that individual's discrimination may sue under both the FHAA and section 504. If the landlord or seller received no federal financial assistance, and the resident did not receive financial assistance directly from the Federal Government, the resident would be able to sue only under the FHAA.

Although the intent of the Rehabilitation Act was to eliminate and provide redress for acts of discrimination against people with disabilities, the Act has been criticized for having loopholes and enforcement problems, particularly in regard to housing discrimination.¹²⁴

118. 42 U.S.C. § 1437f (1988) (implementing § 8 lower-income housing assistance generally); *id.* § 1437f(p) (implementing shared housing for elderly and handicapped).

119. See SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 667 (3d ed. 1985) (discussing courts' use of § 504 to protect mentally disabled persons from discrimination in federally assisted housing projects despite HUD's failure to issue regulations to fully implement statute).

120. 465 U.S. 555 (1984).

121. 20 U.S.C. § 1681(a) (1982).

122. *Grove City College v. Bell*, 465 U.S. 555, 570-74 (1984) (stating that although federal financial aid to specific program will not "trigger institutionwide coverage," specific program is covered).

123. Rehabilitation Act Amendment, Pub. L. No. 100-259, sec. 4, § 504, 102 Stat. 29 (1988) (codified at 29 U.S.C. § 794(b) (1988)).

124. See H.R. REP. NO. 711, *supra* note 95, at 18, 28-29 (1988), 1988 U.S.C.C.A.N. at 2179, 2189-90 (discussing loopholes in original Act's coverage of handicapped and stating that FHAA requirements prohibiting discriminatory housing practices against handicapped persons were based heavily on § 504 case law developed primarily in employment and services context).

III. THE FAIR HOUSING AMENDMENTS ACT OF 1988 AND PEOPLE WITH MENTAL DISABILITIES

Twenty years after the passage of the original Fair Housing Act, Congress passed the Fair Housing Amendments Act of 1988 in response to housing discrimination against people with disabilities and the lack of enforcement of the original Act.¹²⁵ The FHAA expanded the coverage of the Fair Housing Act by prohibiting all forms of housing discrimination based on handicap and familial status.¹²⁶ The FHAA also strengthened the Fair Housing Act's enforcement mechanisms by providing HUD with the power to refer cases involving breaches of conciliation agreements to the Department of Justice.¹²⁷ Further, the FHAA prohibits discrimination in certain transactions that were not included in the original Fair Housing Act, such as the sale, rental, financing, brokering, appraising, making, and purchasing of loans for dwellings, and local land-use decisions.¹²⁸

The FHAA also directed the Secretary of HUD to issue regulations implementing the Fair Housing Amendments Act within 180 days,¹²⁹ which the Secretary did,¹³⁰ but not without a battle. When the Secretary published notice of a proposed rulemaking in the Federal Register in November 1988,¹³¹ disability-rights advocates and real estate developers immediately criticized the proposed rule.¹³² HUD

125. See H.R. REP. NO. 711, *supra* note 95, at 15, 18, 1988 U.S.C.C.A.N. at 2176, 2179 (discussing lack of effective enforcement mechanism in existing law and rising awareness of problems of accessibility and "erroneous beliefs about their abilities" faced by disabled).

126. See H.R. REP. NO. 711, *supra* note 95, at 17-21, 1988 U.S.C.C.A.N. at 2178-82 (discussing rationale for FHAA coverage of handicapped and families with children). This Article only addresses the effect of the FHAA on people with mental disabilities.

127. 42 U.S.C. § 3610(c) (1988). If conciliation fails, HUD has the power to seek injunctive relief in federal court or to file an administrative complaint before an administrative law judge (ALJ). 42 U.S.C. §§ 3610(e), 3612 (1988). The ALJ can issue injunctive relief or impose penalties of up to \$50,000, depending on the number of violations. 42 U.S.C. § 3612(g) (3) (1988).

128. 42 U.S.C. § 3605 (1988); see H.R. REP. NO. 711, *supra* note 95, at 29, 1988 U.S.C.C.A.N. at 2191 (elaborating on congressional intent not to "restrict or prohibit the legitimate consideration of actual obligations in caring for children" when evaluating individuals' qualification for mortgage).

129. 42 U.S.C. § 3601 note (1988).

130. HUD had not always been so prompt. For example, HUD took 15 years to issue its final regulations implementing § 504's prohibition against discrimination in federally assisted housing. See *Nondiscrimination Based on Handicap in Federally Assisted Programs and Activities of the Department of Housing and Urban Development*, 53 Fed. Reg. 20,233 (1988) (codified at 24 C.F.R. § 8 (1993)). Coincidentally, the § 504 regulations were promulgated just months before the final FHAA regulations. *Implementation of Fair Housing Amendments Act*, 54 Fed. Reg. 3232 (1989) (codified at 24 C.F.R. §§ 100, 103-106, 109-110, 115, 121 (1993)).

131. *Fair Housing: Implementation of Fair Housing Amendments Act of 1988*, 53 Fed. Reg. 44,992 (1988) (to be codified at 24 C.F.R. §§ 100, 103-106, 109-110, 115, 121) (proposed Nov. 7, 1988).

132. One source of dispute was the effective date of the FHAA regulations. According to HUD, the regulations were to apply only to complaints filed after March 12, 1989, and then only

received over 6500 comments in response to the proposed rule, approximately 4000 of which were critical of the regulations.¹³³ Amid the storm of controversy, HUD published its final FHAA regulations on January 23, 1989,¹³⁴ and reiterated the purpose of the Act, stating, "No person shall, on the basis of race, color, religion, sex, handicap, familial status, or national origin, be subjected to discrimination in the sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions."¹³⁵

The constitutional authority for the FHAA is different from the authority for the original Fair Housing Act. Soon after Congress passed the original Act in 1968, the Supreme Court held in *Jones v. Alfred E. Mayer Co.*¹³⁶ that racial discrimination in housing falls under the rubric of "badges and incidents of slavery" and that Congress therefore had the power to enact the Fair Housing Act under the Thirteenth Amendment.¹³⁷ Because the FHAA goes beyond race to include disability, the Thirteenth Amendment is not sufficient authority for the Act. Instead, the FHAA appears to derive its constitutional authority from the Commerce Clause,¹³⁸ which has

if the complaint pertained to violations that occurred or continued after that date. See 24 C.F.R. § 103.1(b)(2) (1993). If a complaint was filed prior to the effective date of the statute, even if the violation continued after the effective date, the complainant would have the option to proceed under either the new or the old rules. 24 C.F.R. §§ 103.1(b)(2), 103.40(c) (1993). Parties whose complaints were pending as of the effective date of the Act were not able to benefit from the new statutory remedies. Further, parties who brought complaints after the FHAA's effective date but whose claims accrued prior to the effective date were unable to take advantage of the new procedures. This interpretation of the Act's effective date has been criticized as unduly restrictive and inconsistent with the intent of Congress. See Memorandum for Childrens' Defense Fund Concerning Summary of Comments of the Childrens' Defense Fund on the Proposed Regulations to Implement the Fair Housing Amendments Act (Dec. 5, 1988) (on file with *The American University Law Review*) (discussing HUD's request for comments on whether proper effective date for FHAA's transition provisions should be FHAA's enactment date or effective date).

133. Interview with Bonnie Milstein, Staff Attorney, Mental Health Law Project, in Washington, D.C. (July 12, 1989).

134. Implementation of Fair Housing Amendments Act, 54 Fed. Reg. 3232 (1989) (codified at 24 C.F.R. §§ 100, 103-106, 109-110, 115, 121 (1993)).

135. 24 C.F.R. § 100.5(a) (1993). The regulations exempt certain religious organizations and private clubs, as well as housing for older persons. See 42 U.S.C. § 3607 (1988). Further, the regulations make clear that nothing in the Act, other than the prohibitions against discriminatory advertising, applies to the sale or rental by an owner of certain single-family houses without the use of a real estate broker or to the rental of rooms in owner-occupied dwellings containing living quarters occupied by no more than four families. See 42 U.S.C. § 3604 (1988).

136. 392 U.S. 409 (1968).

137. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-43 (1968); see also U.S. CONST. amend. XIII (abolishing slavery in United States); Civil Rights Cases, 109 U.S. 3, 20-21 (1883) (discussing self-executing nature of Thirteenth Amendment and Congress' power to pass legislation under it).

138. See U.S. CONST. art. I, § 8. In his dissenting opinion in *United States v. Guest*, Justice Brennan suggests that § 5 of the Fourteenth Amendment could also provide the necessary

broad reach and empowers Congress to regulate any commerce that "concerns more States than one and has a real and substantial relation to the national interest."¹³⁹ Discrimination in housing against groups protected by the Fair Housing Amendments Act may burden interstate commerce by making housing unavailable in certain areas, thereby discouraging certain citizens from moving to those areas. Housing discrimination may also burden interstate commerce by restricting the transportation of goods related to housing construction. In short, housing discrimination against people with mental disabilities would likely prevent interstate travel by people protected by the FHAA and thereby adversely affect interstate commerce.¹⁴⁰

A. *A Comparative Analysis of the Coverage of the Fair Housing Amendments Act of 1988 and the Rehabilitation Act of 1973*

1. *Definition of "handicap"*

The FHAA House Report states unequivocally the purpose of the FHAA:

[The FHAA] is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.¹⁴¹

authority for the FHAA. *United States v. Guest*, 383 U.S. 745, 774 (1966) (Brennan, J., dissenting). In *Guest*, Justice Brennan stated that Congress may act as "reasonably necessary to protect a right created by and arising under" the Fourteenth Amendment, including the Equal Protection Clause. *Id.* at 782. He argued that § 5 of the Fourteenth Amendment was a "positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." *Id.* at 784.

139. *See* *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 255-56 (1964). In this case the plaintiffs challenged the constitutionality of title II of the Civil Rights Act of 1964, which prohibited discrimination on the basis of race in public accommodations affecting commerce. *Id.* at 242-43. The Supreme Court upheld the statute as a proper exercise of Congress' power to regulate interstate commerce. *Id.* at 250. The Court explained that racial discrimination in public accommodations burdened interstate commerce by impeding the interstate travel of citizens. *Id.* at 252-53. The same argument is appropriate to support the Fair Housing Amendments Act of 1988.

140. *See* *Seniors Civil Liberties Ass'n v. Kemp*, 761 F. Supp. 1528, 1545-46 (M.D. Fla. 1991) (upholding FHAA under Commerce Clause in case involving unsuccessful challenge to FHAA's ban on familial discrimination by elderly residents of age-restricted housing). *But see* *Michigan Protection & Advocacy Servs. v. Babin*, 799 F. Supp. 695, 741 (E.D. Mich. 1992) (holding that although Commerce Clause may provide sufficient constitutional authority to prohibit discrimination in housing in some instances, it does not extend to case involving restrictive covenant between two neighbors where brokers and interstate travel were not involved).

141. H.R. REP. NO. 711, *supra* note 95, at 18, 1988 U.S.C.C.A.N. at 2179.

Accordingly, the FHAA extends protection to people who are considered "handicapped," which is defined as broadly in the FHAA as in the Rehabilitation Act of 1973.¹⁴² The regulations implementing the Rehabilitation Act define "handicapped" as "any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment."¹⁴³

The FHAA ensures that both AIDS sufferers and other individuals with the Human Immunodeficiency Virus (HIV) are considered "individuals with handicaps."¹⁴⁴ The FHAA's coverage of HIV and AIDS is consistent with the Department of Justice's interpretation of the Rehabilitation Act¹⁴⁵ and with the Supreme Court's decision in *School Board v. Arline*.¹⁴⁶ In *Arline*, the Supreme Court held "that a person with a record of a physical impairment [who] is also contagious" is not necessarily excluded from section 504's scope.¹⁴⁷ In the housing context, a landlord cannot evict or refuse to rent or sell to an individual unless reasonable accommodation of any risk to the health and safety of others would be impossible.¹⁴⁸

The coverage of the FHAA is extremely broad and many non-disabled people, in addition to people with disabilities, have standing to sue under the law.¹⁴⁹ For example, not only can a buyer or

142. H.R. REP. NO. 711, *supra* note 95, at 17, 1988 U.S.C.C.A.N. at 2178.

143. 24 C.F.R. § 8.3 (1993); *see* 29 U.S.C. § 706(8) (1988) (amending of "handicapped" provided in original codification). The FHAA definition, which appears at 42 U.S.C. § 3602 (1988), includes essentially the same definition of "handicap" that applies in § 504. 54 Fed. Reg. 3232, 3245 (1989). Section 504 is intended to cover the widest possible range of disabilities that limit activities such as walking, seeing, hearing, speaking, breathing, learning, and working. *See* 24 C.F.R. § 8.3 (1993). It also includes as many impairments as possible, including a range of physiological disorders and conditions such as mental retardation, organic brain syndrome, emotional and mental illness, orthopedic, visual, speech, and hearing impairments, autism, epilepsy, muscular dystrophy, multiple sclerosis, cerebral palsy, diabetes, cancer, heart disease, drug addiction, and alcoholism. *Id.*

144. *See* *Baxter v. Belleville*, 720 F. Supp. 720, 730 (S.D. Ill. 1989) (interpreting FHAA to include HIV carriers as "individuals with handicaps").

145. *See* Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 264-65 (1988) (concluding that § 504 protects HIV-infected individuals from discrimination in nonemployment as well as employment context).

146. 480 U.S. 273 (1987).

147. *School Bd. v. Arline*, 480 U.S. 273, 289 (1987). In *Arline*, the Court ruled that a person who poses a significant risk of infecting others in the workplace will not be considered otherwise qualified for the job if reasonable accommodation will not eliminate that risk of infection. *See id.* at 287-88 (discussing factors to use in evaluating risk of contagion).

148. *See* H.R. REP. NO. 711, *supra* note 95, at 25, 1988 U.S.C.C.A.N. at 2186 (stating that FHAA "makes it illegal to refuse to make reasonable accommodation in rules, policies, practices, or services if necessary to permit a person with handicaps equal opportunity to use and enjoy a dwelling").

149. *See* H.R. REP. NO. 711, *supra* note 95, at 15-16, 19-21, 1988 U.S.C.C.A.N. at 2176-77, 2180-81 (discussing FHAA coverage of minorities and families with children). In addition to covering persons with handicaps, the FHAA adds familial status to the list of classes protected

renter who has a disability sue, but the buyer's or renter's family members, roommates, housing providers, or any other person associated with the buyer or renter may also sue under the FHAA.¹⁵⁰ In addition, it is unlawful to refuse to rent or sell to a person who has a record of being disabled or who is perceived as being disabled.¹⁵¹ This prohibition is significant for people with mental disabilities because people labeled mentally ill are often regarded by others as "handicapped" because of certain behaviors that result from their conditions.¹⁵² Such behaviors may lead an observer to conclude that the individual is mentally ill and to treat him or her differently as a result. Such treatment, however, is proscribed by the FHAA, as

by its antidiscrimination provision. 42 U.S.C. § 3604 (1988). The Act, however, does contain exemptions from this antidiscrimination provision for three types of housing for older persons: (a) subsidized housing for older persons; (b) housing in which all of the occupants are 62 years of age or older; and (c) housing in which no fewer than 80% of the dwellings have at least one resident who is 55 years of age or older. 42 U.S.C. § 3607(b) (1988).

The purpose of the exemptions is to accommodate the interests of senior citizens who choose to live in specialized housing that is "tailored to their specific needs." H.R. REP. NO. 711, *supra* note 95, at 21, 1988 U.S.C.C.A.N. at 2182. Additionally, the exceptions protect surviving spouses who are under the age of 55 from being evicted when a resident over 55 leaves the unit because of death or disability. *See* 134 CONG. REC. H6498 (daily ed. Aug. 8, 1988) (statement of Rep. Edwards) (discussing merits of exceptions for housing for elderly).

150. 42 U.S.C. § 3602(i)(2) (1988). Such broad standing is provided in the context of race discrimination under the original Fair Housing Act as well. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100-09 (1979) (holding that indirect victims of discrimination can sue under Fair Housing Act). In 1982, the Court went even further and held that a tester—a person who poses as a buyer or renter in order to detect housing discrimination—who had been the object of discriminatory misrepresentation could prevail. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-75 (1982). The Court declared that testers enjoy a "legal right to truthful information about available housing," *id.* at 373, because the law makes it illegal to misrepresent "to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." *Id.* (citing 42 U.S.C. § 3604(d)(1982)). White parents of a black child were also allowed to sue for racial discrimination in housing. *See Pughsley v. 3750 Lake Shore Drive Coop Bldg.*, 463 F.2d 1055, 1056 (7th Cir. 1972) (stating that African-American child's white parents' claim of discriminatory misrepresentation was not frivolous); *see also Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 646 (6th Cir. 1991) (discussing courts' "broad reading of the FHAA in order to fulfill its remedial purpose"); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir.) (stating that Congress "intended standing under [FHAA] to extend to full limits of Article III"), *cert. denied*, 498 U.S. 980 (1990), *and cert. denied*, 498 U.S. 1046 (1991).

151. 24 C.F.R. § 8.3 (1993); *id.* § 100.201(d). The FHAA and § 504 regulations include within their definitions of "being regarded as having such an impairment" an individual who:

- (1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by a recipient as constituting such a limitation;
- (2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of others towards such impairment; or
- (3) Has none of the impairments defined in . . . this section but is treated by a recipient as having such an impairment.

Id. § 8.3(d); *see also id.* § 100.201(d) (FHAA regulations).

152. *Cf.* H.R. REP. NO. 711, *supra* note 95, at 22, 1988 U.S.C.C.A.N. at 2183 (stating that people discriminated against by others who perceived them to be drug users, but who were not, were covered by Act).

well as section 504 of the Rehabilitation Act, which prohibits discriminatory actions against people who are perceived as handicapped.¹⁵³ Further, the FHAA prohibits a landlord from refusing to rent to someone whom he or she believes to be a former patient in a mental hospital or whom he or she believes has AIDS.¹⁵⁴ Despite the breadth of its coverage, the FHAA does not protect all people with handicaps. For example, the FHAA specifically excludes users of illegal drugs and people addicted to controlled substances from the definition of handicap.¹⁵⁵

2. *The "otherwise qualified" and "solely by reason of her or his handicap" requirements*

Before HUD issued its FHAA regulations, the Supreme Court in *Southeastern Community College v. Davis*¹⁵⁶ interpreted the phrase "otherwise qualified handicapped individual" in section 504 of the Rehabilitation Act.¹⁵⁷ According to the Court, "An otherwise qualified person is one who meets all of a program's requirements in spite of his handicap."¹⁵⁸ An individual may be "otherwise qualified" without meeting all of a program's requirements, however, if a refusal

153. See, e.g., *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261, 262-63 (5th Cir. 1984) (holding that § 504 covered students excluded from federally funded programs because they were perceived as handicapped although they were not).

154. See H.R. REP. NO. 711, *supra* note 95, at 18, 1988 U.S.C.C.A.N. at 2179.

155. 42 U.S.C. § 3602(h)(3) (1988). The legislative history makes clear that the FHAA protects people who are in the process of recovering from drug addiction by participating in a treatment or self-help program. H.R. REP. NO. 711, *supra* note 95, at 22, 1988 U.S.C.C.A.N. at 2183. The House Report states:

Just like any other person with a disability, such as cancer or tuberculosis, former drug-dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of status. Depriving such individuals of housing or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery.

Id.; see *United States v. Southern Management Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) (upholding recovering addict's right to damages as "handicapped persons" under FHAA). People who have not recovered from their drug addiction, however, are not protected by the FHAA. 42 U.S.C. § 3602(h)(3).

Unlike the FHAA, § 504 protects people with drug addictions, even if they are currently and illegally using drugs. 24 C.F.R. § 8.3 (1993). Only individuals whose "current alcohol or drug abuse would constitute a direct threat to property or the safety of others" lose protection under § 504. *Id.* Another difference between the FHAA and § 504 is the laws' treatment of transvestites. While the FHAA excludes transvestites from coverage, 42 U.S.C. § 3602 note (1988), § 504 does not. See 24 C.F.R. § 8.3 (defining applicable terms of § 504 and omitting exception for transvestites).

156. 442 U.S. 397 (1979).

157. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

158. *Id.*

to modify the program to accommodate the handicapped individual would be unreasonable and discriminatory.¹⁵⁹

The FHAA House Report and the FHAA regulations seek to ensure that people with disabilities will not be discriminated against in housing simply because they have a disability or because they exhibit certain behaviors. In defining its prohibitions, the FHAA makes clear that it does not require that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of others or would result in substantial physical damage to the property of others.¹⁶⁰ Congress, however, did not intend for this provision to create or even permit a presumption that individuals with disabilities generally pose a greater threat to the health or safety of others than do individuals without handicaps.¹⁶¹ On the contrary, it was added to prohibit discrimination against people whose unusual behavior may result from their illness and who pose no danger to others and to "allay fears of those who believe that the nondiscrimination provisions of this Act could force landlords and owners to rent or sell to persons whose tenancies could pose such a risk."¹⁶²

The House Report accompanying the FHAA also states that the purpose of the provision is to require the landlord or owner to establish that there is a nexus between the individual's tenancy and the asserted threat.¹⁶³ The nexus must be established by evidence of past acts or current conduct.¹⁶⁴ As the House Report indicates, "Generalized assumption, subjective fears, and speculation are insufficient to prove the requisite direct threat to others."¹⁶⁵

Case law has defined the scope of the FHAA and its prohibition against treating people with mental disabilities differently from other people in the context of housing. In *Cason v. Rochester Housing Authority*,¹⁶⁶ for example, the federal district court for the Western District of New York invalidated a local public housing authority's eligibility criteria as violative of the FHAA as well as section 504 of the

159. *Id.* at 412-13; see *Strathie v. Department of Transp.*, 716 F.2d 227, 231 (3d Cir. 1983) (holding that individual who did not satisfy hearing requirements for school bus driver's license was "otherwise qualified" under § 504 and that reasonable accommodation was therefore necessary).

160. 42 U.S.C. § 3604(f)(9) (1988).

161. H.R. REP. NO. 711, *supra* note 95, at 28, 1988 U.S.C.C.A.N. at 2189.

162. H.R. REP. NO. 711, *supra* note 95, at 28, 1988 U.S.C.C.A.N. at 2189.

163. H.R. REP. NO. 711, *supra* note 95, at 18, 1988 U.S.C.C.A.N. at 2179.

164. H.R. REP. NO. 711, *supra* note 95, at 18, 1988 U.S.C.C.A.N. at 2179.

165. H.R. REP. NO. 711, *supra* note 95, at 19, 1988 U.S.C.C.A.N. at 2190.

166. 748 F. Supp. 1002 (W.D.N.Y. 1990).

Rehabilitation Act.¹⁶⁷ The plaintiffs in *Cason* were applicants for low-income housing who had mental and physical disabilities.¹⁶⁸ They claimed that they met all of the eligibility requirements for housing despite their handicaps and that they were denied housing only because of an impermissible evaluation of their disabilities, including an arbitrary and subjective determination of their "ability to live independently."¹⁶⁹ The court in *Cason* agreed, finding that the Rochester Housing Authority's rules for tenancy had the effect of treating applicants with disabilities differently from "so-called able-bodied applicants."¹⁷⁰ Accordingly, the court found that the FHAA prohibited such inquiries into the nature and severity of a renter or buyer's disabilities.¹⁷¹ In enacting the FHAA, the court noted, Congress specifically considered the plight of people with mental illness.¹⁷² "In the case of a person with a mental illness . . . there must be objective evidence from the person's prior behavior that the person has committed overt acts which caused harm or which directly threatened harm."¹⁷³ Yet in this case, all that was presented was "unsubstantiated inferences."¹⁷⁴

167. *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1006-07 (W.D.N.Y. 1990).

168. *Id.* at 1004.

169. *Id.* The "Standards for Tenant Selection Criteria" provided for consideration of the following:

(a) an applicant's ability to live independently, or to live independently with minimal aid; (b) an applicant's past performance in meeting financial obligations, especially rent, unless good cause can be shown for non-payment of rent; (c) a record of disturbance of neighbors, destruction of property or of living habits at prior residences which may adversely affect the health [and safety of other tenants]; (d) a history of criminal activity involving crimes of physical violence to person or property, or other criminal acts which would adversely affect the health, safety, and welfare of other tenants.

Id.

Plaintiffs challenged only the "ability to live independently" provision of the Standards, which required:

[T]hat an applicant is able to perform those basic functions of adult living for and by him/her self. These activities include: ability to understand and to sign contracts and legal agreements, ability to perform basic housekeeping and personal care; ability to perform necessary daily activities [sic] ability to understand and conform to applicable standards of safety.

Id.

The court ruled in favor of plaintiffs, concluding that the standards unlawfully authorized detailed inquiries into the nature and scope of the applicant's disabling condition and may have required the applicant to release confidential medical information. *Id.* at 1011.

170. *Id.* at 1003.

171. *Id.* at 1001.

172. *Id.* at 1007.

173. *Id.* (quoting H.R. REP. NO. 711, *supra* note 95, at 29, 1988 U.S.C.C.A.N. at 2190).

174. *Id.* at 1008 (quoting H.R. REP. NO. 711, *supra* note 95, at 30, 1988 U.S.C.C.A.N. at 2191).

3. *Reasonable accommodation*

The FHAA, like section 504 of the Rehabilitation Act, provides that a person with a handicap is entitled to "reasonable accommodation."¹⁷⁵ The regulations implementing section 504 define "reasonable accommodation" as follows: "A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant with handicaps or employee with handicaps, unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."¹⁷⁶ The regulations provide examples of reasonable accommodation, but all of these examples are in the employment context, and none apply to housing.¹⁷⁷ Additionally, none of the examples involve people with mental, as opposed to physical, disabilities.¹⁷⁸ Although Congress intended the term "reasonable accommodation" to provide equality in all aspects of life for people with disabilities, it has been used primarily in the context of removing architectural barriers for people with physical disabilities.¹⁷⁹

The FHAA regulations, unlike the section 504 regulations, specifically address the meaning of accommodation in the context of housing. The FHAA regulations provide that "[i]t shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit, including public and common areas."¹⁸⁰ Yet, none of the examples contained in the FHAA regulations provide guidance for applying the accommodation requirement to people

175. 42 U.S.C. § 3604(f)(3)(B) (1988). In particular, the FHAA states that "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" is a discriminatory housing practice. *Id.*

176. 24 C.F.R. § 8.11(a) (1993). The phrase "reasonable accommodation" has been interpreted to mean "adjustments or modification of opportunities to permit handicapped people to participate fully in society." U.S. COMM'N ON CIVIL RIGHTS, *supra* note 106, at 103.

177. *See* 24 C.F.R. § 8.11(b).

178. *See id.* Section 8.11(b) provides that "reasonable accommodation may include: (1) making facilities used by employees accessible to and usable by individuals with handicaps; and (2) job restructuring, job relocation, part-time or modified work schedules, acquisitions or modification of equipment or devices, the provision of readers or interpreters and other similar actions." *Id.*

179. *See* Charles D. Goldman, *Architectural Barriers: A Perspective on Progress*, 5 W. NEW ENG. L. REV. 465, 478-79 (1983) (discussing requirement that federally funded buildings remove architectural barriers for people with handicaps).

180. 24 C.F.R. § 100.204(a) (1993). The examples provided in the regulations refer to a blind individual who seeks to have his seeing eye dog live with him despite a "no pets" policy and a mobility-impaired individual who seeks the parking space closest to his apartment unit. *Id.*

with mental disabilities.¹⁸¹ Accordingly, people with mental disabilities and their advocates will continue to be required to analogize their situations to those of people with physical handicaps in order to prevail on their claims of housing discrimination.

What type of accommodation is possible for people with mental disabilities? In the context of housing, the only qualification for admittance to housing should be the financial ability to pay rent. All other requirements, such as keeping an apartment clean or not having pets, should be subject to accommodation. Only those people who are unable to pay rent, personally or with support, should be considered not "otherwise qualified." Thus, a landlord may ask a person with mental retardation or a person labeled mentally ill for references regarding his or her ability to pay the rent, just as she or he may do for all prospective tenants.¹⁸² The landlord may also consider past rental history in his or her decision to accept or reject applicants for housing.¹⁸³ A landlord, however, is not permitted to infer that a recent hospitalization or history of institutionalization constitutes proof that an applicant will be unable to fulfill the obligations of the tenancy.¹⁸⁴ Indeed, any reason for rejecting an applicant with a mental disability other than an inability to pay rent is impermissible unless the applicant poses a substantial threat to the health and safety of others or to the physical integrity of the property.¹⁸⁵ In short, the FHAA regulations require an applicant to meet the "requirements of tenancy."¹⁸⁶

The FHAA regulations include a statement that reasonable accommodation does *not* require a housing provider to make available supportive services, such as counseling, medical, or social services, that fall outside the scope of the services that the housing provider offers to residents generally.¹⁸⁷ The nature of a handicap, however, may

181. 24 C.F.R. § 100.204(b) (1993); *see* 42 U.S.C. § 3604(3)(c)(i)-(iii) (1988).

182. *Cf.* 42 U.S.C. § 3605(c) (1988) (stating that FHAA does not "prohibit[] a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status"); 42 U.S.C. § 3602(h)(1) (1988) (including in definition of "handicap" "physical or mental impairment which substantially limits one or more of such person's major life activities").

183. *See* 42 U.S.C. § 3605(c) (providing for consideration of other factors not prohibited by FHAA in appraising prospective real estate transactions).

184. *See* H.R. REP. NO. 711, *supra* note 95, at 29-30, 1988 U.S.C.C.A.N. at 2190-91 (stating that fact of history of mental illness alone is insufficient for landlord to refuse to rent to prospective tenant).

185. *See* H.R. REP. NO. 711, *supra* note 95, at 30, 1988 U.S.C.C.A.N. at 2191 (restricting questions landlord may ask to applicant's ability to meet tenancy requirements); *see also* 24 C.F.R. § 100.202(c) (1993) (discussing permissible inquiries by landlords).

186. 24 C.F.R. § 100.202(c)(1).

187. 24 C.F.R. § 100.202(a).

require assistance of some kind. Applying standard rental leases to all residents without taking into consideration their individual needs may result in a refusal to accept almost all applicants with mental disabilities. In promulgating the regulations, HUD stated that although a landlord does not have to provide fundamentally different housing to disabled applicants, "[t]he test is whether with appropriate modifications, the applicant can live in the housing that the housing provider offers; not whether the applicant could benefit from some other type of housing that the housing provider does not offer."¹⁸⁸ The apparent purpose of this provision is to allay landlords' fears that the regulations will obligate them to provide additional services to tenants with disabilities that they do not already offer to tenants without disabilities. Neither section 504 nor the FHAA regulations, however, effectively describe the conduct prohibited by these antidiscrimination laws.¹⁸⁹

Several tenants with mental disabilities have successfully challenged lease provisions that failed to accommodate their needs. In *Majors v. Housing Authority*,¹⁹⁰ for example, a tenant challenged the "no pet" provision of her lease on the ground that reasonable accommodation under section 504 required the landlord to permit her to keep her dog because of her mental disability that required her to rely on the dog's companionship.¹⁹¹ The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.¹⁹² The appellate court held that except for her "psychological and emotional" dependency on her pet poodle, the plaintiff was "otherwise qualified" and that an exception to the no pet rule would be a "reasonable accommodation" as required by section 504.¹⁹³ Thus, like *Southeastern Community College v. Davis*,¹⁹⁴ in which the Supreme Court held that defendants were not required to act affirmatively to accommodate a plaintiff's handicap,¹⁹⁵ the court in *Majors* did not require the landlord to act. Rather, the landlord was required *not* to

188. 54 Fed. Reg. 3232, 3249 (1989) (discussing reasonable accommodation requirement of 24 C.F.R. § 100.204).

189. See 24 C.F.R. § 8.11 (1993); 24 C.F.R. § 100.204.

190. 652 F.2d 454 (5th Cir. 1981).

191. *Majors v. Housing Auth.*, 652 F.2d 454, 455 (5th Cir. 1981).

192. *Id.* at 454.

193. *Id.* at 458.

194. 442 U.S. 397 (1979).

195. See *Southeastern Community College v. Davis*, 442 U.S. 397, 413-14 (1979) (holding that § 504 did not require nursing school to adapt its teaching program to accommodate deaf student).

act; he was required not to enforce the no pet rule in the lease.¹⁹⁶ Accordingly, accommodating the plaintiff required no undue burden.¹⁹⁷

A Massachusetts case provides another example in which the reasonable accommodation requirement was interpreted to compel modification of the plaintiff's lease. In *Whittier Terrace Associates v. Hampshire*,¹⁹⁸ the state appellate court overturned the eviction of a tenant with a psychiatric disability that made her emotionally dependent on her cat.¹⁹⁹ The tenant was, in the court's view, an "ideal tenant" and, therefore, the landlord should permit her to keep her cat to enable her "to continue to function successfully on her own."²⁰⁰

A second category of reasonable accommodation cases involves challenges to evictions by people with disabilities whose conduct is at issue.²⁰¹ In *Peabody Properties, Inc. v. Jeffries*,²⁰² a housing court judge prevented the eviction of a deaf tenant labeled mentally ill who had allegedly taunted and harassed other tenants and the building's security guards by making gestures and noises, kicking over trash cans, kicking the walls in common areas, and opening windows in cold weather.²⁰³ The court concluded that although the tenant had engaged in disorderly and inappropriate behavior, she could not be evicted because the landlord had not attempted to accommodate her handicap.²⁰⁴ The court observed that although the tenant's behavior might justify the eviction of a non-disabled tenant, in this case, her disability excused her.²⁰⁵ The court reasoned that "serious disabili-

196. *Majors*, 652 F.2d at 458 (stating that exception to enforcement of no pet rule was "reasonable" accommodation and remanding for determination of material facts); see also *Evans v. Watson*, No. 91-904-FR, 1993 U.S. Dist. LEXIS 1420, at *5 (D. Or. Feb. 4, 1993) (stating that exception to no pet rule was "reasonable accommodation" for tenant with epilepsy).

197. *Majors*, 652 F.2d at 457-58.

198. 532 N.E.2d 712 (Mass. App. Ct. 1989).

199. *Whittier Terrace Assocs. v. Hampshire*, 532 N.E.2d 712, 713 (Mass. App. Ct. 1989).

200. *Id.*; see also *Schueft Inv. Co. v. Anderson*, 386 N.W.2d 249, 250 (Minn. Ct. App. 1986) (holding that landlord did not reasonably accommodate tenant who had injured her back when landlord insisted that tenant clean her apartment and remedy fire code violations and ordering landlord to grant grace period to allow tenant's recovery before requiring cleaning).

201. See, e.g., *Larry Realty Co. v. Matthews*, No. 89-CG-1211, at 2-3 (Circ. Ct. for Balt. County, MD, Jan. 30, 1990) (settlement agreement) (on file with *The American University Law Review*) (providing settlement agreement reached in eviction case between subsidized housing landlord and married couple with developmental disabilities in which staff and tenants of housing project agreed to participate in training to "increase the staff's understanding of and sensitivity to the needs and special problems of tenants with disabilities").

202. Memorandum of Findings, Rulings, Order for Entry of Judgment, and Injunctive Order, *Peabody Properties, Inc. v. Jeffries*, No. 88-SP-7613-S (Mass. Trial Ct., Hampden Div., Jan. 6, 1989).

203. *Id.* at 2, 8-9.

204. *Id.* at 7-9.

205. *Id.* at 7.

ties were involved in this case" and that "[t]hey cannot be ignored by the court, and anyone inclined to ignore them would do well to remember that tomorrow's accident or disease could leave any of us immobile, in darkness, or in the silent world of Dorothy Jeffries."²⁰⁶ Accordingly, the court held that Ms. Jeffries could not be evicted until steps were taken to accommodate her handicap.²⁰⁷ The court then ordered the parties to enter into a stipulation outlining the specific steps that the landlord would take to accommodate the tenant.²⁰⁸

In another case by the same judge who decided *Peabody Properties v. Jeffries*, the housing court prevented a landlord from evicting a tenant who suffered from schizophrenia and, during an episode resulting from her illness, had damaged the walls of her apartment unit.²⁰⁹ In *City Wide Associates v. Penfield*,²¹⁰ the housing court concluded that the tenant's disability caused her to engage in behavior that would likely justify the eviction of a non-disabled tenant.²¹¹ The court, however, found that the laws governing handicapped discrimination required a result other than eviction.²¹² The judge ordered the landlord to accommodate the tenant's handicap by discontinuing the eviction action.²¹³ The tenant in this case reported that she heard voices coming from inside the walls of her apartment and that she struck back at the voices by hitting the walls or by throwing objects at them.²¹⁴ The landlord argued that the tenant had caused substantial damage to the walls of her apartment requiring costly repair, and

206. *Id.*

207. *Id.*

208. *Id.* at 9. The court also found that although certain of Ms. Jeffries' actions were inappropriate and aggressive, they did not constitute a direct threat to others but rather were the result of her disability. *Id.* at 7-8. For example, her aggressive gestures were not threats to other tenants but an attempt to indicate that she was endangered by the smell of noxious fumes in her apartment. *Id.* at 4-5. The court did not specify how to accommodate the tenant, but it did offer several suggestions, such as requiring the landlord to investigate and correct, if necessary, the offensive odor in Ms. Jeffries' apartment and to provide training and interpreters for the security guards and other building personnel to assist them in communicating with Ms. Jeffries. *Id.* at 8 n.3.

The parties' subsequent stipulation heeded the court's suggestions. Stipulated Order, *Peabody Properties, Inc. v. Jeffries*, No. 88-SP-7613-S (Mass. Trial Ct., Hampden Div., Feb. 13, 1989). The landlord agreed to investigate the presence of any noxious fumes in the tenant's apartment, to train security guards to increase their understanding of and sensitivity to the needs and special problems of the tenant, to provide interpreter services, and to install and maintain visible indicators to alert the tenant of the arrival of guests as well as the event of a fire. *Id.* at 1-2.

209. *City Wide Assocs. v. Penfield*, 564 N.E.2d 1003, 1005 (Mass. 1991) (reviewing disposition of case at housing court level).

210. 564 N.E.2d 1003 (Mass. 1991).

211. *Penfield*, 564 N.E.2d at 1004-05.

212. *Id.* at 1005.

213. *Id.*

214. *Id.* at 1004.

that she had violated the clause in her lease in which she agreed not to "deface or otherwise damage the dwelling unit."²¹⁵ On appeal, the Supreme Judicial Court of Massachusetts held that reasonable accommodation was required under section 504 and that the housing court was correct in proposing as reasonable accommodation that the landlord provide the tenant with an opportunity to pursue counseling.²¹⁶ Applying the balancing test of the anticipated benefit to the tenant of continued subsidized housing against the burden on the owner, the appellate court prevented the tenant's eviction.²¹⁷ In the court's view, the cost of repair was small in relation to the rent over the course of the tenancy and the benefit of allowing Ms. Penfield the opportunity to continue to live independently.²¹⁸

Thus, the requirement of reasonable accommodation requires a fact-based, individualized assessment and plan, not adherence to an inflexible legal rule. While the requirement provides certain protections to people with mental disabilities, it does not guarantee equality nor require any affirmative action. Rather, it attempts to ensure that people with disabilities are provided equal opportunities based on their abilities. On the other hand, affirmative action would require some effort beyond nondiscrimination and reasonable accommodation to increase the participation of people with disabilities in society. Affirmative action for people with disabilities would focus on removing the present effects of past discrimination, rather than on merely eliminating only current discrimination.²¹⁹ Affirmative action attempts to provide remedial relief to the class of persons subject to discrimination.²²⁰ To date, no statute provides such affirmative action for people with disabilities.

215. *Id.*

216. *Id.* at 1005.

217. *Id.* at 1004-05 (holding that reasonable accommodation was required in light of superficial nature of damage and absence of impact on other tenants).

218. *Id.*; see also *Nelson v. Thornburgh*, 567 F. Supp. 369, 382 (E.D. Pa. 1983) (holding that reasonable accommodation includes provision of services to handicapped individual). *But see* *Housing Auth. v. Pappion*, 540 So. 2d 567, 569-70 (La. Ct. App. 1989) (holding that tenant considered paranoid schizophrenic was not "otherwise qualified" under § 504 for tenancy where tenant had threatened other residents and exhibited bizarre behavior).

219. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 363 (1977) (allowing state educational institutions to adopt admissions program that explicitly took race into account to improve position of class members who were disadvantaged by past discrimination).

220. See *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 444-79 (1986) (holding that title VII does not prohibit race-conscious relief as remedy for past discrimination); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 757-62 (1976) (providing retroactive seniority status to minority employees on showing of discriminatory promotion practices).

4. *Reasonable modification*

In addition to the reasonable accommodation requirement, the FHAA provides that a person with a disability has a right to make reasonable modifications in or on the premises after securing the owner's approval.²²¹ No similar provision appears in section 504 of the Rehabilitation Act. "Reasonable modification" differs from "reasonable accommodation" in that it is accomplished by the prospective homeowner or tenant rather than by the current owner. Under the reasonable modifications provision, the prospective owner or tenant may make changes at her or his own expense that the existing owner or landlord is not required to make.²²² If the tenant believes the landlord is unreasonably withholding consent, the tenant may file a complaint with HUD.²²³ No case has yet addressed the question of whether a landlord may shift the cost of an accommoda-

221. 42 U.S.C. § 3604(f)(3)(A) (1988). The regulations provide:

(a) It shall be unlawful for any person to refuse to permit, at the expense of a handicapped person, reasonable modifications of existing premises, occupied or to be occupied by a handicapped person, if the proposed modifications may be necessary to afford the handicapped person full enjoyment of the premises of a dwelling. 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 interiors of the premises to the condition that existed before the modification, reasonable wear and tear excepted. The landlord may not increase for handicapped person any customarily required security deposit. However, where it is necessary in order to ensure with reasonable certainty that funds will be available to pay for the restorations at the end of the tenancy, the landlord may negotiate as part of such a restoration agreement a provision requiring that the tenant pay into an interest bearing escrow account, over a reasonable period, a reasonable amount of money not to exceed the cost of the restorations. The interest in any such account shall accrue to the benefit of the tenant.

(b) A landlord may condition permission for a modification on the renter providing a reasonable description of the proposed modifications as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained.

24 C.F.R. § 100.203(a)-(b) (1993).

222. 42 U.S.C. § 3604(f)(3)(A) (1988). The regulations provide examples to clarify the "reasonable modifications" provision. 24 C.F.R. § 100.203(c) (1993). One example involves parents of a wheelchair-bound child who wish to widen the bathroom doorway of an apartment at their own expense. *Id.* It would be unlawful under the statute and the regulations for the landlord to refuse to permit the parents to make the modifications. *Id.* It also would be unlawful for the landlord to require the parents to pay for narrowing the doorway at the end of their tenancy because "a wider doorway will not interfere with the landlord's or the next tenant's use and enjoyment of the premises." *Id.*

223. 42 U.S.C. § 3610 (1988). Although a landlord may not prevent a tenant from making reasonable modifications, a landlord may require a tenant to make a deposit to be used to restore the premises to their original condition at the end of the tenancy. 24 C.F.R. § 100.203(a) (1993). The landlord, however, may not routinely require all people with disabilities to make deposits. Fair Housing Regulations, 54 Fed. Reg. 3231, 3248 (1989). In each case, the landlord must make an individual determination of the risk that the premises will not be restored, taking into account the duration of the lease, the tenant's credit and tenancy history, and the extent of the modifications. *Id.* at 3248.

tion to the tenant, claiming it is a modification rather than an accommodation.

B. *Discriminatory Actions Prohibited by the FHAA*

The Fair Housing Amendments Act prohibits discrimination against people with disabilities in all transactions related to housing. Specifically, the FHAA makes it unlawful 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."²²⁴ With one notable exception, the actions prohibited by the FHAA are similar to those prohibited by the original version of the law.²²⁵ The FHAA prohibits not only the actual denial of housing but also decisions that operate to deny people with disabilities equal access to housing, including the application of government-imposed restrictions on the ability to provide housing for people with mental disabilities.²²⁶ As the House Report makes clear:

Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or overprotective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.²²⁷

Thus, while not every decision that has a disproportionately adverse effect on people with mental disabilities violates the FHAA, zoning laws and other land-use decisions that exclude people with mental disabilities are illegal under the FHAA.²²⁸ Such prohibited acts include the application of special-use permit requirements, limitations

224. 42 U.S.C. § 3604(f)(1) (1988).

225. While both statutes make it unlawful to discriminate on the basis of race, color, religion, or national origin, the FHAA also adds sex, handicap, and familial status as protected categories. Compare Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 804-806, 82 Stat. 82, 82-84 with Fair Housing Amendments Act, 42 U.S.C. §§ 3604-3606 (1988) (prohibiting discriminatory acts related to real estate transactions specifying actions that discriminate and are proscribed).

226. See H.R. REP. NO. 711, *supra* note 95, at 24, 1988 U.S.C.C.A.N. at 2185.

227. H.R. REP. NO. 711, *supra* note 95, at 24, 1988 U.S.C.C.A.N. at 2185. From the language of the House Report, it appears that the zoning ordinance at issue in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-49 (1985), would be illegal under the FHAA because the Supreme Court found that the ordinance at issue in *Cleburne* was based on reasons that were either impermissible (e.g., neighbors' fears for safety) or unbelievable (e.g., concern for residents' safety). See *infra* notes 275-86 and accompanying text (discussing Court's reasoning in *Cleburne*).

228. See H.R. REP. NO. 711, *supra* note 95, at 24, 1988 U.S.C.C.A.N. at 2185.

on the number of residents in a home,²²⁹ and dispersal and density limits.²³⁰ Similarly, private restrictions such as restrictive covenants are no longer enforceable if they restrict the ability of people with disabilities to live where they wish.²³¹ For example, a zoning ordinance that required a special-use permit only for homes for people with mental retardation would be illegal because it would impose a requirement on people with disabilities and not on non-disabled people.²³²

Although HUD's regulations do not expressly address zoning laws, the legislative history of the FHAA makes clear that local laws are valid only if they are applied equally to all residents and do not discriminate on the basis of handicap.²³³ Further, because the FHAA prohibits discriminatory effects, not just intentional discrimination, regulations that appear neutral are unlawful if they have the effect of restricting housing opportunities for people with disabilities.²³⁴ The scope of the statute's coverage is made clear by the House Committee Report:

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community. Under [this law], land use and zoning cases are to be litigated in court by the Department of Justice. They would not go through the administrative process.²³⁵

229. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-9 (1973) (holding that local ordinance limiting number of unrelated residents living together to two was valid exercise of legislative power); see also *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1341-46 (D.N.J. 1991) (granting injunction to prevent city from enforcing restriction on number of residents in group home for recovering alcoholics and drug abusers because city ordinance violated FHAA).

230. See *United States v. Village of Marshall*, 787 F. Supp. 872, 876-78 (W.D. Wis. 1991) (addressing challenge to ordinance requiring 2500 feet between community living facilities).

231. See H.R. REP. NO. 711, *supra* note 95, at 24, 1988 U.S.C.C.A.N. at 2185 (stating that FHAA is "intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special-use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community").

232. See H.R. REP. NO. 711, *supra* note 95, at 24, 1988 U.S.C.C.A.N. at 2173 (stating that FHAA prohibits discriminatory use of land-use and health-and-safety restrictions, which "sometimes been used to restrict the ability of individuals with handicaps to live in communities").

233. See H.R. REP. NO. 711, *supra* note 95, at 24, 1988 U.S.C.C.A.N. at 2185.

234. See H.R. REP. NO. 711, *supra* note 95, at 24, 1988 U.S.C.C.A.N. at 2185 (discussing discriminatory enforcement of neutral health, safety, and land use laws and regulations and stating that such discrimination is unlawful).

235. H.R. REP. NO. 711, *supra* note 95, at 24, 1988 U.S.C.C.A.N. at 2185.

When the Department of Justice determines that a violation of the rights of people with disabilities may have occurred, the Attorney General may sue to challenge local zoning practices.²³⁶ To date, the Department has filed several complaints alleging violations of the FHAA in the enactment and application of restrictive zoning laws.²³⁷

While the power to zone can be a beneficial regulatory tool, states and localities may exercise that power only pursuant to a permissible governmental purpose.²³⁸ Often, zoning laws affecting the development or use of residences for people with mental disabilities have not withstood this test. Although zoning laws are designed to regulate only *how* land is used, local zoning authorities have seized upon local zoning laws as a way to regulate *who* uses the land, thereby excluding from residential communities people considered "different."²³⁹

236. 42 U.S.C. § 3614 (1988); see H.R. REP. NO. 711, *supra* note 95, at 24, 1988 U.S.C.C.A.N. at 2185 (stating that land use and zoning cases will not go through administrative process).

237. See, e.g., *United States v. City of Taylor*, 798 F. Supp. 442, 447-50 (E.D. Mich. 1992) (holding that city zoning ordinance prohibiting expansion of adult foster care home from six to 12 residents violated FHAA by placing demand on persons with disabilities that was not placed on other unrelated persons); *United States v. Borough of Audubon*, 797 F. Supp. 353, 359-62 (D.N.J. 1991) (holding that enforcement of zoning ordinance in effort to force closure of home for recovering alcoholics and drug users violated FHAA); *United States v. Village of Marshall*, 787 F. Supp. 872, 879 (W.D. Wis. 1991) (stating that failure to grant exception to statute requiring 2500 feet between community-based residential facilities violated "reasonable accommodation" provision of FHAA); *United States v. Puerto Rico*, 764 F. Supp. 220, 223-25 (D.P.R. 1991) (granting preliminary injunction prohibiting enforcement of zoning agency order requiring closure of nursing home for elderly handicapped persons); Consent Decree at 2-4, *United States v. City of Chicago Heights*, No. 89-C-4981 (N.D. Ill., Jan. 16, 1990) (enjoining city from discriminating against buyers or renters with disabilities and granting special-use permit to group home for adults with developmental disabilities); *United States v. Schuylkill Township*, No. 90-2165, 1990 WL 180980, at *11 (E.D. Pa. Nov. 16, 1990) (holding that amended zoning ordinance discriminated against people with disabilities in violation of FHAA); Consent Decree at 2, *Zimmer v. Moon Township*, No. 89-1139 (W.D. Pa. Mar. 19, 1989) (reciting consent decree under which township agreed to repeal ordinance requiring spacing of one mile between community-based residential facilities); cf. *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1341-46 (D.N.J. 1991) (deciding that group home for recovering substance abusers was entitled to preliminary injunction modifying restraints on number of residents allowed based on likelihood that state court would find restraints to be in violation of FHAA).

238. See ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 9.2, at 513 (2d ed. 1993) (discussing government's ability to restrict land use as exercise of "police power"); see also *Euclid v. Amber Realty Co.*, 272 U.S. 365, 368-94 (1926) (stating that zoning ordinances that are not unreasonable or arbitrary uses of police power are constitutional).

239. See, e.g., *Town of Huntington v. NAACP*, 488 U.S. 15, 18 (1988) (holding that zoning ordinance restricting location of low-income housing has discriminatorily disparate impact on minorities); *Metropolitan Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) (holding that denial of permit for construction of low-cost housing has greater effect on African-Americans than on whites and, therefore, violates Fair Housing Act), *cert. denied*, 434 U.S. 1025 (1978); *Williams v. Matthews Co.*, 499 F.2d 819, 828 (8th Cir.) (stating that policy of selling lots only to builders discriminates on basis of race), *cert. denied*, 419 U.S. 1021 (1974); *City of Taylor*, 798 F. Supp. at 447-50 (holding that zoning ordinance that restricts size of adult foster-care home discriminates against disabled persons); *Borough of Audubon*, 797 F. Supp. at 359-62 (holding that zoning ordinance prohibiting establishment of group home for substance abusers is discriminatory).

Today, federal and state laws reflect the public policy of providing people with disabilities with community care as an alternative to institutionalization.²⁴⁰ With the advent of deinstitutionalization, new concepts emerged regarding the type of housing best suited for people leaving state mental hospitals and mental retardation facilities.²⁴¹ For those who were able to live without constant medical services, group living arrangements or home care provided by family or friends was the desirable alternative to institutional living.²⁴² Group homes and other community residences housing people with the same disability have been viewed the best way to further the principle of normalization.²⁴³

This concept of group living has been considered consistent with the goal of normalization, which entails providing people with mental disabilities with "the patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of life of society."²⁴⁴ Further, as the principle of normalization was interpreted in the early years of deinstitutionalization, people with mental disabilities were to be provided with the opportunity to live together as a household under the supervision of surrogate parents and in a residential neighborhood.²⁴⁵

Together with educational and employment opportunities, community living would provide the individual with a disability with an opportunity to reach his or her potential and become a productive

240. Congress has enacted several laws that recognize the need for individual program planning, including the provision of services on a nondiscriminatory basis and in noninstitutional settings. See, e.g., Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. § 3026 (1988) (outlining plan for encouraging and assisting state agencies to serve elderly); Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6081-6082 (1988) (encouraging and funding states to set up community programs for disabled); Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1411-1413 (1988) (finding state special education services for handicapped children); Rehabilitation Act of 1973, 29 U.S.C. § 722 (1988) (providing for written, structured rehabilitation programs for handicapped).

241. See JUDITH B. KRAUSS & ANN T. SLAVINSKY, *THE CHRONICALLY ILL PSYCHIATRIC PATIENT AND THE COMMUNITY* 95-129 (1982) (discussing strategy for care of mentally ill within community).

242. See *COMMUNITY LIVING FOR PEOPLE WITH DEVELOPMENTAL AND PSYCHIATRIC DISABILITIES* 24 (John W. Jacobson et al. eds., 1992) (noting that studies indicate that community treatment is almost always as, or more, effective than hospital-based treatment).

243. See *id.* at 219 (discussing studies that measure effects of moving disabled into homelife settings); BRUCE L. BAKER ET AL., *AS CLOSE AS POSSIBLE: COMMUNITY RESIDENCES FOR RETARDED ADULTS* 39 (1977) (finding that small group homes effectively promote most principles important to normalization). But see STEVEN J. TAYLOR ET AL., *THE NONRESTRICTIVE ENVIRONMENT: ON COMMUNITY INTEGRATION FOR PEOPLE WITH THE MOST SEVERE DISABILITIES* 50 (1987) (suggesting that group homes should not put people with similar disabilities together and should be limited to four residents).

244. Bengt Nirje, *The Normalization Principle*, in *CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED* 231, 231 (1976).

245. *Id.* at 232, 236.

member of society.²⁴⁶ In fact, studies have proven the efficacy of providing services in the community and have shown that community care reduces hospitalizations.²⁴⁷ By most accounts, both treatment and quality of life were as good or better for persons receiving community care as for those receiving treatment in mental hospitals.²⁴⁸ Yet, when community care homes attempted to open in residential areas, neighbors feared that these homes would depress property values and destroy the residential character of their neighborhoods.²⁴⁹ Accordingly, with the assistance of local authorities, zoning laws were used to prevent people with mental disabilities from having such housing opportunities.²⁵⁰ Thus, despite the recognized public policies of deinstitutionalization and normalization, the development of community housing opportunities was and continues to be slow and has not kept pace with the demand for such housing.

Neighborhood opposition to housing for people with mental disabilities has been intense at times, and zoning laws have fueled the opposition's fire.²⁵¹ Zoning laws generally divide communities into three districts: residential, commercial, and mixed use.²⁵² Typically, a zoning ordinance sets forth land uses that are permissible, those that are not, and those for which special permission from a zoning

246. *Id.* at 237.

247. See BENJAMIN PASAMANICK ET AL., SCHIZOPHRENICS IN THE COMMUNITY 99-102 (1967); Fred R. Fenton et al., *A Comparative Trial of Home and Hospital Psychiatric Care*, 36 ARCHIVES GEN. PSYCHIATRY 1073, 1077 (1979); Leonard I. Stein & Mary A. Test, *Alternatives to Mental Hospital Treatment*, 37 ARCHIVES GEN. PSYCHIATRY 392, 392 (1980).

248. See Charles A. Keisler, *Mental Hospitals and Alternative Care: Noninstitutionalization as Potential Public Policy for Mental Patients*, 37 AM. PSYCHOL. 349, 349 (1982); Stein & Test, *supra* note 247, at 394-97.

Community care should not be confused with nursing home care. Nursing homes are institutions, not homes. Indeed, deinstitutionalization may better be described as transinstitutionalization because many people were simply transferred from one institution (such as a state mental hospital) to another (such as a nursing home). See JOHNSON, *supra* note 6, at 125-26 (stating that in years of deinstitutionalization, nursing home industry flourished). For example, in just five years, New York state nursing homes received a 450% return on their original investments. *Id.*

249. See *Group Homes Gaining Ground: Despite Opposition, Number of Proposals Expected to Rise*, NEWSDAY, Oct. 19, 1993, at 37 (explaining that fear of declining property values caused original opposition to group homes); *Viewpoints*, NEWSDAY, Oct. 4, 1993, at 40 (stating that neighbors' claim is that group home will bring drug addicts into neighborhood).

250. See Steven A. Adler, *Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning*, 6 VT. L. REV. 509, 509 n.5 (1981) (discussing exclusionary zoning that operates to bar group homes from communities).

251. See *'Family Values' in Wilmette*, CHI. TRIB., Sept. 14, 1988, at C20 (decrying residents' opposition to change in zoning laws that would allow small group homes); James Feron, N.Y. TIMES, July 2, 1978, at 3 (discussing opposition to group homes by residents of county with 17 homes for mentally disabled).

252. See ROGER BERNHARDT, REAL PROPERTY 370-74 (2d ed. 1981) (discussing creation of zoning districts).

authority is required.²⁵³ Some zoning boards, at the instigation of influential neighbors, have attempted to use zoning laws to exclude people with mental disabilities from residential communities.²⁵⁴ One common method of exclusion is to designate a group home as a boarding home, medical facility, school, or business, thereby restricting the home to operation in areas zoned for commercial and industrial use.²⁵⁵

Most courts have ruled in favor of group homes, concluding that a community's fears about declining property values or the danger of prospective residents of group homes are unfounded and not legitimate bases for denying a group home the necessary permit to open.²⁵⁶ Courts have also rejected claims by neighborhood associations or local governing authorities that they have a right to approve the site of a group home prior to its opening.²⁵⁷ Thus, although

253. See *id.* at 365-77 (reviewing types of land-use regulation).

254. See, e.g., Sylvia Adcock, *Group for Mentally Ill Sues Oyster Bay*, NEWSDAY, May 12, 1993, at 31 (noting that opposition of neighbors and town officials to group home for mentally disabled preceded lawsuit over zoning interpretation); Brian Cox, *Zoning for Group Homes Called Illegal*, CHI. TRIB., Apr. 26, 1993, at N3 (stating that zoning ordinance, which restricted location of group homes for mentally disabled and was passed because of neighbors' concerns, may be illegal); Peter Geller, *Painesville's Zoning Drops Group Homes*, CLEV. PLAIN DEALER, Aug. 3, 1993, at B1 (discussing elimination of special category in zoning code for group homes for disabled due to neighbors' fears).

255. See, e.g., *Civilians Care, Inc. v. Board of Adjustment*, 437 So. 2d 540, 543 (Ala. Civ. App. 1983) (deciding that group home for adults with developmental disabilities was boarding house rather than family dwelling); *Roundup Found., Inc. v. Board of Adjustment*, 626 P.2d 1154, 1156 (Colo. Ct. App. 1980) (holding that group home for children with mental retardation did not fit zoning ordinance definition of family and did not constitute "single unit dwelling"); *City of Westerville v. Kuehnert*, 553 N.E.2d 1085, 1090 (Ohio Ct. App. 1988) (holding that foster family home for people with disabilities was neither business nor institution but family home); *Markley v. Carlisle Zoning Hearing Bd.*, 527 A.2d 595, 596-99 (Pa. Commw. Ct. 1987) (discussing citizens groups' attempt to classify one apartment in group of eight used to house mentally disturbed individuals as "office" in order to exclude home from district zoned for apartments); *Allegheny Valley Sch. v. Zoning Hearing Bd.*, 517 A.2d 1385, 1389 (Pa. Commw. Ct. 1986) (holding that house for adults with mental retardation was not rooming house but rather charitable institution functioning permissibly as single household in residential district); *Culp v. City of Seattle*, 590 P.2d 1288, 1290 (Wash. Ct. App. 1979) (designating group home for 12 children with mental retardation as institution rather than family home).

256. See, e.g., *Costley v. Caromin House*, 313 N.W.2d 21, 28 (Minn. 1981) (ruling that fears of threat to safety or reduction of property value are not sufficient bases for injunction against group home); *Township of Washington v. Central Bergen Community Mental Health Ctr.*, 383 A.2d 1194, 1209 (N.J. Super. Ct. Law Div. 1978) (rejecting claim that group home for former mental patients should be disallowed because it presented threat to general safety as argument founded on unsubstantiated fears); *Horizon House Dev. Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992) (noting neighbors' objections to group home as "classic case of 'NIMBY,' not in my backyard" and permitting home to open). Not surprisingly, public zoning board hearings quickly become a public forum to air prejudice against people with mental disabilities. Such prejudice can take the form of hateful remarks and patronizing concerns about the potential residents' welfare.

257. See, e.g., *Glennon Heights, Inc. v. Central Bank & Trust*, 658 P.2d 872, 878 (Colo. 1983) (holding that neighboring property owners' rights were not violated by absence of notice and hearing before opening of group home); *Clark v. Manuel*, 463 So. 2d 1276, 1286 (La. 1985)

opponents of group homes may turn to the courts, state and federal courts alike have been unwilling to legitimate their fears and prejudices. The courts have held consistently that individual property owners have no right to determine who qualifies to be their neighbor or to exercise control over the use of property owned by others.

The second and more common method for excluding group homes from residential areas is to argue that community living arrangements for people with mental disabilities are not included within the definition of "family" in a zoning ordinance that restricts residences to "single family dwellings."²⁵⁸ "Family" is commonly defined in such ordinances as one person living alone or two or more persons related by blood, marriage, or adoption, or a group not exceeding a certain number of unrelated persons living as a single housekeeping unit.²⁵⁹ Some courts have interpreted such zoning ordinances literally, thereby excluding certain homes from residential areas.²⁶⁰

(ruling that state law forcing prospective group homes to receive prior approval of local governing authority violated Equal Protection Clause).

258. See, e.g., *Roundup Found.*, 626 P.2d at 1156 (stating that group home for mentally disabled children did not fit zoning ordinance definition of "family" and was not "single unit dwelling"); *Zoning Bd. v. T.A.R.C.*, 510 So. 2d 751, 753-54 (La. Ct. App. 1987) (holding that definition of "family" does not imply single living unit, but rather relation, and upholding injunction against group home); *Normal Life v. Jefferson Parish*, 483 So. 2d 1123, 1125 (La. Ct. App. 1986) (upholding injunction against community home for mentally retarded because residents of home were not "family" under zoning ordinance); *Verland C.L.A. v. Zoning Hearing Bd.*, 556 A.2d 4, 6 (Pa. Commw. Ct. 1989) (declaring that group residence for mentally retarded did not cater to residents related by blood, and therefore was not single-family residence as contemplated by zoning law); *Appeal of Lynch Community Homes, Inc.*, 554 A.2d 155, 157-58 (Pa. Commw. Ct. 1989) (denying group home's claim that it should not need special exemption in order to fall under ordinance's "group home" exception, and excluding home from ordinance's definition of "family"); *Culb*, 590 P.2d at 1290 (finding that zoning ordinance definition of "family" was not meant to include group home for retarded children where staff did not live in home).

259. See *Jefferson Parish*, 483 So. 2d at 1125 (quoting ordinance that required either relation by blood or marriage or four or fewer unrelated residents in order to satisfy "family requirement"); *Appeal of Lynch Community Homes*, 554 A.2d at 156 (restating ordinance's definition of "family," which required relation or limit of four unrelated individuals living as single housekeeping unit).

260. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-9 (1974). In *Village of Belle Terre*, the Supreme Court upheld the constitutionality of a local ordinance that narrowly defined "family" to include only persons related by blood or marriage. *Id.* The ordinance at issue defined "family" as follows:

[O]ne or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family.

Id. at 2. The owners of the home and three of the tenants challenged the ordinance on the grounds that it interfered with the right to travel, that the village residents had no right to dictate social homogeneity, that it restricted the lessees' privacy, and that it was of no concern to villagers whether the lessees were married or not. *Id.* at 7. The Court found each of these arguments unpersuasive and upheld the constitutionality of the local government's attempt to enforce the ordinance, concluding that the ordinance at issue was a legitimate land-use

Yet, under ordinances that define "family" in terms of a housekeeping unit, rather than by relation, courts have regarded groups of people with mental disabilities living together as families.²⁶¹

The Supreme Court originally defined the contours of permissible zoning legislation with respect to the definition of "family" in *Moore v. City of East Cleveland*.²⁶² In *Moore*, the Court held that certain restrictions resulting from the narrow definition of "family" were invalid and struck down, on due process grounds, a city ordinance that limited occupancy of a dwelling unit to members of a single family.²⁶³ The ordinance at issue in *Moore* contained an unusually

regulation. *Id.* at 7-9. As Justice Douglas wrote:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clear air make the area a sanctuary for people.

Id. at 9.

261. See *Metropolitan Bd. of Zoning Appeals v. Gunn*, 477 N.E.2d 289, 299 (Ind. Ct. App. 1985) (characterizing group home for developmentally disabled as stable and permanent household similar to any other home); *West Monroe v. Ouachita Ass'n for Retarded Children*, 402 So. 2d 259, 265-66 (La. Ct. App. 1981) (finding that group home for mentally retarded adults was single-family dwelling where residents had common interest and goals and would be supervised by couple residing in home); *Township of Washington v. Central Bergen Community Mental Health Ctr.*, 383 A.2d 1194, 1209 (N.J. Super. Ct. Law Div. 1978) (holding that group home for former mental patients in which residents jointly shared household tasks was sufficiently similar to traditional family to comply with ordinance); *Allegheny Valley Sch. v. Zoning Hearing Bd.*, 517 A.2d 1385, 1388-89 (Pa. Commw. Ct. 1986) (classifying group home for mentally retarded adults as charitable institution lawfully functioning as single household permitted within residential district); *Beres v. Hope Homes, Inc.*, 453 N.E.2d 1119, 1123 (Ohio Ct. App.) (holding that six mentally retarded women living together as housekeeping unit constituted family), *cert. denied*, 464 U.S. 937 (1982); *Philadelphia Ctr. for Developmental Servs., Inc. v. Zoning Hearing Bd.*, 492 A.2d 1191, 1192-93 (Pa. Commw. Ct. 1985) (holding that three people with mental retardation living together with resident staff member was family "doing their cooking on the premises" in compliance with ordinance); *Collins v. City of El Campo*, 684 S.W.2d 756, 760-62 (Tex. Ct. App. 1984) (holding that use of home by four men with mental retardation and their supervising parents was "for residential purposes" and therefore complied with ordinance).

Further, courts in some states have found that single-family land-use ordinances that require residents to be related are illegal under their state constitutions. See, e.g., *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440 (Cal. 1980) (holding that zoning ordinance that distinguished between related and unrelated groups living in home violated guarantees in California state constitution); *State v. Baker*, 405 A.2d 368, 369 (N.J. 1979) (striking down ordinance prohibiting more than four unrelated individuals from sharing house as improper means of furthering legitimate goal of preserving "family" character of neighborhood); *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1243-44 (N.Y. 1985) (finding that narrow definition of "family" violated due process clause of state constitution).

262. 431 U.S. 494 (1977).

263. *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977). The majority in *Moore* noted that the Court had "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment." *Id.* at 499 (citing *Cleveland Bd. of Educ. v. Lafleur*, 414 U.S. 632, 639-40 (1974)). The Court held that when the government intrudes on choices concerning family life, the Court must examine the importance of the stated governmental interests more carefully and the extent to which the regulation advances those interests. *Id.* (citing *Poe v. Ullman*, 367

restrictive definition of family, which included only certain, but not all, categories of individuals related by blood or marriage.²⁶⁴ The City of East Cleveland argued that the Court should uphold the ordinance under its earlier decision of *Village of Belle Terre v. Boraas*²⁶⁵ in which the Court upheld an ordinance defining "family" as persons related by blood, adoption, or marriage.²⁶⁶ The Court rejected this argument and struck down the ordinance after finding that it was only tenuously related to a legitimate governmental purpose.²⁶⁷

A review of zoning cases since *Moore v. City of East Cleveland* reveals a potpourri of decisions interpreting the definition of "family" in zoning ordinances. Although most of those decisions uphold the right for people with mental disabilities to live in group homes in areas zoned for single-family use,²⁶⁸ the fact that residents of a group home are not related by blood, marriage, or adoption continues to be the primary rationale offered to exclude people with mental disabilities from residential neighborhoods.²⁶⁹ Whether or

U.S. 497, 554 (1961)). Justice Brennan was joined by Justice Marshall in a concurring opinion that stated that the zoning power is not a license for local communities to arbitrarily restrict private areas of protected family life. *Id.* at 507 (Brennan, J., concurring). In a second concurring opinion, Justice Stevens provided an alternative rationale for invalidating the ordinance, unrelated to its effect on family life. Justice Stevens observed that the ordinance cut "deeply into a fundamental right normally associated with the ownership of residential property," namely that an owner may decide who may reside on his property. *Id.* at 520 (Stevens, J., concurring).

264. For example, under the ordinance in *Moore*, a household consisting of a grandmother, her son, and her two grandsons (who were first cousins) would be unlawful. *Id.* at 496-97.

265. 416 U.S. 1 (1974); see *supra* note 260 (discussing *Village of Belle Terre v. Boraas*).

266. *Moore*, 431 U.S. at 498.

267. *Id.* at 498-500. Accordingly, the plaintiff's conviction under the ordinance for sheltering an "illegal occupant," her own grandson, was invalidated. *Id.*

268. See, e.g., *Linn County v. City of Hiawatha*, 311 N.W.2d 95, 99-100 (Iowa 1981) (holding that group foster home for up to six disabled children that was staffed by trained married couple was single-family home rather than boarding house); *State v. Baker*, 405 A.2d 368, 372 (N.J. 1979) (stating that zoning ordinance that prohibited more than four unrelated individuals from sharing house was improper means of furthering legitimate goal); *Township of Washington v. Central Bergen Community Mental Health Ctr.*, 383 A.2d 1194, 1207-09 (N.J. Super. Ct. Law Div. 1978) (declaring that use of mental health center as transitional facility for former mental patients was permitted use under zoning ordinance); *Philadelphia Ctr. for Developmental Servs., Inc. v. Zoning Hearing Bd.*, 492 A.2d 1191, 1192-93 (Pa. Commw. Ct. 1985) (holding that community living arrangements for mentally retarded citizens fell within definition of "family" in zoning ordinance and did not require special exception to operate); *Collins v. City of El Campo*, 684 S.W.2d 756, 759-60 (Tex. Ct. App. 1984) (stating that home for four unrelated mentally retarded men and their "houseparents" constituted "family" within zoning ordinance definition).

269. See, e.g., *Roundup Found., Inc. v. Board of Adjustment*, 626 P.2d 1154, 1156 (Colo. Ct. App. 1981) (holding that group home for mentally disabled did not satisfy ordinance's definition of "family" and was not single-unit dwelling); *Zoning Bd. v. T.A.R.C.*, 510 So. 2d 751, 753 (La. Ct. App. 1987) (upholding injunction against group home that violated ordinance definition of "family" requiring relation between residents); *Appeal of Lynch Community Homes, Inc.*, 554 A.2d 155, 158 (Pa. Commw. Ct. 1989) (stating that group home does not fall

not a group home for people with mental disabilities may be permitted in a particular neighborhood has turned on the language of the particular ordinance and the characteristics of the particular home. In general, courts have limited the discretion of local zoning authorities in land-use decisions affecting people with mental disabilities.²⁷⁰

Most courts now permit group homes to be located in areas zoned for use by single-family dwellings because they have determined that group homes operate like any other homes in which a family resides.²⁷¹ Other courts have chosen to exempt group homes

within zoning ordinance definition of "family" and must obtain special exemption in order to operate).

270. For a comprehensive discussion of cases involving challenges to local zoning laws, see Kanter, *supra* note 23, at 516-17.

271. See, e.g., *City of Peekskill v. Rehabilitation Support Servs.*, 806 F. Supp. 1147, 1154-55 (S.D.N.Y. 1992) (denying city's request for injunction to prevent maintenance of transitional housing for people with mental disabilities because housing unit closely resembled family unit); *United States v. Taylor*, 798 F. Supp. 442, 449 (E.D. Mich. 1992) (holding that adult foster home for elderly people with disabilities was appropriate for single family zone despite operator's for-profit status); *Devereux Found. v. O'Donnell*, No. 89-6134, 1990 U.S. Dist. LEXIS 11831, at *3 (E.D. Pa. Sept. 6, 1990) (holding invalid zoning restriction that singled out group homes for discriminatory treatment); *Hessling v. City of Broomfield*, 563 P.2d 12, 13-14 (Colo. 1977) (holding that group composed of married couple and up to six handicapped children constituted "family" under ordinance); *Oliver v. Zoning Comm'n of Chester*, 326 A.2d 841, 845 (Conn. C.P. 1974) (classifying state-supervised group home for small number of retarded adults with two supervisory "parents" as "single housekeeping unit"); *City of College Park v. Flynn*, 282 S.E.2d 69, 71 (Ga. 1981) (determining that operation of group personal-care home for 12 mentally disabled persons was lawful when "family" was given generic definition); *Linn County v. City of Hiawatha*, 311 N.W.2d 95, 99-100 (Iowa 1981) (holding that group foster home for up to six disabled children, staffed by trained married couple, was single-family home rather than boarding house); *Hamner v. Best*, 656 S.W.2d 253, 255-56 (Ky. Ct. App. 1954) (stating that group home for children with emotional disturbances operated as single-family dwelling); *Thomas v. Evergreen Presbyterian Ministries, Inc.*, 535 So. 2d 1046, 1048 (La. Ct. App. 1988) (finding home for six or fewer retarded adults to be single-family dwelling); *Vienna Bend Subdiv. Homeowners Ass'n v. Manning*, 459 So. 2d 1345, 1349-50 (La. Ct. App. 1984) (holding that community home for five adults with mental retardation and two live-in house parents was residential and did not violate restrictive covenant); *Harbour v. Normal Life*, 454 So. 2d 1208, 1210-11 (La. Ct. App. 1984) (holding that for-profit group home was residence rather than business); *City of West Monroe v. Ouachita Ass'n for Retarded Children*, 402 So. 2d 259, 264-66 (La. Ct. App. 1981) (ruling that home for supervised mentally retarded adults with common goals, interests, and problems was single-family dwelling); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 25-26 (Minn. 1981) (holding that group home for six retarded adults and two resident supervisors was single-family unit even though operated for profit); *Township of Washington v. Central Bergen Community Health Ctr.*, 383 A.2d 1194, 1207-09 (N.J. 1978) (classifying mental health center used as transitional residence as sufficiently permanent to satisfy requirement of family); *Borough of Glassboro v. Vallorosi*, 529 A.2d 1028, 1032-34 (N.J. Super. Ct. Ch. Div.) (ruling that group home for college students was single family unit or functional equivalent within meaning of zoning ordinance), *aff'd*, 539 A.2d 1223, 1224 (N.J. Super. Ct. App. Div. 1988); *City of White Plains v. Ferriaoili*, 313 N.E.2d 756, 758-59 (N.Y. 1974) (holding that ordinance cannot restrict single-family dwellings by defining "family" to exclude stable home environments that are functional but not biological families); *Village of Freeport v. Association for Help of Retarded Children*, 406 N.Y.S.2d 221, 223 (Sup. Ct. 1977) (defining "community residence" as stable and permanent household consonant with lifestyle of family-oriented neighborhood); *Little Neck Community Ass'n v. Working Org.*, 383 N.Y.S.2d 364, 367

operating under state approval from local zoning restrictions altogether.²⁷² Such courts have reasoned that the home itself is an

(1976) (determining that group home reasonably resembling biological unitary family in size and appearance would not alter character of single-family residential zone); *White v. Board of Zoning Appeals*, 451 N.E.2d 756, 758-59 (Ohio 1983) (stating that use of family home to house two mentally retarded adults was valid accessory use in residential district); *Freedom Township Bd. of Zoning Appeals v. Portage County Bd. of Mental Retardation and Developmental Disabilities*, 476 N.E.2d 360, 364 (Ohio Ct. App. 1984) (finding evidence that occupants of group home would function as family unit in general sense in absence of specific definition of "family" in relevant ordinance); *Beres v. Hope Homes, Inc.*, 453 N.E.2d 1119, 1122-23 (Ohio Ct. App.) (allowing group home for mentally retarded persons in area zoned as single-family residential because home was private and occupants would act as family), *cert. denied*, 464 U.S. 937 (1982); *Jackson v. Williams*, 714 P.2d 1017, 1022 (Okla. 1985) (holding that occupants of group home constituted "family" even though association establishing home received remuneration); *Appeal of Miller*, 515 A.2d 904, 906-09 (Pa. 1984) (holding that boarding house that functioned like family unit would be permissible despite local ordinance's requirement of relationship by blood, marriage, or adoption, or maximum of two unrelated residents); *JALC Real Estate Corp. v. Zoning Hearing Bd.*, 522 A.2d 710, 712 (Pa. Commw. Ct. 1987) (ruling that four mentally retarded individuals living together constituted family for purposes of ordinance); *Mongony v. Bevilacqua*, 432 A.2d 661, 663-64 (R.I. 1981) (holding that residents of group house who shared household chores were family); *Collins v. City of El Campo*, 684 S.W.2d 756, 760 (Tex. Ct. App. 1984) (stating that retarded residents and their supervisors constituted "family" for purposes of ordinance). *But see Roundup Found.*, 626 P.2d at 1156-57 (rejecting claim that home for mentally retarded children satisfied ordinance requiring familial relationship because residents were not related by blood); *City of Kenner v. Normal Life*, 483 So. 2d 903, 906-08 (La. 1986) (upholding ordinance defining "single-family dwelling" as residence occupied by four or fewer people and finding that group home for six violated ordinance); *T.A.R.C.*, 510 So. 2d at 753 (defining "family" as "number of persons related by blood, marriage, or adoption," and finding that group home for six unrelated adults was not family); *Normal Life, Inc. v. Jefferson Parish*, 483 So. 2d 1123, 1125-26 (La. Ct. App. 1986) (stating that group home for six residents and two counselors was not family as defined by ordinance); *Clark v. Lafayette Ass'n for Retarded Citizens*, 461 So. 2d 323, 324-25 (La. Ct. App. 1984) (holding that group home for retarded that would be used for activities such as teaching daily living skills violated building restriction limiting dwellings to single-family use); *Carroll v. Washington Township Zoning Comm'n*, 408 N.E.2d 191, 193-94 (Ohio 1980) (holding that foster family was not family unit because residents were transient and home was substantially remodeled to accommodate children); *Verland C.L.A. v. Zoning Hearing Bd.*, 556 A.2d 4, 6 (Pa. Commw. Ct. 1989) (designating community living arrangement for three mentally handicapped people as group residence rather than single-family dwelling); *Appeal of Lynch Community Homes*, 554 A.2d at 158 (upholding restrictive definition of "family," which excluded group home for three unrelated retarded persons, upon finding that ordinance was closely related to governmental interests); *Appeal of Summers*, 551 A.2d 1134, 1136-37 (Pa. Commw. Ct. 1988) (rejecting argument that homes that temporarily accepted and housed retarded persons in "respite care" program qualified as "families"); *Wengert v. Zoning Bd.*, 414 A.2d 148, 149 (Pa. Commw. Ct. 1980) (affirming zoning board's decision that foster home of up to six children could not be permitted in single-family zone).

272. See, e.g., *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 322 So. 2d 571, 573 (Fla. Dist. Ct. App. 1975) (stating that when state agencies have been exempted from local zoning requirements, parties contracting to provide services for such agencies are also exempt from zoning requirements), *aff'd*, 332 So. 2d 610 (Fla. 1976); *Region 10 Client Management, Inc. v. Town of Hampstead*, 424 A.2d 207, 209 (N.H. 1980) (declaring that state interest in placing developmentally impaired persons in different locations across state could not be frustrated by local zoning ordinance); *Berger v. State*, 364 A.2d 993, 999-1000 (N.J. 1976) (finding that state law proscribing discrimination against children in group-home setting precluded enforcement of local zoning ordinance to contrary); *Abbott House v. Tarrytown*, 312 N.Y.S.2d 841, 842-43 (App. Div. 1970) (holding that zoning ordinance making group home unlawful was invalid as impediment to policy of State Board of Social Welfare); *Town of Southern Pines v. Mohr*, 226 S.E.2d 865, 867 (N.C. Ct. App. 1976) (noting that mental health

agent for the state and therefore enjoys the state's immunity from local regulation.²⁷³ Other courts have ruled that local ordinances limiting the location of homes for people with disabilities violate state policies favoring deinstitutionalization.²⁷⁴

In cases where a group home is not immune from local regulation, a zoning ordinance may require the home's operator to obtain a special-use permit. The Supreme Court addressed the permissibility of this requirement in *City of Cleburne v. Cleburne Living Center, Inc.*²⁷⁵ In *Cleburne*, the first Supreme Court case addressing the rights of

center received 90% of funding from state-administered "government function" and finding that center was therefore permissible under town zoning ordinance). *But see* *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Comm'n*, 314 S.E.2d 218, 223 (Ga.) (holding that in absence of clear intent by legislature, property held by non-profit corporations performing governmental services is not immune from local zoning regulations), *appeal dismissed*, 469 U.S. 802 (1984).

273. *See, e.g.*, *Campbell v. City Council of Lynn*, 586 N.E.2d 1009, 1011 (Mass. App. Ct. 1992) (holding group home jointly operated by state was exempt from zoning requirements as "educational" institution); *City of Temple Terrace*, 322 So. 2d at 571; *Livonia v. Department of Social Servs.*, 328 N.W.2d 1, 3 (Mich. Ct. App.) (noting that state-licensed adult foster care homes enjoyed exemption from local zoning laws), *aff'd in part*, 378 N.W.2d 402 (Mich. 1982); *Region 10 Client Management*, 424 A.2d at 207; *Berger*, 364 A.2d at 993; *Abbott House*, 312 N.Y.S.2d at 841; *Town of Southern Pines*, 226 S.E.2d at 865. *But see* *Macon Ass'n For Retarded Citizens*, 314 S.E.2d at 218.

274. *See, e.g.* *City of Torrance v. Transitional Living Ctrs.*, 638 P.2d 1304, 1306 (Cal. 1982) (noting that California law favors local mental treatment facilities and completely preempts local zoning regulations); *Brandon Township v. North-Oakland Residential Servs., Inc.*, 312 N.W.2d 238, 241 (Mich. Ct. App. 1981) (citing legislative policy that "persons in need of community residential care shall not be excluded by zoning"); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 27-28 (Minn. 1981) (noting that Minnesota legislation enacted to facilitate group home overrides local interest in zoning control); *Ellis v. Liddle*, 520 S.W.2d 644, 650-52 (Mo. Ct. App. 1975) (holding that state policy of public concern for juveniles required broad definition of "single family residence" that included group home for up to 10 neglected boys); *Region 10 Client Management*, 424 A.2d at 209 (finding state law supporting establishment of regional care facility for developmentally impaired persons could not be interfered with by local zoning restrictions); *Mental Health Ass'n v. City of Elizabeth*, 434 A.2d 688, 690-91 (N.J. Super. Ct. Law Div. 1981) (holding that local zoning law impermissibly interfered with state law providing for establishment of community residences for people with developmental disturbances); *Gedney Ass'n v. New York Dep't of Mental Hygiene*, 446 N.Y.S.2d 876, 879 (Sup. Ct. 1982) (determining that establishment of family-style environments for people with mental disabilities is acceptable governmental purpose and that local regulatory control may therefore be overridden); *Abbott House*, 312 N.Y.S.2d at 843 (holding that local zoning law thwarted New York policy favoring care of neglected and abandoned children); *Mongony v. Bevilacqua*, 432 A.2d 661, 664 (R.I. 1981) (noting that state law defined six or fewer people with mental retardation living together as "family" and overrode contrary municipal ordinance).

In *Region 10 Client Management, Inc. v. Town of Hampstead*, 424 A.2d 207 (N.H. 1980), the Supreme Court of New Hampshire concluded that although a proposed group home for eight adults with mental retardation was not a family for zoning purposes, the home nonetheless would be permitted in an area zoned exclusively for single-family residences because of a newly enacted statute that expressed the state policy of deinstitutionalizing people with developmental disabilities and relocating them in communities throughout the state. *Id.* at 209. As the court held, "The statutory purpose of placing developmentally impaired persons in various locations throughout the State carries out a State policy that cannot be frustrated by local zoning restrictions." *Id.*

275. 473 U.S. 432 (1985).

people with mental disabilities to live in residential communities, the Court reviewed the constitutionality of a city's denial of a special-use permit for a proposed group home for thirteen adults with mental retardation in a residential area zoned for multiple occupancy.²⁷⁶ In its opinion, the Supreme Court upheld the right of the group home to open.²⁷⁷ The Court, however, rejected the plaintiff's claim that heightened judicial scrutiny was appropriate because the rights of people with mental retardation were at stake.²⁷⁸ The Court

276. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985). The Cleburne Living Center, a not-for-profit Texas corporation, sought to lease a house in Cleburne for the purpose of operating the city's first group home for people with mental retardation. *Id.* The proposed home would provide an opportunity for 13 men and women to receive training in independent living skills by a staff who would be on duty 24 hours a day. *Id.* The residents of the home would have jobs in the community and their stay would be voluntary. *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 171, 173 (5th Cir. 1984), *aff'd in part and vacated in part*, 473 U.S. 432 (1985). The home would also be operated as a facility entitled to joint federal and state Medicaid reimbursement. *Cleburne*, 473 U.S. at 435 n.2. Accordingly, the home would be subject to extensive federal and state regulations governing its operation. *Id.* The home at issue was located in an area zoned for apartments. *Id.* at 435 n.3. According to the zoning ordinance, the following uses were permitted: apartment houses or multiple dwellings; boarding and lodging houses; fraternity or sorority houses and dormitories; apartment hotels; hospitals, sanitariums, nursing homes, or homes for convalescents or aged other than the insane or feeble-minded or alcoholics or drug addicts; private clubs or fraternal orders; and philanthropic or eleemosynary institutions other than penal institutions. *Id.* at 436 n.3. (citing § 8 of Cleburne zoning ordinance).

The city zoning board had classified the home as a "hospital for the feeble-minded," and informed the Cleburne Living Center that a special-use permit would be required under the city's zoning ordinance. *Id.* at 436. The Cleburne Living Center applied for a special-use permit, which was denied. The Center then filed a law suit challenging the constitutionality of the zoning ordinance on the grounds that it discriminated against people with mental retardation in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 437. The U.S. District Court for the Northern District of Texas upheld the ordinance, notwithstanding the court's finding that the city council's decision to deny the special-use permit "was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded." *Id.* The district court concluded that the Cleburne ordinance was rationally related to the city's legitimate interest in the safety and fears of residents in the adjoining neighborhood and the number of people to be housed in the home. *Id.*

On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed, concluding that the lower court had failed to apply the proper level of judicial scrutiny. *Cleburne*, 726 F.2d at 195-96. The court reasoned that people with mental retardation are entitled to a heightened level of scrutiny, given their history of "unfair and often grotesque mistreatment," an absence of political power, and the immutability of their condition. *Id.* at 197. Accordingly, the Fifth Circuit held that the city had failed to demonstrate that its ordinance was substantially related to a sufficiently important governmental objective. *Id.* at 200-02.

277. *Cleburne*, 473 U.S. at 435.

278. *Id.* In resolving challenges brought under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court applies one of three standards of review. The most stringent standard of review, known as "strict scrutiny," is applied in cases involving statutes that classify by race or national origin or that impinge upon a fundamental right protected by the Constitution. Under this test, the Court will uphold a legislative classification only if it is sufficiently narrow to serve compelling state interests. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (applying "most rigid scrutiny" and finding no overriding legislative concern in deciding miscegenation statute to be unconstitutional). The intermediate level of review, or "heightened scrutiny," is applied to legislative classifications based on gender and illegitimacy. Such classifications will be sustained where they are substantially related to important

declined to apply to "the mentally retarded a more exacting standard of judicial review than is normally accorded economic and social legislation."²⁷⁹ As the Court explained, "They are thus different, immutably so, in relevant respects, and the State's interest in dealing with and providing for them is plainly a legitimate one."²⁸⁰ The task of deciding how best to treat people with mental retardation, according to the Court, is "very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."²⁸¹

Although the Court refused to apply a heightened level of scrutiny, it nonetheless invalidated the zoning ordinance by using the rational basis test.²⁸² The city had argued that it denied the permit to protect the home's residents, not because of discriminatory motives.²⁸³ Yet, the Court observed that the city did not seek to protect other groups from the same risks.²⁸⁴ According to the majority, the city's ostensible justifications for denying the special-use permit were not rationally related to a legitimate governmental purpose; the city's purposes were, therefore, both impermissible and unworthy of belief.²⁸⁵ The Court found that "mere negative attitudes or fear, unsubstantiated by factors which are properly cognizable in a zoning

governmental interests. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (noting that gender-based discrimination is constitutionally permissible only when based on "important governmental objectives" achieved by means that are "substantially related to the achievement of those objectives"). The lowest level of review, the "rational basis test," applies to most economic and social legislation. Under this test, the Court will sustain the statute if the classification is rationally related to a legitimate governmental interest. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (describing application of rational basis test to areas not impinging on fundamental rights).

In *Cleburne*, the Fifth Circuit had held that mentally retarded people constitute a quasi-suspect class entitled to heightened judicial review under the Equal Protection Clause because of the segregation, political powerlessness, and prejudice to which they have been subjected. *Cleburne*, 726 F.2d at 197. The Supreme Court disagreed. *Cleburne*, 473 U.S. at 435.

279. *Cleburne*, 473 U.S. at 442.

280. *Id.* For a discussion of the Court's struggle with the meaning of the word "different" in *Cleburne*, see MINOW, *supra* note 24, at 102-07.

281. *Cleburne*, 473 U.S. at 443. To illustrate the complexity of the issue of whether people with mental retardation should be recognized as a quasi-suspect class entitled to heightened judicial review, the Court noted the existence of federal and state laws that prohibited discrimination against mentally retarded people and guaranteed their right to receive treatment, services, and habilitation in a setting that was "least restrictive of their personal liberty." *Id.* (citing Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6009(2) (1988)). Apparently, the mere existence of such laws "negates any claim that the mentally retarded are politically powerless." *Id.* at 445.

282. *Id.* at 450.

283. *Id.* at 449-50. The city expressed concern that the home was located on a 500-year flood plain and that, should a flood occur, the residents would be endangered. *Id.* at 449. The city also expressed concern that the home was too small for the number of proposed residents. *Id.*

284. *Id.* at 449-50.

285. *Id.* at 448-50.

proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment homes, multiple dwellings and the like."²⁸⁶ Both before and after the Supreme Court decision in *Cleburne*, several lower courts have upheld the right to operate homes for people with disabilities, on constitutional grounds, in the face of restrictive local laws.²⁸⁷

In addition to zoning cases, such as *Cleburne*, that pit group home operators against local zoning authorities, other cases have involved individuals who own property near the site of a prospective group home.²⁸⁸ Such lawsuits by neighbors of prospective group homes often involve restrictive covenants running with the land. In the vast majority of such cases, courts have allowed the group homes to open

286. *Id.* at 448.

287. *See* *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 537 (S.D. Fla. 1987) (declaring unconstitutional several provisions of ordinance regulating "adult congregate living facilities"). In *Burstyn*, the operators of such a facility were denied a special-use permit because the proposed homes exceeded four stories and were located on streets excluded under the ordinance. *Id.* at 530-31. The City of Miami Beach had claimed that it was regulating housing for senior citizens in this manner not because of any animus against elderly people, but because it wanted to promote commercial development in an area now occupied by elderly citizens. *Id.* at 531. The court held that the city's zoning ordinance was unconstitutional under *Cleburne* because it treated residences for disabled people differently from those for other groups for no rational reason. *Id.* at 537.

Similarly, in *Sullivan v. City of Pittsburgh*, 811 F.2d 171 (3d Cir.), *cert. denied*, 484 U.S. 849 (1987), the city tried to close down an alcoholism treatment center by refusing to issue the required conditional-use permits. *Id.* at 172-73. The city argued that it made the decision on the basis of community opposition to the center. *Id.* at 173-74. The federal court of appeals upheld the district court's preliminary injunction against the city on constitutional and statutory grounds. *Id.* at 181-85. The appellate court's decision was based on the lower court's finding that the opposition was motivated by prejudice against handicapped people and that the city "took its essentially unjustified action in an atmosphere charged with hostility toward a minority group." *Id.* at 185; *see also* *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1355 (6th Cir. 1992) (declaring zoning ordinance requiring special-use permits as unconstitutional as applied to group home for prisoners); *Horizon House Developmental Servs. v. Township of Upper Southampton*, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992) (finding that town ordinance requiring 1000 foot spacing between group homes violated FHAA and U.S. Constitution).

In *J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983), the Ninth Circuit held that people with mental illness are entitled to a higher level of review and that the local zoning authority prohibiting mentally ill individuals from living together in a group home failed such enhanced scrutiny. *Id.* at 1131-32. In *People v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983), a group of neighbors in a New York City suburb heard that a group home was planned and bought the property on which it was to be located. *Id.* at 37. The state sued the property owners on the grounds that their action violated the civil rights of the prospective residents as well as the New York human rights law. *Id.* The Second Circuit held in favor of the state. *Id.* at 40-42.

288. *See, e.g.*, *United States v. Scott*, 788 F. Supp. 1555, 1559-61 (D. Kan. 1992) (upholding motion for summary judgment against residents who interfered with neighbors' sale of their home to operator of group home); *Casa Marie, Inc. v. Superior Court*, 752 F. Supp. 1152, 1171-72 (D.P.R. 1990) (relying on FHAA to enjoin enforcement of state court injunction ordering owners of home for handicapped elderly people to close because of restrictive covenant), *vacated*, 988 F.2d 252 (1st Cir. 1993); *Rhodes v. Palmetto Pathway Homes, Inc.*, 400 S.E.2d 484, 486 (S.C. 1991) (holding that enforcement of restrictive covenant against group home for mentally impaired adults would violate FHAA).

despite a covenant limiting the use of property to single-family homes.²⁸⁹ Because nonprofit corporations would operate the homes and the residents would function like any other household, most courts have held that such homes fall within the language of the restrictive covenant.²⁹⁰

The Department of Justice has sued both individual homeowners²⁹¹ and management companies of large apartment complexes²⁹² for violating the FHAA. Private parties also have filed FHAA complaints against municipalities and other private parties.²⁹³ While

289. See, e.g., *Casa Marie*, 752 F. Supp. at 1171-72 (enjoining state court from closing group home allegedly violative of restrictive covenant); *Craig v. Bossenberg*, 351 N.W.2d 596, 601 (Mich. Ct. App. 1984) (refusing to enforce restrictive covenant to bar group home).

290. See *Clark v. Manuel*, 463 So. 2d 1276, 1279 (La. 1985) (noting that training given to mentally retarded adults in group home was analogous to parents' role in raising children and that group home thus served residential purpose required by restrictive covenant); *Vienna Bend Subdiv. Homeowners Ass'n v. Manning*, 459 So. 2d 1345, 1349-51 (La. Ct. App. 1984) (finding that group home for mentally retarded adults qualified as "residential purpose" because training and work activities were conducted elsewhere); *Concord Estates Homeowners Ass'n v. Special Children's Found.*, 459 So. 2d 1242, 1245 (La. Ct. App. 1984) (rejecting argument that group home for mentally retarded was not single-family residence); *Harbour v. Normal Life*, 454 So. 2d 1208, 1210-11 (La. Ct. App. 1984) (holding that activities conducted at home for handicapped persons were not business and did not violate building restrictions); *Mauv v. Community Living for the Handicapped, Inc.*, 813 S.W. 2d 90, 92 (Mo. Ct. App. 1991) (holding that residents of group home would function as family, dependent upon each other to carry out home's daily operation and routines); *Knudston v. Trainor*, 345 N.W.2d 4, 6-8 (Neb. 1984) (rejecting argument that group home was commercial enterprise that violated restrictive covenant); *Gregory v. State*, 495 A.2d 997, 1002 (R.I. 1985) (holding that group home residents' disabilities did not change nature of dwelling from residential to commercial); *Collins v. City of El Campo*, 684 S.W.2d 756, 761-62 (Tex. Ct. App. 1984) (determining that group home did not violate architectural or uses provisions of single-family dwelling restrictive covenant); see also *Craig*, 351 N.W.2d at 601 (concluding that home did not fit language of restrictive covenant, but upholding right of home to open by declaring covenant void for violating public policy). *But cf. Omega Corp. v. Malloy*, 319 S.E.2d 728, 732 (Va. 1984) (finding that term "single family dwelling" in restrictive covenant did not contemplate group home and that zoning ordinance could not release home from restrictive covenant).

291. See, e.g., *United States v. Scott*, 788 F. Supp. 1555, 1562-63 (D. Kan. 1992) (ruling that neighbors who sought court enforcement of restrictive covenant to prevent homeowners from selling their houses to group-home operator violated FHAA).

292. See, e.g., *United States v. Southern Management Corp.*, 955 F.2d 914, 923 (4th Cir. 1992) (holding that manager of apartment complex violated FHAA by refusing to rent to provider of rehabilitative services for recovering alcoholics and drug addicts); *Complaint at 2-3, United States v. Sigal/Zuckerman Management, Inc.*, No. 90-0059A (E.D. Va. Jan. 18, 1990) (alleging that management company refused to make reasonable accommodation for persons with disabilities, including recovering substance abusers); see also *Complaint at 1-3, United States v. Grady Management, Inc.*, No. 90-0060-A (E.D. Va., Jan. 18, 1990) (challenging management company's refusal to rent to Community Services Board for use as residential treatment center for recovering drug and alcohol abusers); *Complaint at 6, United States v. Park Forest, Ltd.*, No. 89-0630 (S.D. Iowa, Sept. 5, 1989) (involving suit to prevent eviction of tenant with physical handicap).

293. See, e.g., *Evans v. Watson*, No. 91-904, 1992 U.S. Dist. LEXIS 10808, at *4-*5 (D. Or. July 16, 1992) (compelling landlord to facilitate disabled tenant's inspection of other tenants' units to determine whether landlord was violating FHAA); *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 734 (E.D. Va. 1992) (denying city's motion for summary judgment in action alleging violation of FHAA by use of police power to interfere with housing of persons with disabilities); *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1007-09 (W.D.N.Y. 1990)

complaints by private parties alleging discriminatory practices generally have succeeded,²⁹⁴ some recent decisions have questioned how far the FHAA may reach into the zoning province of local governments.²⁹⁵

C. State Zoning Preemption Statutes

Today every state has either enabling legislation or state constitutional provisions granting to its municipalities the power to zone.²⁹⁶ These provisions normally impose few substantive guidelines. As local zoning laws began to be used to exclude group homes for people with mental disabilities from residential communities, however, state legislatures reacted by passing laws that preempted local zoning laws.²⁹⁷ These state laws preempt local ordinances by prohibiting

(determining that inquiries into housing applicants' ability to live independently violated HUD regulation and FHAA).

294. See, e.g., *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43, 47-48 (6th Cir. 1992) (finding that city ordinance imposing special safety requirements on all group homes without individualizing requirements to take into account factors particular to people with different types of disabilities violated FHAA); *Horizon Hous. Dev. Servs. v. Township of Upper Southampton*, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992); *Easter Seals Soc'y v. Township of N. Bergen*, 798 F. Supp. 228, 238 (D.N.J. 1992) (granting plaintiff's application for preliminary injunction requiring town to issue requisite construction permit); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 465 (D.N.J. 1992) (granting preliminary injunction prohibiting town from enforcing zoning ordinance against plaintiff halfway house); *Parish of Jefferson v. Allied Health Care Inc.*, No. 91-1199, 1992 U.S. Dist. LEXIS 9124, at *21-*23 (E.D. La. June 10, 1992) (holding that zoning ordinance limiting number of unrelated persons who could reside in single-family residence violated FHAA); *Stewart B. McKinney Found. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1221-22 (D. Conn. 1992) (granting preliminary injunction prohibiting town from requiring special exception for use of two-family residence as home for HIV-infected persons); *Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95, 102-06 (D.P.R. 1990) (finding that agency denial of special-use permit for AIDS hospice violated FHAA); *Baxter v. City of Belleville*, 720 F. Supp. 720, 734-35 (S.D. Ill. 1989) (holding that denial of special-use permit for residence for AIDS-infected persons violated FHAA).

295. See, e.g., *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992); *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991).

In *Familystyle of St. Paul, Inc. v. City of St. Paul*, the U.S. Court of Appeals for the Seventh Circuit held that municipal dispersal requirements for group homes did not violate the FHAA. *Familystyle*, 923 F.2d at 93-94. The court determined that the dispersal requirements reflected the congressional goal of deinstitutionalization and ensured that group homes were located in the community and not in neighborhoods made up exclusively of other group homes. *Id.*

Similarly, in *Elliott v. City of Athens*, the Eleventh Circuit upheld a city ordinance that prohibited more than four unrelated individuals from living together in a single residence. *Elliott*, 960 F.2d at 982-83. The court in *Elliott* determined that the maximum occupancy limitation exemption (§ 3607 of the FHAA) applied, but that the city's use of the ordinance to prevent overcrowding was nondiscriminatory. *Id.*

296. ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* §§ 2.01-29 (3d ed. 1986 & Supp. 1993) (discussing various ways states have conferred zoning power on municipalities, including enabling acts, constitutional provisions, municipal charters, and home rule).

297. See Salsich, *supra* note 2, at 424 (noting that over half of states have enacted statutes easing zoning restrictions for group homes).

the application of restrictive zoning laws to group homes for people with mental disabilities.²⁹⁸

In 1977, when the first national survey of state zoning laws was conducted, only five states—California, Colorado, Minnesota, Montana, and New Jersey—had state statutes preempting local zoning laws.²⁹⁹ Today most states have statutes that preempt local zoning ordinances by restricting localities from using their zoning laws to prevent people with mental disabilities from living in residential neighborhoods.³⁰⁰ If this trend continues, virtually every state will soon have legislation promoting the acceptance of group homes in local communities.³⁰¹

The state preemption statutes supersede actions by local authorities by revoking or curtailing their power to exclude group homes from single-family-residence areas.³⁰² Generally, these laws have had the effect of opening up desirable neighborhoods to people with mental disabilities.

The state zoning laws vary in their approach.³⁰³ Some clearly

298. See *infra* notes 300-11 and accompanying text.

299. MARION K. BATES, WISCONSIN PLANNING COUNCIL, STATE ZONING STATUTES 2 n.* (1977) (on file with *The American University Law Review*).

300. See Salsich, *supra* note 2, at 424.

301. Thirteen states have no state zoning legislation: Alaska, Georgia, Illinois, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, Oregon, Pennsylvania, South Dakota, Washington, and Wyoming. Although these states do not have zoning preemption laws, they may not need such laws to promote the establishment of community living for people with mental disabilities. In Massachusetts and New Hampshire, for example, legislation may be unnecessary because court decisions explicitly protect the right of people with mental disabilities to locate in residential areas. See, e.g., *Harbor Sch. v. Board of Appeals*, 366 N.E.2d 764, 768-69 (Mass. App. Ct. 1977) (holding that community residences are educational in purpose and therefore immune from local zoning laws); *Region 10 Client Management, Inc. v. Town of Hampstead*, 424 A.2d 207, 209 (N.H. 1980) (finding that state policy favoring deinstitutionalization overrides local zoning ordinances).

In Pennsylvania, legislative declarations accomplish the same purpose. See PA. STAT. ANN. tit. 43, § 955(h)(1) (1991 & Supp. 1993) (outlawing discrimination against handicapped or disabled in housing accommodations). State zoning laws in Maine and Oregon were repealed in 1989. ME. REV. STAT. ANN. tit. 30, § 4962-A (West Supp. 1993) (repealed 1989); OR. REV. STAT. § 443.600 (1991) (reopened 1989) and Illinois continues to consider legislation. Kentucky has considered zoning legislation during the 1988 and 1989 sessions; although committee hearings were held, no legislation passed. In Alaska, Mississippi, Washington, Wyoming, and South Dakota, no significant efforts to enact state zoning legislation have been undertaken within the past decade.

302. See MICH. STAT. ANN. § 5.2963(16a) (Callaghan 1989) (declaring group home of six or fewer patients permitted use in all residential zones); N.Y. MENTAL HYG. LAW § 41.34(f) (McKinney 1988) (deeming group home as family unit for purposes of local laws).

303. The state preemption laws also vary with regard to the disabilities they cover. Although virtually every state law covers group homes for people with developmental disabilities, only a portion cover people with mental illness. See, e.g., CONN. GEN. STAT. ANN. § 8-3e (West 1989 & Supp. 1993) (barring different zoning treatment for homes housing fewer than six mentally retarded persons); N.Y. MENTAL HYG. LAW § 41.34(a)(1) (McKinney 1988 & Supp. 1994) (including mentally disabled in definition of community residential facility for disabled); N.C. GEN. STAT. § 168-21 (1992) (defining "handicapped person" for group home purposes as

preempt local zoning laws; others allow a municipality to retain control over the zoning process for such homes. For example, several state statutes permit local authorities to enforce conditions not specified in the state zoning law, but only those conditions related to health and safety regulations necessary to protect residents of the group home.³⁰⁴ In other states, local authorities are permitted to require that group homes conform to standards regarding safety or even compatibility with surrounding land uses.³⁰⁵ State statutes may also provide that small state-licensed homes are to be considered a residential use of property and permitted in all residential zones, including those zoned for single-family use.³⁰⁶ Several state statutes simply designate residents of group homes as families to avoid any problems locating group homes in areas zoned for single-family use. In Rhode Island, for example, small family-like settings may be established for people with mental retardation or mental illness in any community.³⁰⁷

Most state laws also require state licensing for group homes.³⁰⁸ The rationale for such requirements is that the residents of the homes are entitled to assurances that certain safety and health standards are met and maintained. Some states use broad definitions of health and safety, which can include concerns regarding the location of particular homes and require that group homes be dispersed throughout the residential sections of a municipality or that a license for a group home be withheld if the proposed home would result in an overconcentration of group homes in one area.³⁰⁹ In fact, most

including mentally retarded).

304. See, e.g., ARIZ. REV. STAT. ANN. § 36-582.6 (1993); MICH. COMP. LAWS § 125.216a(2) (1992); MINN. STAT. § 245.812(4) (1982 & Supp. 1993); see also *City of Livonia v. Department of Social Servs.*, 378 N.W.2d 402, 418 (Mich. 1985) (upholding state statute prohibiting municipalities from applying local construction and fire codes that effectively excluded group homes from residential neighborhoods); *Northwest Residence, Inc. v. City of Brooklyn Ctr.*, 352 N.W.2d 764, 773-74 (Minn. Ct. App. 1984) (permitting municipalities to impose health and safety standards appropriate to particular group home site).

305. See, e.g., COLO. REV. STAT. § 30-28-115(2)(c) (1986); LA. REV. STAT. ANN. § 28:478 (West 1993); MO. REV. STAT. § 13.40 (7)-(8) (1983 & Supp. 1993).

306. See, e.g., DEL. CODE ANN. tit. 22, § 309(a) (1987); IOWA CODE § 335.25(3) (1983 & Supp. 1993); N.M. STAT. ANN. § 3-21-1(C) (Michie 1985 & Supp. 1993); TENN. CODE ANN. § 13-24-102 (1992).

307. See R.I. GEN. LAWS § 45-24-22 (1988).

308. See, e.g., COLO. REV. STAT. § 30-28-115(2)(a) (1986); IND. CODE § 16-28-2-1 (1993); see also Salsich, *supra* note 2, at 426 (noting that virtually all states with group home statutes require licensing).

309. In New York, the only legitimate basis for neighborhood objection to homes for people with mental disabilities is overconcentration and the resulting effects on the character of the neighborhood. See N.Y. MENTAL HYG. LAW § 41.34(c) (McKinney 1988 & Supp. 1994) (providing for hearing if community claims site selected would result in overconcentration of group care facilities); see also *Town of De Witt v. Surles*, 591 N.Y.S.2d 655, 655-56 (App. Div. 1992) (finding no overconcentration and upholding right of 10 former patients of psychiatric hospital to live

state zoning preemption laws now require that group homes not be located within a certain distance of one another.³¹⁰ These requirements, known as dispersal requirements, vary in their approach. States impose different space requirements, with 300 feet apparently being the smallest distance.³¹¹

Several state statutes also contain density limits that limit the number of people with mental disabilities that can reside in all group homes within a municipality to a certain number of people or a percentage of the municipality's total population.³¹² Unlike dispersal requirements, density limits restrict the number of people with mental disabilities who can live in the group homes rather than the number of homes themselves.³¹³ Other state statutes prohibit local authorities from applying local zoning laws but include within the state law itself complicated siting and dispersal procedures.³¹⁴ Further, some states expressly prohibit unreasonable discrimination in zoning restrictions on group homes.³¹⁵ Even in the absence of

in home in residential neighborhood); *City of Kingston v. Surlis*, 582 N.Y.S.2d 844, 846 (App. Div. 1992) (rejecting claim that community residence for 12 adults with psychiatric disabilities would create saturation of such residences and alter neighborhood's character); *City of Beacon v. Surlis*, 558 N.Y.S.2d 196, 197 (App. Div. 1990) (finding home for 12 people with mental disabilities would not cause overconcentration); *Bedford v. New York*, 533 N.Y.S. 2d 994, 995 (App. Div. 1988) (finding proposed facility would not create oversaturation). Other states have also enacted zoning legislation regarding overconcentration. *See, e.g.*, CONN. GEN. STAT. ANN. § 8-3f (West 1989); DEL. CODE ANN. tit. 22, § 309(c) (1987); N.J. STAT. ANN. § 40:55D-66.1 (West 1991); N.C. GEN. STAT. § 168-22 (1992).

310. *See, e.g.*, CONN. GEN. STAT. ANN. § 8-3f (West 1989) (barring establishment of group homes within 1000 feet of existing group homes without local zoning approval); DEL. CODE ANN. tit. 22, § 309(c) (1987) (providing that new home not be established within 5000 feet of existing facility).

311. *See* ARK. CODE ANN. § 20-48-606(a)(1)(c) (Michie 1991).

312. *See, e.g.*, N.J. STAT. ANN. § 40:55D-66.1 (West 1991) (allowing municipality to deny permits for group homes if existing residents of group homes exceed 0.5% of population).

313. Density limits are among the most irrational legislative reactions to the establishment of homes for people with mental disabilities because they do not accomplish their purported goal of limiting the number of people with disabilities who live in certain neighborhoods. Such limits are vastly underinclusive because all people with mental disabilities do not live in group homes. Many people with mental disabilities may reside with their families or in their own home in the same neighborhood in which a group home is located. Yet these individuals would not be counted toward the density limit. Similarly, density limits are overinclusive because not all residents of group homes are mentally disabled. Some people who reside in group homes are staff; yet the state laws that include density limits make no provision for excluding staff of group homes from their density calculations.

314. *See, e.g.*, N.Y. MENTAL HYG. LAW § 41.34(c) (McKinney 1988 & Supp. 1994) (providing for hearing if community feels site selected by state would result in overconcentration of group care facilities); CONN. GEN. STAT. ANN. § 8-3F (West 1989) (prohibiting siting of group homes within 1000 feet of each other without approval of local zoning body); MICH. COMP. LAWS § 125.216a (1992) (requiring state licensing agencies to notify towns where group homes are to be located at least 45 days before licensing, and requiring towns to notify all residents within 1500 foot radius); N.C. GEN. STAT. § 168-22 (1992) (declaring that no group home shall be located within one-half mile of existing group home).

315. *See, e.g.*, ALA. CODE § 11-52-75.1(a) (Supp. 1993).

such statutes, courts have invalidated zoning restrictions on due process or equal protection grounds.³¹⁶

In addition to preempting local zoning ordinances, many state statutes also limit or void private restrictions in deeds, land contracts, or leases that would exclude group homes from residential properties or subdivisions.³¹⁷ In New York, for example, a state law known as the Padavan Law specifically preempts local zoning laws by permitting small group homes in all residential areas, provided certain procedures are followed regarding the selection of the site.³¹⁸ The New York Court of Appeals rejected an attempt to circumvent this law in *Crane Neck Association v. New York City/Long Island County Services Group*.³¹⁹ In *Crane Neck*, a neighborhood association sought to enforce a restrictive covenant, adopted in 1945, limiting the use of property within its boundaries to "single family dwellings" to exclude a group home for eight adults with severe mental retardation.³²⁰ Although the group home violated the restrictive covenant, the court refused to enforce the covenant because "to do so would contravene a long-standing public policy favoring the establishment of such residences for the mentally disabled."³²¹ Thus, the court held that although it explicitly addresses only local laws and ordinances, the Padavan Law also preempts restrictive covenants.³²²

Surprisingly few state zoning statutes have been challenged in court. Where such challenges were initiated, however, the courts have upheld the laws on the ground that the state preemption statute bears a substantial relation to a legitimate governmental objective and properly overrides local control.³²³

316. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (invalidating city ordinance requiring special-use permit for group home); *J.W. v. City of Tacoma*, 720 F.2d 1126, 1131-32 (11th Cir. 1983) (finding denial of permit for group home for former mental patients to be unreasonably discriminatory).

317. See, e.g., IOWA CODE ANN. § 335.25.4 (West Supp. 1993); N.C. GEN. STAT. § 168-23 (1992); W. VA. CODE § 27-17-4 (1992); WISC. STAT. ANN. § 46.03(22)(d) (West 1987). Ohio is the only state that specifically *permits* the exclusion of group homes in political subdivisions. See OHIO REV. CODE ANN. § 5123.19(m) (Anderson 1993).

318. See N.Y. MENTAL HYG. LAW § 41.34 (McKinney 1988 & Supp. 1993).

319. 460 N.E.2d 1336 (N.Y. 1984).

320. *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 460 N.E.2d 1336, 1337 (N.Y. 1984).

321. *Id.* at 1339.

322. *Id.* at 1341.

323. See, e.g., *City of Los Angeles v. California Dep't of Health*, 133 Cal. Rptr. 771, 774-75 (Ct. App. 1976) (holding that state statute mandating that group homes constitute residential uses fostered legitimate state concern that was sufficient to override municipal affairs); *Glennon Heights, Inc. v. Central Bank & Trust*, 658 P.2d 872, 876-77 (Colo. 1983) (holding that statutory cities, as opposed to home-rule cities, receive power to zone from state and must abide by state zoning regulations); *City of Livonia v. Department of Social Servs.*, 378 N.W.2d 402, 414-15 (Mich. 1985) (noting that ability to zone is conferred upon localities by state and thus state may

D. Enforcement Mechanisms Under the FHAA

In addition to expanding the types of transactions prohibited by the original Fair Housing Act by extending its reach to local zoning laws and restrictive covenants, the FHAA strengthens the tools available for enforcement of the federal ban against housing discrimination. Most significant, proof of discriminatory effect, or disparate impact, is sufficient to support a claim under the FHAA.³²⁴ Proof of discrimi-

preempt local zoning ordinances); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 27-28 (Minn. 1981) (holding that state statute overrode local control over zoning for mentally retarded); *Mahrt v. City of Kalispell*, 690 P.2d 418, 419 (Mont. 1984) (concluding that group home with eight or fewer residents has unquestionable right to operate in any residentially zoned area); *State ex rel. Thelen v. City of Missoula*, 543 P.2d 173, 176-77 (Mont. 1975) (upholding state statute declaring local zoning ordinance invalid and contrary to state policy of promoting right of people with developmental disabilities to live in community); *Mental Health Ass'n v. City of Elizabeth*, 434 A.2d 688, 690-91 (N.J. Super. Ct. Law Div. 1981) (ordering city to issue requested building permit to plaintiffs and concluding that city had failed to meet its burden of proving that legislature acted arbitrarily, capriciously, or unreasonably in enacting statute); *Nichols v. Tullahoma Open Door, Inc.*, 640 S.W.2d 13, 19 (Tenn. Ct. App. 1982) (holding that statute barring commercial use of property was not meant to exclude nonprofit group home). *But see* *Clem v. Christole, Inc.*, 582 N.E.2d 780, 785 (Ind. 1991) (holding that retroactive application of 1988 state preemption statute violated contract clause of state constitution); *Garcia v. Siffrin Residential Ass'n*, 407 N.E.2d 1369, 1379-80 (Ohio 1980) (holding that state preemption statute unreasonably limited enforcement by municipalities of police powers authorized by state constitution), *cert. denied*, 450 U.S. 911 (1981); *Brownfield v. State*, 407 N.E.2d 1365, 1367 (Ohio 1980) (rejecting notion that state is automatically exempt from local zoning regulations); *see also* *City of E. Cleveland v. Board of County Comm'rs*, 430 N.E.2d 456, 459-60 (Ohio 1982) (stating that state was not automatically immune from local zoning laws where neighbors of proposed halfway house for former mental patients sued state that had purchased home but had not applied to court for permit).

The court in *Brownfield* adopted a balancing test to determine whether a proposed use should be immune from local zoning law, balancing the impact of the proposed home with legitimate local interests. *Brownfield*, 407 N.E.2d at 1367-68. A similar balancing test was adopted in *Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace*, 332 So. 2d 610, 612-13 (Fla. 1976) and *Hayward v. Gaston*, 542 A.2d 760, 766 (Del. 1988). The Georgia Supreme Court has rejected this test outright as too vague, and has instead provided immunity only where the legislature has clearly expressed its intent. *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Comm'n*, 314 S.E.2d 218, 223 (Ga. 1984).

324. When President Reagan signed the Fair Housing Amendments Act on September 13, 1988, he stated that the amendments should be construed to require discriminatory intent, rather than discriminatory effect:

At the same time, I want to emphasize that this bill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that title 8 violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent. Title 8 speaks only to intentional discrimination.

Remarks on Signing the Fair Housing Amendments Act of 1988, 1988 PUB. PAPERS 1155, 1156 (Sept. 13, 1988). But the President's attempt to draft legislative history after the fact drew sharp retort by Senator Edward Kennedy, the principal sponsor of the amendments, who made clear the following day that Congress did not contemplate any such intent requirement. Senator Kennedy stated:

Unfortunately, President Reagan . . . announce[d] an interpretation of the act that this [sic] flatly inconsistent with Congress's understanding of the law As the principal Senate sponsor of the 1988 act, I can state unequivocally that Congress contemplated no such intent requirement. The act did not materially alter the 1968 Fair Housing Act provisions defining what is required to prove a discriminatory housing practice .

natory intent is not now required nor was it required, under the original version of the Act.³²⁵

Although the Supreme Court has not specifically addressed whether a showing of discriminatory intent is required under the FHAA,³²⁶

... There is no need to prove discriminatory intent.

134 CONG. REC. S12,449 (daily ed. Sept. 14, 1988) (statement of Sen. Kennedy).

325. A plaintiff may make out a prima facie case of disparate impact under the Fair Housing Amendments Act by showing that a given practice has a greater impact on handicapped applicants or residents than on non-handicapped applicants or residents. See *Doe v. City of Butler*, 892 F.2d 315, 323 (3d Cir. 1989) (stating that showing of either discriminatory intent or impact is required under FHAA); *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450, 461 (D.N.J. 1992) (establishing prima facie case of discrimination by showing disparate impact); *People Helpers, Inc. v. City of Richmond*, 789 F.Supp. 725, 732 (E.D. Va. 1992) (stating that discriminatory intent not required, but only that city acted for sole purpose of effectuating desires of private citizens, that improper considerations were motivating factor behind those desires, and that city decision makers were aware of citizens' motivations); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 752 F. Supp. 1152, 1168 (D.P.R. 1990) (stating plaintiff need not show discrimination was sole motivating factor for action, but only one motivating factor to prove discriminatory impact); *Baxter v. City of Belleville*, 720 F. Supp. 720, 732 (S.D. Ill. 1989) (requiring proof of discriminatory "impact" rather than intent); see also *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977) (stating that discriminatory intent is not required to make prima facie case of discrimination under FHA), *cert. denied*, 434 U.S. 1025 (1978); *United States v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977) (finding that evidence of intention, while required to establish prima facie case under Constitution, is not required under title VIII). Discriminatory effect thus may be shown by proof that all persons negatively affected by an allegedly unlawful practice are handicapped. See, e.g., *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396, 1403 (D. Minn.) (stating in FHAA case that "[a] law enacted without discriminatory intent may still be invalid if it has a disparate impact on a protected group"), *aff'd*, 923 F.2d 91 (8th Cir. 1990); *Support Ministries for Persons with AIDS v. Village of Waterford*, 808 F. Supp. 120, 133-36 (N.D.N.Y. 1992) (invalidating ordinance preventing opening of boarding home for persons with HIV after establishing that denial of special permit constituted discriminatory intent and effect as proscribed under FHAA); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1341-42 (D.N.J. 1991) (granting preliminary injunction to plaintiffs in FHAA case challenging local zoning law's definition of "family" as applied to home for recovering alcoholics).

326. The Supreme Court has provided mixed messages regarding the proof required in cases of discrimination in other contexts. In 1985, the Court upheld the effects test under § 504 of the Rehabilitation Act in *Alexander v. Choate*, 469 U.S. 287 (1985), by rejecting the state's argument that only intentional discrimination was proscribed by the Rehabilitation Act. *Id.* at 294-97. As the Court stated, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296-97. The Court noted, however, that although some conduct that has a disparate impact on people with handicaps is forbidden by § 504, the law does not necessarily reach all such actions. *Id.* at 298.

Two recent decisions in the employment context that reach opposite results provide a distressing hint of what this Court would decide today. In *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993), the Court held that a title VII plaintiff has the ultimate burden of proving that an employer's discriminatory treatment was racially motivated. *Id.* at 2746-47. Justice Souter filed a strong dissent, arguing that the decision is "unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court," such as post hoc pretextual reasons for an adverse employment decision. *Id.* at 2761. Similarly, in *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court increased the plaintiff's statistical obligation by requiring a showing of disparity between the number of "qualified" minorities in the job pool and the number actually employed, rather than between the gross number of skilled and unskilled jobs. *Id.* at 650-55. The Court also required that the plaintiff "prove" disparate impact for each employment practice complained of; previously, the Court had allowed plaintiffs to establish an impact cumulatively for all relevant employment practices. *Id.*

ten of the eleven U.S. courts of appeals that have addressed this issue with respect to the original version of the law have held that title VIII of the Civil Rights Act of 1968 covers not only intentional housing discrimination, but also housing practices that have discriminatory effects, even where the plaintiff cannot prove discriminatory motive.³²⁷ As Senator Kennedy made clear in his support for the FHAA:

at 656-57. The Court also reduced the employer's burden, making it easier to rebut the plaintiff's evidence. *Id.* Prior to *Ward's Cove*, the employer could defend its actions by showing that the disparate impact was a "business necessity." *Id.* The Court in *Ward's Cove* replaced the "business necessity" standard with the easier "not insubstantial business reason" standard. *Id.* Finally, the Court shifted to the plaintiff the burden of proving that this test had not been met, an unusual approach for an affirmative defense. *Id.* at 652. These changes in *Ward's Cove* and *Hicks* regarding the use of statistics and the respective burdens of the parties effectively transform disparate impact analysis into a form of intentional discrimination.

The Civil Rights Act of 1991 (CRA) reversed the effect of the *Ward's Cove* decision, however, by adding a new provision to title VII that establishes proof requirements for disparate impact claims. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (Supp. III 1991). A complainant (the Attorney General, the Equal Employment Opportunity Commission, or an injured individual) must demonstrate that a covered employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, national origin, or sex. *Id.* § 2000e. If the employer demonstrates that the challenged practice is "job related" and consistent with "business necessity," the complaining party must demonstrate that an alternative employment practice with less of a disparate impact exists and that the employer has refused to adopt it. *Id.* § 2000e-2. The CRA, however, does not have any effect on the *Ward's Cove* rule requiring claimants in disparate impact cases to compare job category compositions with qualified labor market or applicant pool compositions rather than with other job category compositions.

327. See *Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989) (holding that prima facie case for discrimination under Fair Housing Act requires proof of (1) membership in racial minority, (2) application for and qualification to rent, (3) denial of opportunity to rent or negotiate, and (4) subsequent availability of housing); *NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir.) (stating that disparate impact is sufficient under Fair Housing Act to make prima facie showing of discrimination), *aff'd*, 488 U.S. 15 (1988); *Arthur v. City of Toledo*, 782 F.2d 565, 574 (6th Cir. 1986) (declaring that referendum may be set aside because of obvious racial classification without proof of discriminatory intent); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984) (stating that landlord's housing practices may be illegal based upon showing of disproportionate impact); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982) (finding possibility of discriminatory effect sufficient to state cause of action under Fair Housing Act); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977) (finding that discriminatory effect alone is sufficient for prima facie case under title VIII), *cert. denied*, 435 U.S. 908 (1978); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (outlining circumstances under which discriminatory impact without discriminatory intent will suffice to show title VIII violation), *cert. denied*, 434 U.S. 1025 (1978); *United States v. Pelzer Realty Co., Inc.*, 484 F.2d 438, 444 (5th Cir. 1973) (finding that plaintiffs were victims of "pattern of discrimination," compelling conclusion of racial motivation), *cert. denied*, 416 U.S. 936 (1974); *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974) (finding discriminatory result sufficient to make prima facie case under title VIII), *cert. denied*, 422 U.S. 1042 (1975); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976) ("Effect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minorities as a willful scheme."); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting Fifth Circuit precedent on discriminatory effect issue and thereby adopting holding of *United States v. Pelzer Realty Co.*); see also Margaret S. Rubin, *Advertising and Title VIII: The Discriminatory Use of Models in Real Estate Advertisements*, 98 YALE L.J. 165, 169-80 (1988) (discussing absence of intent requirement in title VIII causes of action). But see *Latinos Unidos de Chelsea en Acción v. Secretary of HUD*, 799 F.2d 774, 791 (1st Cir. 1986) (declining to resolve issue of whether Fair Housing Act requires discriminatory intent).

In *City of Black Jack*, the Eighth Circuit permanently enjoined enforcement of a restrictive

All of the Federal courts of appeals that have considered the question have concluded that title VIII should be construed, at least in some instances, to prohibit acts that have discriminatory effects, and that there is no need to prove discriminatory intent. . . . In enacting the Fair Housing Amendments Act, Congress accepted this consistent judicial interpretation.³²⁸

The FHAA also seeks to remedy the problems of the original law by providing several enforcement options to complainants. The FHAA gives HUD the authority to investigate and bring lawsuits when mediation efforts fail and establishes an administrative enforcement mechanism for cases where discriminatory housing practices cannot be resolved informally. An individual or the Secretary of HUD may file a complaint with HUD within one year of the alleged discriminatory housing practice.³²⁹ The Secretary must investigate the complaint within 100 days of the filing date³³⁰ and file a final investigative report.³³¹ If no conciliation agreement can be reached, the Secretary must then determine whether "reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur."³³² The Secretary must base the determination of "reasonable cause" only on the facts of each specific case.³³³ If HUD finds

zoning ordinance that effectively prohibited the construction of multiracial, federally subsidized moderate- and low-income housing because it violated title VIII. *City of Black Jack*, 508 F.2d at 1188. The city claimed that the motive of the ordinance was not discrimination, but fear that the proposed apartments would destroy the city's residential character, cause traffic problems, and devalue the property. *Id.* at 1186. The court of appeals disagreed. *Id.* It found that the ordinance would "foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack . . . at a time when 40 percent of them were living in substandard or overcrowded units." *Id.* Consequently, the court believed that implementation of the zoning ordinance would "contribute to the perpetuation of segregation in a community which was 99 percent white." *Id.* Convinced that the city had failed to demonstrate a compelling interest for its action, the court permanently enjoined enforcement of the ordinance as violative of title VIII. *Id.* at 1188.

328. 134 CONG. REC. S12,449 (daily ed. Sept. 14, 1988) (statement of Sen. Kennedy). In the proposed regulations, HUD included several provisions that contained language that could be interpreted to require proof of discriminatory intent in order to establish a violation of title VIII. Implementation of the Fair Housing Amendments Act of 1988, 53 Fed. Reg. 44,992, 44,996 (1988) (to be codified at scattered sections of 24 C.F.R.) (proposed Nov. 7, 1988) (stating that regulations proscribe behavior which is "designed to discourage" persons from attaining housing). Comments to HUD on the proposed regulations urged changing the language to clarify that no showing of intent is required. See Comments of the Leadership Conference on Civil Rights Fair Housing Task Force on the Proposed Rule of H.U.D. Implementing the Fair Housing Amendments Act of 1988 (Dec. 7, 1988) (on file with *The American University Law Review*).

329. 42 U.S.C. § 3610(a)(1)(A)(i) (1988). The original Fair Housing Act required that the complaint be filed within 180 days. Fair Housing Act of 1968, Pub. L. No. 90-284, § 810(b), 82 Stat. 82, 86 (repealed 1988).

330. 42 U.S.C. § 3610(a)(1)(B)(iv) (1988).

331. *Id.* § 3610(b)(5)(A).

332. *Id.* § 3610(g)(1).

333. *Id.*

“reasonable cause” to believe that a violation exists, or is about to occur, the Secretary must issue a charge.³³⁴ If a charge is issued, the aggrieved party must either authorize the Attorney General to begin a civil action in federal court or proceed to a hearing before an administrative law judge.³³⁵ The aggrieved party also has the right to bypass the administrative procedures altogether and proceed directly to federal court.³³⁶ The procedures for such action remain essentially unchanged from the original version of the Fair Housing Act, except that Congress extended the statute of limitations from 180 days to two years.³³⁷ The FHAA also permits a court to appoint an attorney “if in the opinion of the court such person is financially unable to bear the costs of such action.”³³⁸

Further, the Attorney General may file suit on behalf of the United States where there is a pattern or practice of discrimination or acts of discrimination against a group.³³⁹ The Attorney General is also charged with enforcing the FHAA against state and local governments whose zoning, land-use, or state fair housing laws violate the FHAA.³⁴⁰ The FHAA gives the Attorney General authority to seek enforcement of conciliation agreements in federal court, although she is not required to do so.³⁴¹

Unlike the original Fair Housing Act, the FHAA contains a

334. *Id.* § 3610(g)(2)(A).

335. *Id.* § 3612(b). The hearing before the ALJ must begin within 120 days after the date of the charge. *Id.* § 3612(g). The ALJ must then make findings of fact and conclusions of law within 60 days of the hearing. *Id.* If the aggrieved party prevails, the ALJ may award actual damages and additional penalties, including attorneys fees. *Id.* Once the administrative hearing has begun, the party may no longer file a complaint in federal court. *Id.* § 3612(a)(3).

The Justice Department has diligently pursued cases under the FHAA (as compared to its enforcement of the original FHA). *See, e.g.*, Complaint at 2-3, *United States v. Grady Management, Inc.*, No. 90-0060-A (E.D. Va., Jan. 18, 1990) (suing corporate management company on behalf of service provider seeking to rent apartments to operate residential treatment program for recovering alcoholics and drug abusers); Complaint at 1-3, *United States v. Sigal/Zuckerman Management, Inc.*, No. 90-0059A, (E.D. Va., Jan. 18, 1990) (suing Management Company on behalf of service providers seeking to rent apartment for person who had successfully completed residential drug and alcohol treatment program); Complaint at 3, *United States v. Park Forest, Ltd.*, No. 89-0630-B (S.D. Iowa, Sept. 15, 1989) (suing landlords to prevent eviction of physically disabled woman).

336. *See* 42 U.S.C. § 3613 (1988) (outlining procedures for commencing civil action). Some members of Congress, however, considered the administrative procedure to be the “heart of the bill.” 134 CONG. REC. H4608 (daily ed. June 22, 1988) (statement of Rep. Edwards).

337. *Compare* 42 U.S.C. § 3613(a)(1)(A) (1988) (providing for two-year statute of limitations) with Fair Housing Act of 1968, Pub. L. No. 90-284, § 812(a), 82 Stat. 82, 88 (setting statute of limitations at 180 days).

338. 42 U.S.C. § 3613(b)(2) (1988).

339. *Id.* § 3614(a). This procedure was the only way the Federal Government could enforce the 1968 Fair Housing Act. Fair Housing Act of 1968, Pub. L. No. 90-284, § 813, 82 Stat. 82, 88.

340. 42 U.S.C. § 3610 (1988).

341. 42 U.S.C. § 3614(b) (1988). Previously, compliance was voluntary. Fair Housing Act of 1968, Pub. L. No. 90-284, § 813, 82 Stat. 82, 88.

provision permitting the Justice Department to pursue a preliminary injunction or temporary restraining order in situations requiring emergency action.³⁴² This provision provides a mechanism for quick governmental action to preserve the availability of the housing in question pending a final adjudication of the discrimination claim. The procedure is simple and expeditious: once HUD determines the necessity for temporary emergency relief and refers the matter to the Justice Department, the Department must promptly institute an appropriate civil action.³⁴³ This provision is particularly important to a person facing eviction because he or she simply cannot wait for completion of the investigative and adjudicative process.

Following a finding of discrimination by an administrative law judge (ALJ), the Act provides for broad remedies, including injunctive relief, actual damages, punitive damages,³⁴⁴ and attorney's fees.³⁴⁵ No relief order, however, may affect "any contract, sale, encumbrance, or lease consummated before the issuance of such order and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the charge filed under this [title]."³⁴⁶

Not surprisingly, strict time limitations apply under the FHAA. For example, an ALJ must commence the adjudicative hearing no later than 120 days following the charge "unless it is impracticable to do so."³⁴⁷ Similarly, the Secretary of HUD must review an ALJ's decision within thirty days after the issuance of the ALJ's order.³⁴⁸ The purpose of the time limits, it appears, is not to deter the filing of meritorious claims, but to expedite administrative proceedings to provide faster relief to legitimate claimants.

E. State Fair Housing Laws

At least thirty states currently have statutes prohibiting housing

342. Compare 42 U.S.C. § 3610(e) (1988) with Fair Housing Act of 1968, Pub. L. No. 90-284, § 813, 82 Stat. 81, 88.

343. 42 U.S.C. § 3610(e) (1988). In HUD's proposed regulations, HUD suggested adding two additional steps to the emergency relief provision: (1) empower the Office of the General Counsel, rather than the Assistant Secretary for Fair Housing and Equal Opportunity, to seek temporary relief; and (2) require the General Counsel to consult with the Assistant Attorney General for the Civil Rights Division prior to seeking temporary relief. 53 Fed. Reg. 44,992, 45,012-13 (1988) (proposed Nov. 7, 1988). These proposals were not included in the final version of the regulations.

344. 42 U.S.C. § 3612(g) (1988). The FHAA provides for unlimited punitive damages, *id.*, and allows for attorney's fees regardless of whether the prevailing party can pay the cost, as is the case in other federal statutes that allow the recovery of attorney's fees. *Id.* § 3612(p).

345. *Id.* § 3612(p).

346. *Id.* § 3612(g)(4).

347. *Id.* § 3612(g)(1).

348. *Id.* § 3612(h).

discrimination on the basis of handicap.³⁴⁹ At first glance, these statutes appear strikingly similar in their terms and scope. As the following discussion illustrates, however, these laws not only vary widely from state to state, but now must withstand scrutiny under the FHAA.

1. *Persons protected*

Although most state fair housing statutes protect people with mental disabilities from discrimination in housing, each statute defines "mental disability" differently. Thus, a person with a mental illness is specifically protected from discrimination in Alaska,³⁵⁰ but the same person might not be protected from discrimination in other states where the law protects only persons with specified mental disabilities that do not include mental illness.³⁵¹ Further, other states exclude alcoholism and drug abuse, which are considered mental illnesses by some authorities, from the definition of mental disability under their fair housing statutes.³⁵²

This lack of uniformity with respect to the populations protected by state fair housing laws has begun to be resolved as states respond to the FHAA.³⁵³ Some states, however, anticipated the fair housing law and its adoption of the Rehabilitation Act's definition of handicap and incorporated that definition into their fair housing laws.³⁵⁴ Other states have crafted more complex definitions of mental disability in their fair housing laws. Alaska, for example, adopted the following definition of mental illness:

[Mental illness is] an organic, mental, or emotional impairment that has substantial adverse effects on an individual's ability to exercise conscious control of the individual's actions or ability to perceive reality or to reason or understand; mental retardation,

349. See *infra* notes 350-81 and accompanying text (discussing state statutes proscribing discrimination based on mental disability).

350. See ALASKA STAT. § 47.30.865 (1990).

351. See, e.g., ME. REV. STAT. ANN. tit. 5, § 4553 (West Supp. 1992) (limiting coverage to those with mental conditions diagnosed by medical professional).

352. See, e.g., ARIZ. REV. STAT. ANN. § 36-501(22) (1993) (distinguishing mental disorders from conditions resulting from substance abuse or mental retardation); N.C. GEN. STAT. § 168A-3 (1987) (excluding alcoholism and drug addiction or abuse from definition of "mental impairment"); VT. STAT. ANN. tit. 9, § 4501 (Supp. 1990) (excluding alcohol- or drug-addicted persons who are threats to others from definition of "handicapped individual").

353. For example, prior to the FHAA, New Hampshire law protected only persons with a mental "handicap, other than illness." N.H. REV. STAT. ANN. § 354-A:3 (1989). The amended statute includes the definition of "mental impairment" found in the FHAA. N.H. REV. STAT. ANN. § 354-A:2 (Supp. 1992).

354. See, e.g., DEL. CODE ANN. tit. 6, § 4602 (Supp. 1992); N.M. STAT. ANN. § 28-1-2 (Michie 1991); N.C. GEN. STAT. § 168A-3 (1987); OKLA. STAT. ANN. tit. 25, § 1451 (West Supp. 1993); OR. REV. STAT. § 659.400 (1991); WIS. STAT. ANN. § 101.22(1m) (West 1992).

epilepsy, drug addiction, and alcoholism do not per se constitute mental illness, although persons suffering from these conditions may also be suffering from mental illness.³⁵⁵

Although this statute appears to cover certain groups excluded from other states' laws, it is not clear what kinds of disabilities fall within the category of those having "substantial adverse effects."³⁵⁶

Maryland's law defines "mental handicap" as "any mental impairment or deficiency [such] as, but not limited to, retardation or such other which may have necessitated remedial or special education and related services."³⁵⁷ It is not clear, however, whether psychological services or psychiatric treatment fall within the category of "related services."³⁵⁸ Therefore, the possibility remains that in Maryland, people labeled mentally ill who are receiving or have received supportive services different from those designed to meet the needs of people with mental retardation would not be protected under the state's fair housing law.

In an effort to avoid such ambiguities, some states have chosen to rely on mental health professionals to determine which individuals will be considered mentally disabled for the purpose of receiving protection under the state's fair housing law. In Maine, for example, a person is protected by the law if the person has a "mental condition . . . that constitutes a substantial disability as determined by . . . a psychiatrist or psychologist."³⁵⁹

An additional method of narrowing the scope of individuals covered by a state's fair housing law is to protect only those individuals whose mental handicap is "unrelated to the person's ability to acquire, rent, or maintain a housing accommodation."³⁶⁰ In such states, however, there is no indication of which factors should be considered in determining a person's ability "to acquire, rent, or maintain a housing accommodation."³⁶¹ The state, therefore, may be unintentionally fostering, rather than eliminating, discrimination by permitting the consideration of factors unrelated to the potential

355. ALASKA STAT. § 47.30.915 (1990).

356. *Id.*

357. MD. ANN. CODE art. 49B, § 15 (1991).

358. *Id.*

359. ME. REV. STAT. ANN. tit. 5, § 4553 (West Supp. 1992).

360. ILL. ANN. STAT. ch. 68, para. 1-103(I)(2) (Smith-Hurd Supp. 1992); *see also* MICH. STAT. ANN. § 3.550(502) (Callaghan 1990) (limiting protection to persons with disabilities unrelated to ability to rent, acquire, or maintain property); N.M. STAT. ANN. § 28-1-7 (Michie 1991) (using language similar to Illinois statute); S.D. CODIFIED LAWS ANN. § 20-13-1(4)(b) (Supp. 1993) (limiting applicability of housing discrimination law to disabilities unrelated to one's ability to acquire, rent, or maintain property).

361. ILL. ANN. STAT. ch. 68, para. 1-103(I)(2).

tenant's ability to meet the lease obligations. It is likely, however, that the courts will invalidate such a provision because the FHAA excludes any requirement that a tenant with a disability provide proof of independent living skills prior to securing housing.³⁶²

2. *Persons prohibited from discriminating*

The state fair housing laws generally apply to all individuals involved in real estate transactions, including any owner, lessee, managing agent, or other person having the right to sell, rent, or lease any real property, or an agent or employee of any such person.³⁶³ Many statutes include a separate section specifically applying to banks, banking organizations, mortgage companies, insurance companies, or other financial institutions or lending organizations to whom applications are made for assistance to purchase, lease, acquire, construct, rehabilitate, repair, or maintain any real property.³⁶⁴

3. *Prohibited conduct*

Like the FHAA, state fair housing laws generally prohibit discrimination in the sale, rental, or leasing of any real property.³⁶⁵ Some states also include the subleasing³⁶⁶ and assigning³⁶⁷ of properties.

362. 42 U.S.C. § 3604 (1988); see *supra* notes 169-70 and accompanying text (discussing evidence of independent living skills as requirement for tenancy).

363. See, e.g., DEL. CODE ANN. tit. 6, § 4603 (Supp. 1992); IOWA CODE ANN. § 216.8 (West Supp. 1993); ME. REV. STAT. ANN. tit. 5, § 4582 (West Supp. 1992); MASS. GEN. L. ch. 151B, § 4 (1982 & Supp. 1993); MINN. STAT. ANN. § 363.03 subd. 2(1) (West Supp. 1993); MONT. CODE ANN. § 49-2-305(1) (1993); N.H. REV. STAT. ANN. § 354-A:10 (Supp. 1992); N.J. STAT. ANN. § 10:5-12 (West Supp. 1993); N.M. STAT. ANN. § 28-1-7 (Michie 1991); N.Y. EXEC. LAW § 296(2-a) (McKinney 1993); OKLA. STAT. ANN. tit. 25, § 1452 (West Supp. 1993); OR. REV. STAT. § 659.430(4) (1991); W. VA. CODE § 5-11-9 (Supp. 1993); WIS. STAT. ANN. § 101.22(2) (West Supp. 1992).

364. See, e.g., D.C. CODE ANN. § 1-2515 (1981); LA. REV. STAT. ANN. § 46:2254 (West 1982); ME. REV. STAT. ANN. tit. 5, § 4582 (West Supp. 1992); MASS. GEN. L. ch. 151B, § 4 (1982 & Supp. 1993); MD. ANN. CODE art. 49B § 23 (Supp. 1993); MINN. STAT. ANN. § 363.03 subd. 2(3) (West Supp. 1993); MO. ANN. STAT. § 213.045 (Vernon Supp. 1993); MONT. CODE ANN. § 49-2-306 (1993); N.J. STAT. ANN. § 10:5-12 (West Supp. 1993); N.M. STAT. ANN. § 28-1-7 (Michie 1991); N.D. CENT. CODE § 14-02.4-13 (1991); PA. STAT. ANN. tit. 43, § 955 (Supp. 1993); S.D. CODIFIED LAWS ANN. § 20-13-21 (1987); VA. CODE ANN. § 36-90 (Michie 1990); W. VA. CODE § 5-11-9 (Supp. 1993); WIS. STAT. ANN. § 101.22(2) (West Supp. 1992).

365. See, e.g., IOWA CODE ANN. § 216.8 (West Supp. 1993); ME. REV. STAT. ANN. tit. 5, § 4582 (West Supp. 1992); MD. ANN. CODE art. 49B, § 22(a)(1), (b) (Supp. 1993); MINN. STAT. ANN. § 363.03 subd. 2(1)(a) (West Supp. 1993); MO. ANN. STAT. § 213.040 (Vernon Supp. 1993); MONT. CODE ANN. § 49-2-305(1)(a) (1993); N.H. REV. STAT. ANN. § 354-A:10 (Supp. 1992); N.J. STAT. ANN. § 10:5-12 (West Supp. 1993); N.M. STAT. ANN. § 28-1-7 (Michie 1991); N.Y. EXEC. LAW § 296(2-a) (McKinney 1993); OR. REV. STAT. § 659.430(1)(a) (1991); PA. STAT. ANN. tit. 43, § 955 (Supp. 1993); S.D. CODIFIED LAWS ANN. § 20-13-20 (Supp. 1993); W. VA. CODE § 5-11-9 (Supp. 1993).

366. See, e.g., IOWA CODE ANN. § 216.8 (West Supp. 1993); MINN. STAT. ANN. § 363.03 subd. 2(1)(a) (West Supp. 1993); N.H. REV. STAT. ANN. § 354-A:10 (Supp. 1992); N.J. STAT. ANN. § 10:5-

The statutes that prohibit the most activities include the phrase "or otherwise deny" and make explicit that *all* transactions relating to real estate are subject to the prohibitions contained in the statute.³⁶⁸

Perhaps the broadest state fair housing law is North Carolina's, which provides that "[e]ach handicapped citizen shall have the same right as any other citizen to live and reside in residential communities, homes, and group homes."³⁶⁹ The language of this statute more closely resembles zoning legislation than fair housing laws. The North Carolina statute, however, does appear to integrate the interests sought to be protected by both zoning and fair housing laws. While this statute does not single out particular real estate transactions, it does establish that people with disabilities have the same right as others to live in residential communities. The effect of the law, then, is the same as other fair housing laws—to prohibit discrimination in real estate transactions involving housing in residential communities. The law does not apply, however, to other types of real estate transactions or commercial property transactions, which are covered by some of the other more detailed state fair housing laws.³⁷⁰

4. *Other discriminatory acts*

a. *Prohibited inquiries*

Some state fair housing laws make it illegal to "make an inquiry of the . . . physical or mental disability . . . of a person seeking to buy, lease, or rent a housing accommodation or property."³⁷¹ Such provisions ensure that people with disabilities (including people with mental disabilities whose disability may not be readily apparent) are

12 (West Supp. 1993); N.M. STAT. ANN. § 28-1-7 (Michie 1991); N.Y. EXEC. LAW § 296(2-a) (McKinney 1993); OR. REV. STAT. § 659.430(1)(a) (1991); S.D. CODIFIED LAWS ANN. § 20-13-20 (Supp. 1993); W. VA. CODE § 5-11-9 (Supp. 1993).

367. See, e.g., IOWA CODE ANN. § 216.8 (West Supp. 1993); MINN. STAT. ANN. § 363.03 subd. (1)(a) (West Supp. 1993); N.J. STAT. ANN. § 10:5-12 (West Supp. 1993); N.M. STAT. ANN. § 28-1-7 (Michie 1991); S.D. CODIFIED LAWS ANN. § 20-13-20 (Supp. 1993); W. VA. CODE § 5-11-9 (Supp. 1993).

368. See, e.g., ME. REV. STAT. ANN. tit. 5, § 4582 (West Supp. 1992); MD. ANN. CODE art. 49B, § 22 (Supp. 1993); MINN. STAT. ANN. § 363.03 subd. 2(1) (West Supp. 1993); MO. ANN. STAT. § 213.040 (Vernon Supp. 1993); N.J. STAT. ANN. § 10:5-12 (West Supp. 1993); N.Y. EXEC. LAW § 296 (McKinney 1993); PA. STAT. ANN. tit. 43, § 955 (Supp. 1993); W. VA. CODE § 5-11-9 (Supp. 1993).

Other state statutes simply provide that "[t]he fact that a person is or has been evaluated or treated for mental illness may not be a basis for discrimination in . . . obtaining or retaining housing." ALASKA STAT. § 47.30.865 (1990); see also ARIZ. REV. STAT. ANN. § 36-506 (1986).

369. N.C. GEN. STAT. § 168-9 (1987).

370. See *supra* notes 365-68 and accompanying text (discussing statutes that proscribe discrimination in real estate transactions).

371. MONT. CODE ANN. § 49-2-305 (1993); see also PA. STAT. ANN. tit. 43, § 955(h)(6) (Supp. 1993) (prohibiting inquiries regarding handicap or disability).

evaluated solely on the basis of criteria that are relevant to real estate transactions and that apply to all housing applicants and occupants. In short, it may be illegal under various state fair housing laws for a landlord, real estate agent, or even mortgage officer to ask whether an individual has undergone treatment for mental illness or other disability.

b. Misrepresentations of property values

Among the greatest obstacles to securing housing for people with mental disabilities is neighborhood opposition. Neighbors of prospective homes for people with mental disabilities have claimed that people with mental disabilities are dangerous and that permitting them to live in their neighborhoods will lower property values, change the character of their neighborhood, and even endanger their safety.³⁷² Such unwarranted fears and prejudice have figured prominently in zoning cases involving challenges to the establishment of group homes.³⁷³ Similar attitudes may contribute to discrimination against people with mental disabilities in their efforts to acquire individual, independent housing accommodations or real property. Some state fair housing laws therefore include a provision similar to Oklahoma's statute, which makes the following discriminatory practice unlawful:

[T]o knowingly induce or attempt to induce another person to transfer an interest in real property, or to discourage another person from purchasing real property, by representations regarding the existing or potential proximity of real property owned, used, or occupied by persons of any particular . . . handicap, or to represent that such existing or potential property shall or may result in:

- a. the lowering of property values,
- b. a change in the . . . character of the block, neighborhood, or area in which the property is located,
- c. an increase in criminal or antisocial behavior in the area, or
- d. a decline in quality of the schools serving the area.³⁷⁴

372. A study of the General Accounting Office reported that "decline in real estate values," the neighbors' common objection prior to the opening of a group home, was seldom mentioned after the home was in operation. U.S. GEN. ACCOUNTING OFFICE, ANALYSIS OF ZONING AND OTHER PROBLEMS AFFECTING THE ESTABLISHMENT OF GROUP HOMES FOR THE MENTALLY DISABLED 9 (1983).

373. See *supra* note 256 and accompanying text (discussing role of fear and prejudice in neighborhood opposition to group homes); see also *supra* note 22 and accompanying text (discussing widespread fear of people with mental disabilities).

374. OKLA. STAT. ANN. tit. 25, § 1452(12) (West Supp. 1993). Illinois and Wisconsin have enacted similar statutory prohibitions. See ILL. ANN. STAT. ch. 68, para 3-103 (Smith-Hurd Supp. 1992); WIS. STAT. ANN. § 101.22(2)(m) (West Supp. 1992).

Such provisions may not eliminate the fears and prejudices that prevent people with mental disabilities from acquiring housing, but they do send a message that the state intends for its citizens to provide equal treatment to such people in real estate transactions. Further, expanding the scope of state fair housing laws in this manner is consistent with empirical data that establishes that people with mental disabilities make good neighbors; it also enables the state to address an often more subtle and insidious form of discrimination.

c. Restrictive covenants

Restrictive covenants allow landowners to circumvent state fair housing laws by preventing property from passing to certain people, such as people with mental disabilities, or by restricting the property to certain uses. To protect against unlawful discrimination through the use of restrictive covenants, some states, such as Arkansas, prohibit any restrictive covenants that discriminate on the basis of a mental handicap.³⁷⁵ Such laws further the state's fair housing goals by assuring that restrictive covenants will not be used as a means to obstruct the efforts of people with mental disabilities from acquiring residential housing or real property. Faced with a restrictive covenant excluding mentally disabled persons and a fair housing law protecting such persons from unlawful discrimination, a court would likely invalidate such a covenant on the grounds that it contravenes state law. Incorporating a provision that explicitly bans restrictive covenants would preclude any questions of their validity and eliminate expensive and time-consuming litigation that might otherwise be required to invalidate the covenant.

5. Exemptions to state fair housing laws

Although most state fair housing laws are broad in their scope and coverage, some provide exemptions for certain classes of people or certain transactions. For example, many statutes provide that the state's fair housing law should not be construed to prohibit dwellings or residential facilities that are designed exclusively for and occupied exclusively by individuals of the same gender.³⁷⁶ Similarly, many state statutes place the sale or rental of dwellings or facilities designed exclusively for elderly persons beyond the reach of the state fair

375. ARK. CODE ANN. § 20-48-611 (Michie 1991); *see also* HAW. REV. STAT. § 518-3 (Supp. 1990); R.I. GEN. LAWS § 34-4-25 (Supp. 1992); WASH. REV. CODE ANN. § 49.60.224 (West 1990).

376. *See, e.g.*, MD. ANN. CODE art. 49B, § 21 (Supp. 1993); N.J. STAT. ANN. § 10:5-12 (West Supp. 1993); N.Y. EXEC. LAW § 296 (McKinney 1993); W. VA. CODE § 5-11-9 (Supp. 1993).

housing law.³⁷⁷

States with fair housing laws that protect persons with mental illness or other mental disabilities are generally careful to allow programs, services, or facilities designed specifically to benefit this population.³⁷⁸ Some states also provide an exception for owner-occupied housing or housing occupied by the owner's family.³⁷⁹ In short, the scope and interpretation of each state's fair housing law varies according to the interaction between the prohibited transactions and the definition of the population that is protected by the law. Furthermore, to the extent that a provision of a state's fair housing law is inconsistent with the FHAA, it will be subject to repeal or court challenge.³⁸⁰ Thus, the new challenge that lawyers, mental health advocates, and legislators face is to ensure that state fair housing laws are consistent with the federal law and to encourage states to provide additional measures of protection where the federal law may be inadequate to facilitate the integration of people with mental disabilities into our residential neighborhoods.³⁸¹

CONCLUSION

The Fair Housing Amendments Act of 1988 represents the boldest

377. *See, e.g.*, DEL. CODE ANN. tit. 6, § 4607 (Supp. 1992); MD. ANN. CODE art. 49B, § 21 (Supp. 1993); MINN. STAT. ANN. § 363.03 subd. 2 (West Supp. 1994); N.H. REV. STAT. ANN. § 354-A:5 (Supp. 1992); N.Y. EXEC. LAW § 296 (McKinney 1993); OKLA. STAT. ANN. tit. 25, § 1453 (West Supp. 1993); VT. STAT. ANN. tit. 9, § 4503 (Supp. 1993); WIS. STAT. ANN. § 101.22(2g) (West 1988).

378. *See, e.g.*, MD. STATE GOV'T CODE ANN. § 9-1101 (1993) (establishing Maryland Advisory Council for Individuals with Disabilities to provide services to people with mental disabilities); N.Y. SOC. SERV. LAW § 153 (McKinney 1993) (reimbursing expenditures to assist mentally and physically disabled persons); S.D. CODIFIED LAWS ANN. § 27-4-1 (1992) (providing assistance for special medical needs of disabled persons).

379. *See, e.g.*, DEL. CODE ANN. tit. 6, § 4607 (Supp. 1992); LA. REV. STAT. ANN. § 46:2254 (West 1992); N.H. REV. STAT. ANN. § 354-A:13 (Supp. 1992); N.Y. EXEC. LAW § 296 (McKinney 1993); OKLA. STAT. ANN. tit. 25, § 1453 (West Supp. 1993).

380. *See* 42 U.S.C. § 3604 (1988) (stating that FHAA will not invalidate state statutes with greater protections for handicapped persons than provided under FHAA).

381. Massachusetts has recently enacted a statute making unlawful all health, safety, land-use, and zoning laws that discriminate against people with disabilities. MASS. ANN. LAWS ch. 40A, § 3 (Law. Co-op. 1993). Further, several state attorney generals have recently issued opinions invalidating provisions of their respective state laws because they violate the FHAA. *See* Op. Att'y Gen. of Del., Op. No. 90-1001, 1990 De. AG LEXIS, at *10 (Jan. 5, 1990) (invalidating Delaware law requiring 5000 feet between group homes for people with developmental disabilities); 74 Op. Att'y Gen. of Md., Op. No. 89-026, *reprinted in* 16 Md. Reg. 2010 (Aug. 7, 1989) (invalidating Maryland dispersion and concentration rules as violative of FHAA); Op. Att'y Gen. of Kan., Op. No. 89-99, 1989 Kan. AG LEXIS 100 (Aug. 11, 1989) (invalidating special use permit and 1000-foot dispersal rule under FHAA); Op. Att'y Gen. of Tex., Op. No. JM-1093, 1989 Tex. AG LEXIS 95 (Sept. 5, 1989) (holding invalid bill requiring disclosure of HIV-related illness of current or previous occupant of any property). *But see* 75 Op. Att'y Gen. of Md., Op. No. 90-014, *reprinted in* 17 Md. Reg. 1442 (Mar. 7, 1990) (upholding procedure requiring public hearing for group home applications as lawful under FHAA).

action by the Federal Government to curb discrimination in housing against people with mental disabilities. It provides a clear message to state and local governments as well as private property owners that discrimination against people with mental illness, developmental disabilities, or people who are perceived as mentally disabled will not be permitted. No longer will localities and individuals be free to discriminate against people with mental disabilities with impunity. The existence of the law itself, however, will not eradicate discrimination.

The results of the FHAA depend on several factors. First, the effectiveness of the FHAA will depend in part on federal agencies, such as HUD and the Justice Department, and the resources they devote and their commitment to enforcing the law.³⁸² Although the Justice Department has actively pursued cases since the FHAA's enactment, it must continue to do so in order to convey the message to landlords and neighbors that the Federal Government will not tolerate discrimination against people with mental disabilities.

Second, the law's effectiveness will depend on changing societal attitudes about people with mental disabilities. Prejudice against people with mental disabilities is prevalent, even with the enactment of the Americans with Disabilities Act.³⁸³ People are often supportive of the rights of people with disabilities to live in the community, but when they find out that their new neighbors are people labeled mentally ill or people with developmental disabilities, their attitudes often change. Resisting that change in attitude and supporting efforts to assist people with mental disabilities to live "next door" will help.

Such progress does not depend only on the extent to which those who are considered "different" are physically integrated with the rest of the population. Just as segregation can stigmatize people with mental disabilities, so too can integration that merely emphasizes another's differences.³⁸⁴ This is the lesson of group homes and other congregate housing programs. The practice of developing separate housing for people with mental disabilities that is located in residential neighborhoods, but that is not truly integrated into the life

382. Problems with the FHAA have already been identified. See, e.g., F. Willis Caruso & William H. Jones, *Fair Housing in the 1990's: An Overview of Recent Developments and Prognosis of their Impact*, 22 J. MARSHALL L. REV. 421, 440-46 (1989) (identifying problems in FHAA in areas of administration, procedure, substantive rights, and remedies); Michael A. Wolf, Comment, *The Fair Housing Amendments Act of 1988: A Critical Analysis of "Familial Status,"* 54 MO. L. REV. 393, 402-04 (1989) (concluding that problems families face in housing are not solved by FHAA because problems are primarily economic).

383. Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (Supp. II 1990).

384. MINOW, *supra* note 24, at 116-17 (citing Justice Marshall for proposition that separation that exaggerates differences is root of prejudice).

of the community, conveys the message that the residents of such housing are different and should be avoided. As long as people with mental disabilities are rejected in this way, and as long as such actions go unchallenged, people with mental disabilities will remain segregated, wherever they live. Accordingly, we must now begin to abandon the term "integration" and work toward inclusive or nonsegregated housing—housing that is equally available to all.³⁸⁵ In short, the quality of life available to all must, in a very real sense, also become available to people with disabilities.

Yet a major problem not addressed by the FHAA is one of the most serious problems facing all of society today, namely the lack of affordable housing. Although the barrier of discrimination may be removed with vigilant enforcement of the FHAA, the law will help people with mental disabilities only if they can afford the housing units to which they are legally entitled.³⁸⁶ For the past two decades, however, HUD has allowed, and even sponsored, the destruction of housing and the conversion of temporary and permanent housing for low-income people to housing for more affluent residents. Each year, approximately 2.5 million Americans lose their homes, and as many as 500,000 low-rent units disappear as a result of urban renewal and gentrification.³⁸⁷ Thousands of Americans are on waiting lists for public housing.³⁸⁸ Still others, perhaps as many as one-in-five poor persons, are forced to live in substandard housing.³⁸⁹ Not only is there a shortage of adequate affordable housing, but a poor person must spend a greater proportion of his or her income on housing. Consequently, many people become homeless. For people with

385. See O'Connor & Racino, *supra* note 38, at 137-60.

386. See James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1105-06 (1989). According to Professor Kushner, title VIII should be amended to prevent landlords from denying housing to recipients of public assistance. *Id.* In Kushner's view, welfare recipients are arguably the best tenants because they have income that is not dependent on job stability and local economics. *Id.* Yet, they are often excluded not on economic grounds, but because of the landlord's desire not to stigmatize the housing as "welfare housing." *Id.* at 1106. Professor Kushner notes that many state and localities have enacted legislation specifically prohibiting discrimination against welfare recipients. *Id.* (citing D.C. CODE ANN. § 1-2515(a) (1987); WIS. STAT. ANN. § 101.22(1) (West 1973 & Supp. 1982)). Kushner also observes that most courts typically construe title VIII to prohibit such discrimination. *Id.* (citing NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir.), *aff'd*, 109 S. Ct. 276 (1988) (per curiam)); United States v. Starrett City Assocs., 840 F.2d 1096, 1101 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038-40 (2d Cir. 1979)). Given these practices, Kushner argues persuasively that either Congress should amend the FHAA to cover such bias explicitly or HUD should issue regulations specifying such prohibitions. *Id.*

387. See Dionne, *supra* note 74, at A18.

388. Dionne, *supra* note 74, at A18.

389. Dionne, *supra* note 74, at A18.

mental disabilities, homelessness can be particularly devastating.³⁹⁰

The Housing Act of 1949 declared the national goal of providing "a decent home and a suitable living environment for every American family."³⁹¹ Even the Universal Declaration of Human Rights declares that everyone has a right to a standard of living sufficient to enable him and his family to have housing.³⁹² The Supreme Court, however, has never recognized a constitutionally protected right to housing under federal law. Accordingly, decent housing remains unavailable for many Americans, and the FHAA will not remedy this situation. To ensure housing for all, the Supreme Court must hold that there is a fundamental right to housing. Alternatively, Congress can recognize the right to housing. Until then, the right of people with mental disabilities to be free of discrimination will be the law, while in practice, decent, affordable housing will remain unavailable.

390. See Arlene S. Kanter, *Homeless But Not Helpless: Legal Issues in the Care of Homeless People with Mental Illness*, 45 J. SOC. ISSUES 91, 101-03 (1989) (concluding that recent efforts to institutionalize mentally ill homeless people are misdirected solutions to solving problems of mentally ill homeless people); Kanter, *supra* note 31, at 351-57 (concluding that institutionalizing efforts will not solve problems of homelessness for mentally ill); see also *Heard v. Cuomo*, 567 N.Y.S.2d 594, 599 (Sup. Ct. 1991) (ordering city to provide appropriate housing for people discharged from mental hospitals, but due to shortage of adequate housing, delaying implementation of judgment "over a period of time").

391. 42 U.S.C. § 1441 (1988).

392. *Universal Declaration of Human Rights*, art. 25(1), G.A. Res. 217(III) (Dec. 10, 1948), reprinted in UNITED NATIONS RESOLUTIONS 135, 140 (Dusan J. Djonovich ed., 1973).