

SLOW PROGRESS: NEW FEDERAL RULES ONLY BEGIN TO ADDRESS HOUSING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

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Fran and Anna Simon receive a civil union ceremony after Colorado's civil union law took effect at midnight on May 1, 2013 – Photo by Mike Shum

“LGBT discrimination is real and... we need to do something about it.” – Secretary Shaun Donovan, U.S. Department of Housing and Urban Development²

I. Introduction

I always envied Jake’s apartment. There were obvious reasons, like the sunny porch and full dining room, but ultimately it was the space that I coveted. While my boyfriend and I tripped over each other in a studio, Jake and Sean seemed to have achieved the apex of full adulthood: the two-bedroom apartment.

Only a couple of years out of undergrad and armed with nothing but our liberal arts degrees, Jake and I both struggled to make ends meet. One night, as we discussed the bleak job market and bemoaned lingering student loan debt, I posed what seemed an obvious question: “Why don’t you and Sean move into a one-bedroom? You could save a ton of money.” “We need to apply to two-bedroom apartments to keep up the appearance that we’re roommates,” he explained.

It had never occurred to me that Jake and Sean would feel they had to represent themselves as anything other than the loving couple I knew them

to be. To my surprise, I learned that federal law does not protect LGBT individuals from housing discrimination.³ The Fair Housing Act, found in Title VIII of the Civil Rights Act of 1968,⁴ prohibits discrimination in the sale, lease, or rental of housing on the basis of race, color, religion, sex, handicap, familial status, or national origin. If a prospective tenant or buyer is a victim of discrimination on one or more of these bases, he or she can seek relief through a formal process that enjoys the full scope of federal protections including public representation in court and civil penalties up to \$50,000.⁵ However, if a landlord or seller declines a particular individual based upon sexual orientation or gender identity, the list of remedies shrinks considerably.⁶

To address this resource vacuum, states and municipalities throughout the United States have instituted much-needed protections.⁷ In February 2012, Shaun Donovan, the Secretary for the U.S. Department of Housing and Urban Development (HUD), announced new regulations to prevent those who own or operate HUD-funded housing from inquiring about an applicant's sexual orientation or gender identity.⁸ This article examines the methods by which advocates have attempted to curb discrimination against LGBT individuals in the housing context absent an overarching federal solution. This article will highlight the rules of one of the oldest and most robust municipal entities created to address discrimination, the New York City Human Rights Commission, as a counterpoint to the limited options available at the federal level. The federal government's inability to keep pace with changing public perceptions is particularly apparent in this area.⁹ While HUD's new rule is certainly an important step in the right direction, nothing short of amending the Fair Housing Act can truly ensure full equality.

II. The Evolution of Fair Housing

At the time of its passage in 1968, the Fair Housing Act's purview was limited to discrimination on the basis of race, color, national origin, or religion.¹⁰ Over the next two decades, Congress gradually expanded its scope to include discrimination on the basis of sex, disability and family status.¹¹ Underlying these expanding protections was a growing recognition

of housing as a fundamental human right.¹² In the international context, the global community has codified the right to housing in numerous multilateral treaties placing specific emphasis on vulnerable groups, such as women, children, and individuals with disabilities.¹³ As in the United States, changing international norms suggest potential areas of movement in the expansion of these protections to LGBT individuals.¹⁴ While some countries have enacted legislation banning discrimination against LGBT individuals specifically, several have turned to established, generally-worded equal protection statutes to enlarge the extent of protection.¹⁵

In the United States, advocates have utilized the Equal Protection Clause of the Fourteenth Amendment to change discriminatory state laws that affect LGBT individuals.¹⁶ In the landmark case of *Lawrence v. Texas*,¹⁷ the United States Supreme Court found unconstitutional a state law that criminalized sodomy between persons of the same sex. The Court determined that the law violated equal protection guarantees, thereby overruling an earlier ruling by the Court on another state sodomy law.¹⁸ In March 2013, the Supreme Court heard two cases regarding challenges to marriage equality and the decisions are expected in June 2013.¹⁹ However, despite these movements in the direction of equal treatment under the law, such protection has yet to be extended to housing.²⁰

III. New York Human Rights Commission

Passed in 1957, New York City's Human Rights Law²¹ preceded its state and federal counterparts by several years.²² Tracking the progression of public opinion, the law gradually broadened its scope from its narrow prohibition of discrimination based on race to eventually encompass sex, marital status, disability, and age.²³ Additionally, the New York City Human Rights Commission was the first entity in the United States to make private discrimination illegal.²⁴ In 1986, the Commission expanded the law to prohibit discrimination on the basis of sexual orientation.²⁵ As applied, this law provides substantial coverage in both public and private housing.²⁶ Moreover, the law provides a private right of action in state courts for violations, authorizes civil penalties up to \$50,000, and entitles prevailing parties to attorney fees.²⁷

When analyzing alleged discriminatory practices, the Human Rights Commission examines claims through the lens of disparate treatment and disparate impact.²⁸ Discrimination cases involving disparate treatment include those in which discrimination against a member of protected group is overt and targeted,²⁹ and often include those of the most facially pernicious discriminatory and/or harassing practices.³⁰ Disparate impact may prove more difficult to demonstrate; however, it is particularly vital in assessing discriminatory practices that appear facially neutral but in practice disproportionately affect a protected group. The process of review becomes convoluted when a protected individual is asserting a specific right that may not yet be recognized by that particular state.³¹

This situation came to the forefront in *Levin v. Yeshiva University*.³² Two lesbian students at Yeshiva University's Albert Einstein College of Medicine sued the school for denying them and their respective partners access to school-owned housing on account of a school policy that restricted housing to medical students, their spouses, and children.³³ When the students applied for housing, the school, in keeping with its policy, required a marriage certificate.³⁴ As New York law did not allow marriage between same-sex couples at the time, the students could not satisfy school regulations and the school denied their application.³⁵ The students brought their claim under the New York Human Rights Law, citing disparate impact on the basis of sexual orientation and marital status.³⁶ The Supreme Court of the State of New York and the Appellate Division dismissed the case, stating that the plaintiffs failed to state a cause of action with regard to disparate impact because the university's rule treated unmarried heterosexual and homosexual couples equally.³⁷ However, the New York Court of Appeals found that, under New York City's Civil Rights Law, the appellants' complaint sufficiently alleged a disparate impact on the basis of sexual orientation.³⁸

Although New York City's Human Rights Law offers significantly greater protections to LGBT individuals than any regulations at the federal level, the Commission has been the subject of many complaints regarding slow and cumbersome processes.³⁹ Indeed, with each expansion of groups protected by the law, funding for the Commission remained static or increased only marginally, thereby leading to fewer

available resources to address a ballooning caseload.⁴⁰ Despite honorable intentions, if insufficient options for redress exist, justice is not truly being served.

IV. Consequences of Discrimination

A. Homelessness and Other Issues Among LGBT Youth

The lack of a coordinated federal response to housing discrimination against LGBT individuals generates widespread, detrimental consequences. When viewed in the context of youth, the failure to formalize protections against discrimination in the private sector poses a particular concern. A study conducted by The Williams Institute found that LGBT youth represent between 30% and 43% of those served in drop-in centers and street outreach programs.⁴¹ While numerous factors contribute to LGBT youth leaving their homes, family conflict is cited as the primary reason that teens become homeless.⁴² According to information obtained by The National Gay and Lesbian Institute, 50% of LGBT teens experience a negative reaction when they first come out to their families.⁴³ The same study found that over a quarter of teens were kicked out by their parents;⁴⁴ however, a more recent survey of agencies providing services to homeless youth estimated the actual number to be closer to 43%.⁴⁵ Even more concerning are findings that over a third of the teens reported experiencing a violent assault in the home after coming out to family members.⁴⁶ According to the Department of Health and Human Services, as a result of living in a society that stigmatizes and discriminates against homosexual individuals, LGBT youth face higher incidences of mental health issues.⁴⁷ As such, homeless LGBT youth are especially vulnerable to victimization, substance abuse, and risky sexual behavior.⁴⁸

In addition to the many dangers associated with living on the streets, advocates have expressed concern that LGBT youth may also experience discrimination from shelters run by faith-based organizations that are often better funded and more numerous than secular shelters.⁴⁹ This issue is even more magnified for transgender youth due to segregation within the shelters based on sex at birth, which does not take into account the individual's

gender identity.⁵⁰ In keeping with the disjointed governmental approach to addressing issues relating to LGBT housing and homelessness, programs that serve homeless youth in general, and LGBT youth specifically, are grossly underfunded.⁵¹ The Williams Institute's found that of the 381 respondents in its study, almost 30% reported receiving no federal sources of support, while 20% received no state support, and 23% received no city or county support.⁵²

B. Disparate Treatment Toward LGBT Couples

In states with no overarching laws preventing discrimination against LGBT applicants, landlords, sellers, and realtors may discriminate with impunity.⁵³ A study conducted by four fair housing organizations in Michigan found significant disparities in the treatment of opposite-sex couples and same-sex couples when attempting to rent or purchase a home.⁵⁴ Michigan lacks any statewide protections for LGBT individuals, although fourteen municipalities' ordinances specifically protect LGBT individuals from discrimination.⁵⁵ The project conducted 120 paired tests comparing the treatment of test teams posing as same-sex life partners to those posing as an opposite-sex married couple. The test team posing as a same-sex couple experienced disparate treatment in nearly 30% of the tests, while their opposite-sex counterparts did not.⁵⁶ In the tests showing disparity in treatment, the testers perceived as a same-sex couple were quoted higher rent rates, experienced less encouragement to apply, and were charged application fees, while the testers posing as opposite-sex married couples were not.⁵⁷ Testers posing as same-sex couples also experienced behavior bordering on sexual harassment.⁵⁸ While acknowledging that city ordinances are not as robust as federal or state laws, the study indicated that city ordinances play an important role in ending discrimination on the basis on sexual orientation.⁵⁹

Like Jake and Sean, LGBT couples wishing to avoid discriminatory landlords may resort to less-than-ideal options. It is worth noting that the state in which Jake lived, Colorado, prohibits discrimination based on sexual orientation;⁶⁰ however, as evidenced by the Michigan study, city and state remedies often lack the teeth of a federal solution.⁶¹ Expounding on the Michigan study, a 2012 article noted that same-

sex couples are more likely than single applicants to face discrimination because their sexual orientation is more immediately apparent to potential landlords or sellers.⁶²

The potential impact of such discrimination is significant when viewed together with recent data obtained from the 2010 U.S. Census showing over 646,000 same-sex couple households throughout the United States.⁶³ Information obtained from the Census further indicated that same-sex couples were identified in 93% of all United States counties.⁶⁴ Given that over half the states offer no protection against discrimination on the basis of sexual orientation in the realm of housing, this data highlights the number of couples and individuals who are living in areas without any federal, state, or even municipal protection.

V. The Limits of New Federal Rules

Although HUD's new rule is a step in the right direction, its scope is limited. The rule against discrimination based on sexual orientation or gender identity only applies to HUD-funded housing.⁶⁵ LGBT individuals and couples who wish to live in privately owned and insured housing may still face discrimination if they live in a state or city that does not protect them from being discriminated against based on their sexual orientation.⁶⁶ LGBT individuals and couples may also continue to experience discrimination in obtaining mortgages to purchase their own homes, as evidenced in the Michigan test.⁶⁷ However, if an LGBT individual or couple were applying for a mortgage insured by the Federal Housing Administration, the HUD rule would offer protection.⁶⁸

Recognizing the remaining obstacles to true equality in the housing realm, former-Senator John Kerry (D-MA) and Representative Jerrold Nadler (D-NY) introduced bills in the Senate and House of Representatives that would amend the Fair Housing Act to include protection on the basis of sexual orientation.⁶⁹ Unfortunately, neither bill was voted out of its respective committee.⁷⁰ In 2010, Secretary Donovan announced a national study to determine the impact of housing discrimination based on sexual orientation and gender identity.⁷¹ The results have not yet been announced;⁷² however, such a large-

scale endeavor will hopefully help propel the federal governments efforts forward.

VI. Conclusion

Discrimination based on sexual orientation and gender identity is an affront to the American values of equality and liberty. As domestic and international norms move decidedly toward full acceptance of LGBT rights,⁷³ the federal government must adapt. Unless the federal government takes decisive action in the form of amending the Fair Housing Act, LGBT individuals and couples will continue to experience unchecked discrimination in the housing context in the thirty states that currently have no laws on the books to prevent it.⁷⁴ The new HUD rule is an excellent first step in this process; however, it does not go far enough to address the struggle many LGBT individuals and couples face when they try to exercise their right to safe, affordable housing.

As evidenced by the number of homeless LGBT youth, discrimination has lasting, damaging effects. The federal government must assume a stronger leadership role in advocating on behalf of these individuals and refuse to tolerate the discrimination against them. Without a robust federal role, states will continue forward with the piecemeal approaches currently taken, which lack the needed enforcement and support to ensure housing equality.

(Endnotes)

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² Mike Householder, *Shaun Donovan On LGBT Housing Discrimination: "You Are Breaking The Law, And You Will Be Held Accountable,"* THE HUFFINGTON POST (Mar. 9, 2012), available at http://www.huffingtonpost.com/2012/03/09/shaun-donovan-lgbt-housing_n_1335003.html.

³ Human Rights Campaign, *Housing for LGBT People: What You Need to Know About Property Ownership and Discrimination*, <http://www.hrc.org/resources/entry/housing-for-lgbt-people-what-you-need-to-know-about-property-ownership-and> (last visited Mar. 30, 2013).

⁴ 42 U.S.C. § 3604.

⁵ Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 991, 1010-11 (1996).

⁶ Dennis M. Teravainen, *Federal Law's Indifference to Housing Discrimination Based on Sexual Orientation*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 11, 34 (2002); Human Rights Campaign, *Housing for LGBT People: What You Need to Know About Property Ownership and Discrimination*.

⁷ Human Rights Campaign, *supra* note 2.

⁸ 24 C.F.R. § 5.105(a)(2)(ii) (2012).

⁹ *Support for Same Sex Marriage Grows As More Americans Change Their Views*, Pew Research Center, <http://www.pewresearch.org/daily-number/support-for-same-sex-marriage-grows-as-more-americans-change-their-views/> (last visited Mar. 30, 2013) (noting that 14% of Americans surveyed say they have changed their views on same-sex marriage resulting in 49% overall support).

¹⁰ Dennis M. Teravainen, *Federal Law's Indifference to Housing Discrimination Based on Sexual Orientation*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 11, 22 (2002); Human Rights Campaign, Human Rights Campaign, *Housing for LGBT People: What You Need to Know About Property Ownership and Discrimination*.

¹¹ *Id.*

¹² Dara Smith, *Home Is Where the Heart Is: Sexual Orientation Discrimination and the Right to Adequate Housing in International Law*, 40 GEO. WASH. INT'L L. REV. 1343, 1358-59 (2009) (noting the expansion of United Nations recognition of sexual orientation as a protected class and the applicability of this development to housing rights); Teravainen, *Federal Law's Indifference to Housing Discrimination Based on Sexual Orientation* (highlighting the Supreme Court's recognition of housing as a fundamental right).

¹³ Smith, *supra* note 11.

¹⁴ *Id.* at 1363 (stating that "the existence of such provisions strongly supports the notion that international law increasingly ensures LGBT individuals substantive lifestyle equality").

¹⁵ *Id.*

¹⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding a Texas law outlawing sodomy violated the Due Process clause); Smith, *Home Is Where the Heart Is: Sexual Orientation Discrimination and the Right to Adequate Housing in International Law*.

¹⁷ 539 U.S. 558 (2003).

¹⁸ *Bowers v. Hardwick*, 478 U.S. 186 (1986) *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁹ *United States v. Windsor*, 133 S. Ct. 786 (2012); *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012)

²⁰ Dennis M. Teravainen, *Federal Law's Indifference to Housing Discrimination Based on Sexual Orientation*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 11, 22-23 (2002).

²¹ New York City Administrative Code § 8-107(17)(a)(l)-(2).

²² Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 991, 1014-15 (1996).

²³ *Id.* at 991.

²⁴ *Id.* at 1010.

²⁵ New York, N.Y., Local Law No. 2 s 1 (Apr. 2, 1986).

- ²⁶ *FairHousing: It's the Law*, NYC Commission on Human Rights 4-6 (2012), available at http://www.nyc.gov/html/cchr/pdf/fairhousebook_2012_eng.pdf (listing exceptions, which include owner-occupied dwellings, housing for elderly or disabled, gender-specific dormitory-style residences).
- ²⁷ Schill, *supra* note 21.
- ²⁸ *Fair Housing: It's the Law*, *supra* note 25.
- ²⁹ *Id.*
- ³⁰ See 119-121 E. 97th St. Corp. v. New York City Comm'n on Human Rights, 220 A.D.2d 79, 82, 642 N.Y.S.2d 638, 640 (1996) (Appellate Division of New York Supreme Court held that sufficient evidence existed to find discrimination against tenant based on sexual orientation and HIV-positive status when a landlord committed acts of harassment, including burglarizing his apartment and writing threatening notes).
- ³¹ See Andrew Kravis, *Is the Inability to Marry A Marital Status? Levin v. Yeshiva University and the Intersection of Sexual Orientation and Marital Status in Housing Discrimination*, 24 COLUM. J. GENDER & L. 1, 18 (2012).
- ³² Levin v. Yeshiva Univ., 96 N.Y.2d 484, 754 N.E.2d 1099, 1101 (N.Y. 2001).
- ³³ *Id.* at 489.
- ³⁴ *Id.* at 498-99.
- ³⁵ *Id.* at 503.
- ³⁶ *Id.* at 489.
- ³⁷ *Id.* at 498-99.
- ³⁸ *Id.* at 503 (Smith, J., concurring) (acknowledging that the university's rule has a disparate impact on homosexual students, because they cannot live with their partners in student housing because they do not have the option of marrying their life partners).
- ³⁹ Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 991, 1023-24 (1996).
- ⁴⁰ *Id.* at 1025.
- ⁴¹ Laura E. Durso & Gary J. Gates, *Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth who are Homeless or At Risk of Becoming Homeless*, The Williams Institute with True Colors Fund and The Palette Fund 3 (2012).
- ⁴² Nicholas Ray, *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness*, The National Gay and Lesbian Task Force Policy Institute with the National Coalition for the Homeless 2 (2006).
- ⁴³ *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ Durso & Gates, *supra* note 40.
- ⁴⁶ Ray, *supra* note 41.
- ⁴⁷ *Id.* (citing Gibson, P., *Preventions and Interventions in Youth Suicide*, U.S. Department of Health and Human Services 9 (2005)).
- ⁴⁸ *Id.* at 3.
- ⁴⁹ *Id.* at 4-5.
- ⁵⁰ *Id.* at 5.
- ⁵¹ Laura E. Durso & Gary J. Gates, *Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth who are Homeless or At Risk of Becoming Homeless*, The Williams Institute with True Colors Fund and The Palette Fund 4 (2012).
- ⁵² *Id.* at 7.
- ⁵³ Dennis M. Teravainen, *Federal Law's Indifference to Housing Discrimination Based on Sexual Orientation*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 11, 34 (2002); Human Rights Campaign, *Housing for LGBT People: What You Need to Know About Property Ownership and Discrimination*, <http://www.hrc.org/resources/entry/housing-for-lgbt-people-what-you-need-to-know-about-property-ownership-and>.
- ⁵⁴ *Sexual Orientation and Discrimination in Michigan*, Michigan Fair Housing Centers (2007), available at http://www.fhcmichigan.org/images/Arcus_web1.pdf.
- ⁵⁵ *Id.* at 4.
- ⁵⁶ *Id.* at 3.
- ⁵⁷ *Id.* at 9.
- ⁵⁸ *Id.*
- ⁵⁹ *Id.* at 16 (noting an eight percent difference in the disparity in treatment between cities that had protective law versus those that did not).
- ⁶⁰ Human Rights Campaign, *Housing for LGBT People: What You Need to Know About Property Ownership and Discrimination*, <http://www.hrc.org/resources/entry/housing-for-lgbt-people-what-you-need-to-know-about-property-ownership-and> (listing the states with laws that protect against discrimination on the basis of sexual orientation and gender identity).
- ⁶¹ *Sexual Orientation and Discrimination in Michigan*, Michigan Fair Housing Centers 4 (2007), available at http://www.fhcmichigan.org/images/Arcus_web1.pdf.
- ⁶² See Andrew Kravis, *Is the Inability to Marry A Marital Status? Levin v. Yeshiva University and the Intersection of Sexual Orientation and Marital Status in Housing Discrimination*, 24 COLUM. J. GENDER & L. 1, 9 (2012) (expounding on the implications of the Michigan study).
- ⁶³ Gary J. Gates & Abigail M. Cooke, *United States Census Snapshot: 2010*, The Williams Institute 1-3 (2011).
- ⁶⁴ *Id.*
- ⁶⁵ Kravis, *supra* note 61.
- ⁶⁶ *Id.* at 21-22.
- ⁶⁷ *Sexual Orientation and Discrimination in Michigan*, *supra* note 60.
- ⁶⁸ 24 C.F.R. § 5.105(a)(2)(ii) (2012).
- ⁶⁹ See Kravis *supra* note 61 at 22.
- ⁷⁰ HOME Act of 2011, S. 1605, 112th Cong. (2011); HOME Act of 2011, H.R. 3030, 112th Cong. (2011).
- ⁷¹ Department of Housing and Urban Development, *LGBT Discrimination Study*, http://portal.hud.gov/hudportal/HUD?src=/LGBT_Discrimination_Study.
- ⁷² *Id.*
- ⁷³ Lawrence v. Texas, 539 U.S. 558, 573 (2003) (noting the growing international acceptance of same-sex relationships and the rejection of laws criminalizing sexual intimacy between same-sex individuals).
- ⁷⁴ See Kravis *supra* note 61 at 23 (listing each state's protections, or lack thereof, for LGBT individuals in the realm of housing and marital status).