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Fifty Years Since Passage of the Fair Housing Act: Rent-To-Income Ratios In the Persistence of Residential Racial Segregation In Chicago, 51 J. Marshall L. Rev. 551 (2018)

Amanda Insalaco

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FIFTY YEARS SINCE PASSAGE OF THE
FAIR HOUSING ACT: RENT-TO-INCOME
RATIOS IN THE PERSISTENCE OF
RESIDENTIAL RACIAL SEGREGATION IN
CHICAGO

AMANDA INSALACO*

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I. INTRODUCTION

In the wake of racial unrest and the assassination of Martin Luther King, Congress adopted the Fair Housing Act of 1968 (“FHA” or “the Act”).¹ Fifty years have since passed, but the conclusion of the National Advisory Commission on Civil Disorders in its “Kerner Report” remains painfully poignant: “Our nation is moving toward two societies, one Black, one White—separate and unequal.”²

*J.D., DePaul University College of Law, 2019. Prior to law school, Insalaco worked with pro se litigants in rural Illinois through the Illinois JusticeCorps program. She was the 2016 Chicago Bar Foundation Marovitz Public Interest Law Scholarship recipient. Throughout law school, she worked for and volunteered at various Chicago-based legal aid organizations. The author would like to thank the many academics and practitioners who provided feedback and facilitated connections with those who did. She would like to extend special thanks to Jerry Levy, whose countless phone conversations provided indispensable perspective.

1. The “riots,” as some refer to them, were largely attributed to White racism and the barriers such attitudes created to housing rights for African Americans. *E.g.*, Valerie Schneider, *In Defense of Disparate Impact Analysis: Urban Redevelopment and the Supreme Court’s Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 550 (2014).

2. Gerhard Peters & John T. Woolley, *Lyndon B. Johnson: Remarks Upon Signing Order Establishing the National Advisory Comm’n on Civil Disorders*, The American Presidency Project, www.presidency.ucsb.edu/ws/?pid=28369 (hereinafter Remarks Upon Nat’l Advisory Comm’n) (last visited Aug. 6, 2018). This 11-person Commission was established by President Lyndon B. Johnson in an Executive Order to investigate the *supra* causes of the 1967 race riots and to provide recommendations. Schneider, *supra* note 1, at 550.

Although most African Americans report a preference to live in integrated neighborhoods,³ urban cities in the northern states are more segregated now than they were at the start of the twentieth century⁴ and Chicago is no exception.⁵ And because resources and benefits such as property values, public services, safety, education, and employment opportunities are finite and largely determined by locality,⁶ the community in which a person resides has a palpable impact on their future.⁷

Fair housing advocates have long recognized the gravity of segregation's effects, but they face fierce opposition from well-funded interest groups and constituents including financial institutions, realtor's associations, and landlords.⁸ However, it is not just the private sector that is responsible for perpetuating segregation; the government has systemically isolated racial minorities as well.⁹ Thus, the path towards and passage of remedial legislation such as the FHA was arduous,¹⁰ and despite this immense effort, the legislation resulted in minimal progress toward integration.¹¹

Certainly, the forces responsible for the persistence of residential racial segregation are multifaceted and complex. One such contribution to the problem is the tendency of landlords to

3. Esther Havekes, Michael Bader, & Maria Krysan, *Realizing Racial and Ethnic Preferences? Exploring the Mismatches Between What People Want, Where They Search, and Where They Live*, 35 *POPUL. RES. POL'Y REV.* 101, 103–04 (2016).

4. Despite this preference, African Americans are more likely to live in segregated neighborhoods regardless of income level or occupation. Stephanie Schmitz Bechteler, *100 Years and Counting: The Enduring Legacy of Racial Residential Segregation in Chicago in the Post-Civil Rights Era. PART ONE: The Impact of Chicago's Racial Segregation on Residence, Housing and Transp.* CHICAGO URB. LEAGUE 8, 14 (March 2016).

5. *Id.*

6. Bechteler, *supra* note 4, at 17.

7. See generally JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* (1995) (discussing social and economic impact of housing discrimination on minority families).

8. See *infra* notes 165–170.

9. See, e.g., John Marshall Law School Fair Housing Support Center, *Segregation in the Chicago Metropolitan Area – Some Immediate Measures to Reverse this Impediment to Fair Housing*, J. MARSHALL LAW SCHOOL (May 1, 2013) (involving a HUD-funded report detailing segregation in the City of Chicago) [hereinafter JMLS, *Segregation in the Chicago Metropolitan Area*]. See also *infra* notes 32–41 and accompanying text.

10. The FHA was one of the most contentious of the civil rights era legislation. U.S. DEPT OF HOUS. AND URB. DEV., *HISTORY OF FAIR HOUSING*, www.portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited Aug. 6, 2018).

11. Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 *HARV. C.R.-C.L. L. REV.* 155, 155 (1996) (referencing “[d]iscrimination against rental subsidy holders seems to be as open and blatant today as was racial discrimination in the years preceding the enactment of the [FHA] of 1968”).

require income more than three times the rent.¹² This practice effectively excludes the majority of Section 8 Housing Choice Voucher (“HCV”) holders when erroneously applied to the whole of the rent as opposed to the voucher-holder’s share.¹³ It arguably violates local ordinances including the Cook County Human Rights Ordinance (“CCHRO”) and Chicago Fair Housing Ordinance (“CFHO”), which expressly prohibit source of income discrimination.¹⁴ In addition, the practice disparately impacts people of color in violation of the FHA and Illinois Human Rights

12. Interview with Alan Mills, Executive Director of Uptown People’s Law Center (“UPLC”) (Aug. 7, 2017). UPLC is a small nonprofit legal organization located on the North Side of Chicago. Mills started as a volunteer at UPLC in 1979 during his second year of law school at Northwestern University. During law school, Mills began visiting prisoners at Cook County Jail and has since tried dozens of individual cases on behalf of prisoners in state and federal court over the last 35 years. During that time, he has also worked with tenants whose rights had been violated and is now a foremost expert in Chicago tenants’ rights law; Bechteler, *supra* note 4, at 95–96; *see also* Philip D. Tegeler, Michael L. Hanley, and Judith Liben, *Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation*, 30 HARV. C.R.-C.L. L. REV. 451 (1995) (“analyz[ing] in detail the workings of the federal Section 8 certificate and voucher programs, which . . . represent an invaluable, and still largely untapped, resource for regional housing mobility”).

13. *See e.g.*, Garrett v. The Habitat Company, LLC, CCHR No. 14-H-46 (finding respondent’s minimum income requirement excluded at least 75 percent of HCV holders when applied to whole of the rent).

14. CCHRO 93-0-13 (1993); CFHO 5-8-010 (2003).

Act (“IHRA”).¹⁵ Thus, the practice contributes to segregation¹⁶ and segregation helps to maintain the racial economic disparity.¹⁷

In addition to the FHA, local and state legislation may provide litigants additional administrative venues through which to hold landlords accountable, but these avenues are infrequently pursued¹⁸ and landlord violations remain rampant.¹⁹ This

15. Rent-to-income ratios that effectively exclude HCV holders also have a disparate impact on women and people with disabilities. See Chicago Policy Research Team, *Not Welcome: The Uneven Geographies of Housing Choice*, U. OF CHI. (2017), www.docs.wixstatic.com/ugd/e6d287_68e7a1962fe54cbab7598e2cb2346109.pdf. [hereinafter University of Chicago, Not Welcome]; 775 ILL. COMP. STAT. 5/3 (2018). Some practitioners think it may be easier to sustain disability-based disparate impact claims than those based on race, while others believe it more difficult historically. Phone call with Carrie Chapman, Director of Policy Advocacy and Strategic Innovation at the Legal Council for Health Justice (Sept. 6, 2017) (Carrie Chapman oversees litigation, legislation, and administrative advocacy while assisting program directors in supervising legal work. She also uses her experience at building and sustaining medical-legal partnerships to foster new relationships. Chapman has extensive experience serving people in poverty through litigation. Prior to her time at the Council, Chapman directed the public benefits practice group at LAF where she supervised a 25-person team working on public benefits advocacy. She also litigated complex cases on hospital charity care. Currently, she teaches “Poverty Law” at DePaul University School of Law as an adjunct faculty member); Phone call with Jerry Levy, retired legal aid attorney (Sept. 18, 2017) (Jerry Levy worked at Westchester Legal Services for 27 years where, in addition to fair housing, he concentrated on family law, homeless advocacy, public benefits, and welfare rights. In 1993, the New York Bar Association Committee on Legal Aid granted Levy the Denison Ray Civil Legal Service Staff Award. Levy litigated *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989) (discussed *infra* 110-22) and *Giddins v. HUD*, No. 91 Civ. 7181 (S.D.N.Y., filed Oct. 24, 1991) (alleging discriminatory administration of the § 8 program in Yonkers and Westchester Counties). The consent decree entered in *Giddins* created the Enhanced Section 8 Outreach Program (“ESOP”) and required HUD, the State of New York, Westchester County, and the City of Yonkers to fund ESOP for its first five years. ESOP reached out to class members (i.e., Section 8 recipients) to inform them that they were entitled to receive rent exceptions to move to opportunity areas. It also recruited landlords to participate in Section 8 by educating them on the advantages of the program. In 2001, Levy left Westchester Legal Services to serve as General Counsel at ESOP. He remained there until 2016).

16. In Atlanta, studies show that Blacks may be deterred from even searching for housing in neighborhoods where the probability of discrimination is high. Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379, 395–96 (2004).

17. Bechteler, *supra* note 4, at 15.

18. In addition to being one of the nation’s most segregated cities, Chicago’s Cook County is the second-largest county in the country, home to more than 5 million people. And yet, from late 2005 to 2011, only 521 complaints were filed with HUD, the State of Illinois, and the County. Applied Real Estate Analysis, Inc., *Analysis of Impediments to Fair Housing Choice (AIFHC)* (Sept. 2012). This is even more alarming when one considers that 2018 marks twenty-five years since passage of the Cook County HRO.

19. Interview with Chris White of Northside Community Resources (“NCR”), an organization in Rogers Park, Chicago that receives HUD funding to conduct

Comment explores the ways various jurisdictions have responded to challenges to rent-to-income ratio requirements, with a special focus on the issues and work of practitioners in Chicago, Cook County and Illinois.

A vast discrepancy exists between instances of discrimination and the number of discrimination suits brought. Thus, this comment argues for policy changes to facilitate increased disparate impact litigation under the FHA and local and state ordinances, as well as the adoption of methods to strengthen and supplement discrimination suits. Section II of this Comment provides an overview of residential racial segregation broadly and in the city of Chicago, exploring the origins of disparate impact analysis and the ways various jurisdictions have applied it in the housing context. The history surrounding the FHA, IHRA, CCHRO, and CFHO is discussed. Section III details recommended policy changes. Finally, Section IV explores the likely impact of reduced segregation on our communities, and Section V briefly concludes by urging that a lack of political will should not prevent the redress of housing discrimination.

II. BACKGROUND

This section provides historical context to passage of the FHA. It gives an overview of residential racial segregation, including the contributions of the federal government to current housing patterns. Next, it examines the origins of disparate impact analysis and the use of the doctrine in the fair housing context. Finally, this section discusses the responses of various jurisdictions to disparate impact challenges, with emphasis placed on the Seventh Judicial Circuit, Illinois, Cook County, and Chicago.

A. Overview of Residential Racial Segregation: From the Regional- to Urban-Levels

The seeds of residential racial segregation were sown long ago. At the time of slavery, most Blacks lived in rural areas of the southern United States.²⁰ Shortly after abolition in 1865, the Fourteenth and Fifteenth Amendments were ratified, which

fair housing testing to ferret out discriminatory practices (Sept. 19, 2017) (Chris White was the Fair Housing Testing and Outreach Coordinator at NCR. He worked with NCR for a little over a year. For the previous fifteen years, he worked as a community organizer around employment and housing issues. The NCR educates, investigates, and enforces local and national fair housing laws for renters on the north side of Chicago.

20. Steven F. Lawson, *Freedom's Story: Teaching African American Literature and History, Segregation*, NAT'L. HUMAN CTR., www.nationalhumanitiescenter.org/tserve/freedom/1865-1917/essays/segregation.htm (last visited Nov. 8, 2018).

extended citizenship and equal protection of the law to Blacks and prohibited racial discrimination in voting.²¹ Nevertheless, segregation in public and private spheres remained customary.²² In response to continued pervasive discrimination, Congress passed the Civil Rights Act of 1875 (“CRA”).²³ The CRA sought to compel businesses to desegregate their facilities, but it was not long-lived.²⁴

In the Civil Rights Cases of 1883, the Supreme Court declared the CRA of 1875 unconstitutional due to its regulation of private business activities.²⁵ Once the Act was overturned, southern states raced to implement *de jure* segregation,²⁶ and Blacks eventually fled the south during the Great Migration in the hopes that northern cities would provide refuge.²⁷ The *Chicago Defender*, a magazine read widely by Black communities in the south, described ample “employment opportunities and improved schools, transportation and entertainment.”²⁸

In Chicago, Black migrants were restricted to the area below the stockyards known as the “Black Belt” or “Black Ghetto.”²⁹ But the area could not accommodate the influx of residents, and the Black population began to encroach on historically White neighborhoods.³⁰ Whites, who believed opening their neighborhoods to Black residents would result in a decline in property values, used a variety of forces to resist change in their neighborhoods: restrictive covenants, discriminatory zoning practices, and

21. *Id.*

22. *Id.*

23. Lawson, *supra* note 20.

24. *Id.*

25. KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 854–58 (Robert C. Clark et al. eds., 19th ed. 2016).

26. Lawson, *supra* note 20. The segregation extended into other areas of social life besides housing, include health care. These segregated social spheres have largely continued to this day, too. Vann R. Newkirk II, *America’s Health Segregation Problem*, THE ATLANTIC (May 18, 2016), www.theatlantic.com/politics/archive/2016/05/americas-health-segregation-problem/483219/.

27. Bechteler, *supra* note 4, at 22.

28. *Id.* Prior to WWI and the Great Migration, Chicago was comprised mainly of first- and second-generation Anglo-Saxon, German, Scots-Irish, Italian and Eastern European immigrants. Not Welcome, *supra* note 15, at 2. These immigrants were more easily able shed their cultural demarcations and assimilate over time. See generally STANLEY LIEBERSON, A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880 (exploring the causes of disparities between Blacks and white immigrants). As well, they tended to arrive at cities at a time when the demand for unskilled labor remained steady. *Id.* Conversely, the more than 6 million Blacks that migrated to urban cities in the north during the Great Migration were faced with a waning demand for unskilled labor. *Id.*

29. Today, this area is referred to as Bronzeville. *From Riots to Renaissance: Bronzeville: The Black Metropolis*, WTTW, www.interactive.wttw.com/a/dusable-to-obama-explore-riots-to-renaissance-bronzeville-black-metropolis (last visited June 12, 2018).

30. University of Chicago, Not Welcome, *supra* note 15, at 3.

discrimination in sales, rental, and financing were commonplace.³¹ These forms of resistance were reinforced systemically, too.

1. *The Federal Government's Contribution to Systemic Housing Inequality*

In 1934, the federal government created the Federal Housing Administration (“the Administration”) to help remedy the scarcity and dilapidation that characterized the post-Great Depression housing stock.³² The Administration provided insurance for mortgages issued by private institutions.³³ To determine where to invest, it created security maps for large cities that categorized neighborhoods as “White, Black, and Changing.”³⁴ Properties, blocks, and neighborhoods were assigned grades: grade A (Green), B (Blue), C (Yellow), or D (Red).³⁵ Areas with an A-grade had zero immigrants or Blacks and were considered safe investments.³⁶ B- or C-grades indicated risk and were assigned to those properties located in areas with Jewish populations.³⁷ A neighborhood with Black residents was marked down to a D.³⁸ Properties with a D designation were thought likely to decline in value and were considered undesirable locations for purchasing or improving.³⁹ Indeed, the Administration’s *Mortgage Underwriting Standards Manual* “explicitly called for racial discrimination in lending and insuring decisions,”⁴⁰ but there were too few legal tools to challenge these practices at the time.⁴¹

2. *Federal Attempts to Remedy Housing Disparity Emerge*

In 1937, the federal government initiated its “first large-scale

31. These forces were sometimes literal. Between July 1917 and March 1921, fifty-eight Chicago properties rented and owned by African Americans were bombed. JMLS, *Segregation in the Chicago Metropolitan Area*, *supra* note 9, at 14.

32. *Id.*

33. *Id.*

34. *E.g.*, University of Chicago, *Not Welcome*, *supra* note 15, at 3.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *E.g.*, University of Chicago, *Not Welcome*, *supra* note 15, at 3.

40. Bechteler, *supra* note 4, at 10. Of course, this is not to suggest that the feds were the only governmental entity to systemically reinforce segregated housing patterns; municipalities are also responsible. *See, e.g.*, *U.S. v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987) (finding that the City of Yonkers contributed to segregation of housing and subsequent school segregation) and *see U.S. ex rel. Anti-Discrimination Center for Metro New York v. Westchester County, N.Y.*, 668 F. Supp. 2d 548 (S.D. N.Y. 2009) (finding that Westchester County made false claims to the United States government that it was affirmatively furthering fair housing in violation of the False Claims Act).

41. Schneider, *supra* note 1, at 550.

entry into the housing market” in passing the Wagner-Steagall Act.⁴² This New Deal era legislation was intended to create jobs and clear slums by creating locally-based housing authorities to oversee the construction of public housing.⁴³ Much of the infrastructure created during this time remains a source of housing for low-income families.⁴⁴ However, the housing built under the Steagall Act was poorly planned and managed, located in under-resourced areas where families could not access the jobs and infrastructure needed to improve their economic status.⁴⁵

Segregation in “every geographic region in America” actually increased from 1960 to 1970.⁴⁶ In the mid-1960s, protests broke out in Black communities,⁴⁷ so President Lyndon B. Johnson created the 11-person National Advisory Commission on Civil Disorders to investigate the causes of the uprising.⁴⁸ The Commission released its “Kerner Report” just as the Senate tried to filibuster fair housing legislation.⁴⁹ The Commission recommended the “elimination of barriers to choice in housing and the passage of a national and enforceable ‘open housing law.’”⁵⁰

Soon after the Kerner Report was released, Martin Luther King, Jr. was assassinated.⁵¹ The tragedy served as a catalyst for Congressional action.⁵² Less than a week later, the House of Representatives voted to pass Title VIII of the Civil Rights Act, or

42. Dana L. Miller, *Hope VI and Title VIII: How a Justifying Government Can Overcome a Disparate Impact Problem*, 47 ST. LOUIS U. L. J. 1277, 1279 (2003).

43. Miller, *supra* note 42, at 1279.

44. *Id.* Unsurprisingly, the infrastructure is now in poor condition. In 1993, the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act created HOPE VI which was meant to “revitalize” the dilapidated buildings. U.S. DEPT OF HOUS. AND URB. DEV., ABOUT HOPE VI, www.hud.gov/program_offices/public_indian_housing/programs/ph/hope6/about (last visited July 16, 2018); Through the Choice Neighborhood Initiative, HUD provides grants to local Public Housing Authorities (“PHAs”) for demolition of existing projects and construction of new “mixed income” developments. But most of the original tenants are displaced, since a share of the development’s units are preserved for middle-class residents. The Initiative does not require a “one-to-one replacement” of units, so the total amount of housing stock is actually reduced. Miller, *supra* note 42, at 1289.

45. Miller, *supra* note 42, at 1279.

46. Schneider, *supra* note 1, at 550.

47. Remarks Upon Nat’l Advisory Comm’n, *supra* note 2.

48. *Id.*

49. Schneider, *supra* note 1, at 553.

50. *Id.*

51. GEORGE MASON U., “The Communications Media, Ironically, Have Failed to Communicate”: The Kerner Report Assesses Media Coverage of Riots and Race Relations, www.historymatters.gmu.edu/d/6553/ (last visited July 11, 2018) (citing U.S. Kerner Commission, Report of the National Advisory Commission on Civil Disorders U.S. GOV’T PRINTING OFF. (1968)).

52. Schneider, *supra* note 1, at 553.

the FHA,⁵³ and President Johnson signed it the very next day.⁵⁴

3. FHA and Section 8

The wording of the FHA is similar to its predecessor, Title VII,⁵⁵ which prohibits employment discrimination: “[I]t shall be unlawful to refuse to rent or sell . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex . . . or national origin.”⁵⁶ Congress amended the FHA in 1988 to include persons with disabilities and familial status as protected classes.⁵⁷ Although the Act was given more teeth at that time, Congress failed to expressly ratify or disavow use of disparate impact analysis.⁵⁸

53. Title VII, 42 U.S.C. § 2000e et seq. (1964), was co-sponsored by the only Black senator at the time, Edward Brooke III. Schneider, *supra* note 1, at 553.

54. The FHA passed by a vote of 250-172 in the House. *Id.*

55. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1964).

56. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 83 (codified as amended at 42 U.S.C. § 3604 (2012) (emphasis added)); Schneider, *supra* note 1, at 563.

57. JMLS, *Segregation in the Chicago Metropolitan Area*, *supra* note 9.

58. *Id.* The 1988 amendments made several important changes, however. In addition to providing for additional protected classes, a provision was included that expanded HUD’s role in administrative hearings. Prior to this change, HUD could only provide a conciliatory function at administrative hearings before it, and the conciliation hearings were often ineffective, since defendants would not agree to anything. Thus, the complainant was likely to opt for federal court. This avenue presented its own challenges, though. If the complainant was located in a rural area, they often had trouble finding a lawyer to file in federal court. Furthermore, if the discrimination occurred outside of where the federal court was located, complainants and their attorneys would have to travel hundreds of miles. The changes to HUD administrative hearings improved accessibility for complainants, since hearing officers could meet complainants in their own towns. Interview with F. Willis Caruso, Professor Emeritus at John Marshall Law School and attorney of record in *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) and drafter of the IHRA (Mar. 7, 2018) (For more than twenty years, Caruso worked with the John Marshall Fair Housing Legal Clinic as Co-Executive Director or Director. He is a prolific author and has published numerous books and articles on fair housing issues. During his career, Caruso handled more than 1,000 fair housing cases under the FHA and state and local government statutes and ordinances); The 1988 amendments made other changes, too. The time to file a complaint at HUD was increased from 180 days to one year, and the time to file in court was increased from 180 days to 2 years. At the time, most “forward looking states and municipalities” followed Congress’ lead by implementing comparable statutes and ordinances. Michael P. Seng & F. Willis Caruso, *The Fair Housing Act at Forty*, J. AFFORDABLE HOUS. & CMTY. DEV. L. (Winter 2009); Electronic communication with F. Willis Caruso (Mar. 9, 2018). The availability of funding may have had something to do with it: “The concept of a state agency being certified by the federal government as a ‘substantially equivalent agency,’” whereby the federal government provides grant funds to state and local agencies enforcing “substantially equivalent” legislation came from the 1988 amendments. *Comm’n on Human Rights v. Litchfield Housing Authority*, 117 Conn. App. 30, 42 (2009).

In the 1970s, HUD attempted to remedy problems with the public housing developments caused by the Housing Act of 1937 by creating the Section 8 housing subsidy program.⁵⁹ The federal government did not mandate landlord participation in the Section 8 program, but some jurisdictions have since passed laws prohibiting source of income discrimination.⁶⁰ Whether Section 8 vouchers are a “source of income” varies by jurisdiction.⁶¹ Some jurisdictions have taken the position that the voluntary nature of Section 8 preempts states and localities from passing legislation prohibiting source of income discrimination, which they argue “leaves landlords with virtually no choice but to accept a Section 8 tenant.”⁶² But federal regulations expressly authorize states and municipalities to pass comprehensive anti-discrimination laws, including source of income statutes.⁶³

B. *The Origins of Disparate Impact Analysis*

Disparate impact analysis was first used in suits brought under Title VII, such as *Griggs v. Duke Power Co.*⁶⁴ Congress

59. The program provides subsidies for individuals and projects. 42 U.S.C. § 1437f. But only one in four eligible households in need of housing assistance will get a voucher. The program is not one of entitlement, and some are placed on the waitlist for years. *Poverty, Politics, and Profit*, Season 35: Episode 12, FRONTLINE, (aired May 9, 2017) www.pbs.org/wgbh/frontline/film/poverty-politics-and-profit/ [hereinafter *Poverty, Politics, and Profit*]. The Section 8 program also includes a self-sufficiency component which utilizes a formula to calculate rent increases proportional to increases in the family’s income. 42 U.S.C. § 1437u(a). A certain portion of the increased payment is put into an account that earns interest. Families can take the money out when they leave the program or if they experience an emergency. Phone call with Jerry Levy (Mar. 13, 2018).

60. See generally Poverty & Race Research Action Council, *Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program*, APPENDIX B: State, Local, and Federal Laws Barring Source-of-Income Discrimination (Aug. 2017), www.prrac.org/pdf/AppendixB.pdf (compilation of state, local, and federal statutes prohibiting discrimination in the housing market based on source of income).

61. Compare *Montgomery County v. Glenmont Hills Assocs.*, 402 Md. 250 (Md. 2007) (finding that Section 8 vouchers are a source of income), with *Sabi v. Sterling*, 183 Cal. App. 4th 916, 942 (Cal. Dist. Ct. App. 2010) (finding that Section 8 vouchers are not a source of income) and *Inclusive Cmty. Project, Inc. v. Gov. Abbott and the City of Dallas*, 3:17-CV-0440-D (N.D. Tex. 2017) (dismissing without prejudice plaintiff’s action to invalidate a statute precluding Texas cities from prohibiting source of income discrimination in rental housing).

62. Jenna Bernstein, *Note, Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407, 1408 (2010).

63. 24 C.F.R. § 982.53(d) (“Nothing in part 982 is intended to pre-empt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder.”).

64. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

passed Title VII just four years prior to the FHA and prohibited employment discrimination.⁶⁵ Title VII and Title VIII are structurally similar, both containing the “otherwise make unavailable or deny”⁶⁶ provision that was for some time the subject of contention.⁶⁷ The disagreement was over whether a violation could only be sustained by a showing of discriminatory intent, or whether discriminatory effect was sufficient to support a claim under the Act. A violation based upon discriminatory effect is today known as disparate impact; it remains a source of prowess for civil rights attorneys, since discrimination is rarely overt.⁶⁸

The Supreme Court first used disparate impact analysis in the civil rights litigation context in *Griggs v. Duke Power Co.*, a case brought under Title VII.⁶⁹ In *Griggs*, Black employees sued Duke Power, alleging that its employment practices had a disparate impact on Blacks.⁷⁰ Duke required a high school diploma for its higher paying positions as well as an IQ test.⁷¹ The plaintiffs used statistical evidence to demonstrate the disparate impact; in 1960, 34 percent of White males in North Carolina had completed high school while only 12 percent of African American men had done so.⁷² The Court found Duke’s employment requirements impermissible.⁷³ The Court reasoned that although § 703(h) of Title VII permits ability tests “not designed, intended, or used to discriminate because of race,” the requirements employed by Duke were not reasonably related to job performance and did not justify the disparate effect.⁷⁴

C. The Origins and Evolution of Disparate Impact Analysis in Fair Housing

The Supreme Court first considered the FHA in a case under an intentional discrimination theory of liability, as opposed to disparate impact.⁷⁵ In *Trafficante v. Metro Life*, the rental property owners explicitly told non-White applicants that they were not

65. Schneider, *supra* note 1, at 555.

66. Compare 42 U.S.C. § 3601 et seq., with 42 U.S.C. § 2000e et seq. (as cited in *Id.*)

67. Schneider, *supra* note 1.

68. *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (holding that “at least under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent, since “overtly bigoted behavior has become more unfashionable”) [hereinafter *Arlington Heights*].

69. *Griggs*, 401 U.S. at 424 (as cited in Schneider, *supra* note 1, at 5).

70. *Griggs*, 401 U.S. at 427.

71. *Id.*

72. *Griggs*, 401 U.S. at 430 n.6.

73. *Id.* at 436.

74. *Id.*

75. Schneider, *supra* note 1, at 557.

welcome at the complex.⁷⁶ The Court held that White tenants in an apartment building deprived of the benefits of living in an integrated community could sue under the FHA.⁷⁷ In dicta, the Court emphasized that the FHA should be interpreted broadly and expressed concern with “values of integration” not just individual acts of discrimination.⁷⁸ Scholars attribute this reasoning as helping to lay the foundation for disparate impact under the FHA.⁷⁹

The Eighth Circuit first heard a disparate impact case under the FHA in 1974.⁸⁰ In *United States v. City of Black Jack*, plaintiffs challenged the defendant city’s prohibition of the construction of new multifamily dwellings, alleging disparate impact on minorities in violation of the FHA.⁸¹ The City of Black Jack had a population that was at least 98 percent White, while neighboring St. Louis was 40 percent Black.⁸² Plaintiffs alleged that the prohibition on multifamily dwellings in Black Jack effectively precluded Black residents, many of whom were attempting to relocate to Black Jack due to overcrowding in St. Louis.⁸³ The Eighth Circuit found an impermissible racially disparate impact.⁸⁴ It reasoned that the prohibition on multifamily dwellings would perpetuate segregation in Black Jack.⁸⁵

Another significant case in FHA disparate impact jurisprudence is the previously mentioned *Arlington Heights* case.⁸⁶ In *Arlington Heights*, a housing developer sued the Village of Arlington Heights for denying a permit required to build multifamily dwellings on its 15 acres of land.⁸⁷ Ninety of the 290 proposed units would be used to house low-income families.⁸⁸ The Northern District found no disparate impact because the Village was not motivated by “animus,” but instead by maintenance of

76. *Trafficante v. Metro Life*, 409 U.S. 205, 207–209, 212 (1972) (as cited in Schneider, *supra* note 1).

77. Schneider, *supra* note 1; Similarly, the first case to establish that sex-based classifications are subject to intermediate scrutiny was brought in defense of a man. See *Craig v. Boren*, 429 U.S. 190 (1976).

78. Schneider, *supra* note 1, at 557; In fact, perpetuation-of-segregation claims are an additional means by which to challenge a practice under the FHA. Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19(4) J. LEG. AND PUB. POL’Y, 685, 691–92 (2016). But these types of claims are beyond the scope of this Article.

79. Schwemm and Bradford, *supra* note 78, at 691–92.

80. Schneider, *supra* note 1, at 558.

81. *United States v. City of Black Jack*, 508 F.2d 1179, 1181 (8th Cir. 1974) (as cited in Schneider, *supra* note 1).

82. Schneider, *supra* note 1, at 558.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Arlington Heights*, 373 F. Supp. 208 (N.D. 1974), *rev’d* 517 F.2d 409 (7th Cir. 1975), *rev’d* 429 U.S. 252 (1977), *remanded to* 558 F.2d 1283 (7th Cir. 1977).

87. *Arlington Heights*, 429 U.S. at 254.

88. *Id.*

property values.⁸⁹ The Seventh Circuit reversed, finding that an inquiry into intent was unnecessary.⁹⁰ It reasoned that the Village had not made any effort toward integration and that discriminatory effect was sufficient to support a violation under the Fourteenth Amendment, unless the Village could show a compelling interest to justify the denial.⁹¹ The court also found that the protection of property values was not a compelling government interest.⁹²

The Supreme Court disagreed with the Seventh Circuit, however,⁹³ holding that a governmental action could not be found unconstitutional under the Fourteenth Amendment just because it had a “racially disproportionate impact.”⁹⁴ Rather, a showing of racially discriminatory intent was required.⁹⁵ The Seventh Circuit had not yet considered the FHA question, so the Court remanded to permit the Seventh Circuit to determine whether the disparate impact resulting from the rezoning request violated the FHA.⁹⁶

Upon remand, the Seventh Circuit relied upon *Griggs* and held that a finding of intent was not a prerequisite to a finding of discrimination under the FHA.⁹⁷ The court held that “at least under some circumstances a violation of section 3604(a) [of the FHA] can be established by a showing of discriminatory effect without a showing of discriminatory intent.”⁹⁸ However, the court articulated a four-factor balancing test that took discriminatory intent into consideration.⁹⁹ The following four-factors were considered:

1. The strength of the plaintiff’s showing of discriminatory effect;
2. The evidence of discriminatory intent, even if not enough to satisfy the standard of *Washington v. Davis*;¹⁰⁰
3. The defendant’s interest in taking the action complained of; and
4. Whether the plaintiff seeks to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from

89. *Arlington Heights*, 373 F. Supp. at 211.

90. *Arlington Heights*, 517 F.2d at 413, *rev’d* 429 U.S. 252 (1977).

91. *Arlington Heights*, 517 F.2d at 415.

92. *Id.*

93. *Arlington Heights*, 429 U.S. at 270–71.

94. *Id.* at 265–66.

95. *Id.* at 265.

96. *Arlington Heights*, 429 U.S. at 271.

97. *Arlington Heights*, 558 F.2d at 1289.

98. *Id.* at 1290.

99. *Id.*

100. *Washington v. Davis*, 426 U.S. 229 (1976).

interfering with individual property owners who wish to provide such housing.¹⁰¹

Despite a weak showing of the first factor, the court ultimately entered a consent decree, and more than 200 affordable units were constructed in Arlington Heights, Illinois.¹⁰²

Soon after *Black Jack* and *Arlington*, nine other circuits heard disparate impact cases under the FHA, with each circuit finding disparate impact legitimate under the FHA.¹⁰³ However, not all circuits adopted the four-factor balancing test.¹⁰⁴ In fact, the majority used a burden-shifting framework that stemmed from *Griggs* and, at least formally, excluded intent from the analysis.¹⁰⁵

Under the burden-shifting framework, the plaintiff is required to make a *prima facie* showing that the challenged practice results in a disparate impact against a class protected by the FHA.¹⁰⁶ The showing need be more than correlative; it must be “robust.”¹⁰⁷ If the plaintiff meets this threshold burden, the defendant must then demonstrate that “the challenged practices serve legitimate and genuine business goals.”¹⁰⁸ If the defendant can prove the practice justified, the burden shifts back to the plaintiff to show that a viable alternative is available to the defendant that would have less disparate results.¹⁰⁹

101. *Arlington Heights*, 558 F.2d at 1290.

102. Interview with F. Willis Caruso, *supra* note 58.

103. Schneider, *supra* note 1, at 561; Despite the consensus of circuits, scholars of the recent past were concerned about the Supreme Court’s interest in “limiting the use of disparate impact analysis.” Stacy Seicshnaydre, *Is Disparate Impact Having Any Impact?* 63 AM. U. L. REV. 357, 359 (2013) (as cited in Schneider, *supra* note 1, at 543). Yet, the Supreme Court affirmed use of disparate impact analysis in FHA cases. *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015). However, since *Inclusive Communities*, HUD has issued an advance notice of proposed rulemaking (“ANPR”), “invit[ing] public comment on possible amendments to HUD’s 2013 final rule implementing the Fair Housing Act’s disparate impact standard.” 83 C.F.R. § 119 (June 20, 2018).

104. *See, e.g., Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mt. Holly*, 658 F.3d 375 (3d 2011) (applying burden shifting framework); *see also Gallagher v. Magner*, 619 F.3d 823 (8th 2010) (applying burden shifting framework).

105. Schneider, *supra* note 1.

106. *See, e.g., Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989) (finding that a landlord’s rent-to-income ratio had a disparate impact on Blacks by effectively excluding HCV holders, the majority of whom were Black).

107. *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2507.

108. *Bronson*, 724 F. Supp. at 155.

109. *Gallagher*, 619 F.3d 823; This is a departure from *Arlington Heights* in which the majority thought the burden should be on the defendant to show that there is *no* alternative available. *Arlington Heights*, 558 F.2d 1283.

1. *Disparate Impact Challenges to Rent-to-Income Ratio Requirements Under the FHA*

A case from the Southern District of New York is illustrative of the burden-shifting framework in the context of challenging the rent-to-income ratio requirement. In *Bronson v. Crestwood Lake Section 1 Holding, Corp.*, Black plaintiffs brought a class action suit against an apartment complex.¹¹⁰ Although the two plaintiffs agreed to rent payments through direct payment of government benefits or a third-party guarantor, the complex refused to consider “the applications of any person who receive[d] Section 8 housing assistance or whose income [was] not at least three times the rent of the apartment for which that person appl[ied].”¹¹¹

The plaintiff employed testimony by statistical experts to show that the rent-to-income ratio had a disparate impact on people of color.¹¹² But the defendant argued that it was necessary in screening tenants.¹¹³ The defendant also claimed that the Section 8 Housing Voucher Contract was burdensome and provided few protections to the landlord.¹¹⁴ The court found that the defendant did not meet its burden to show a business necessity,¹¹⁵ so did not need to reach the third factor (i.e., the plaintiff’s burden to demonstrate a viable alternative).¹¹⁶ The court noted that the plaintiffs did not need to show discriminatory intent, but that such a showing would “weigh heavily on the plaintiff’s side,”¹¹⁷ and it discerned intent from the defendant’s inconsistent articulation of its application processes and its willingness to rent to White but not Black voucher-holders.¹¹⁸ All of this significantly undermined the defendant’s necessity argument.¹¹⁹ The court ordered the defendants to do the following:

- (1) [E]valuate the named plaintiffs’ applications without regard to whether they are employed and have earned income, to whether they have income in excess of three times the rent, to the amount of their income either absolutely or compared to that of other applicants, or to whether their tenancies require entry into the standard Section 8 lease; and
- (2) [I]mmediately offer plaintiffs occupancy in the two apartments held open pursuant to the temporary restraining order and subsequent ruling by this Court or comparable apartments

110. *Bronson*, 724 F. Supp. at 109.

111. *Id.* at 149.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Bronson*, 724 F. Supp. at 149.

116. *Id.* at 158.

117. *Id.* at 157.

118. *Id.*

119. The Certificate program no longer exists but served as a comparator for the court. Phone call with Jerry Levy, *supra* note 15.

unless defendants can demonstrate legitimate, objective grounds for denying plaintiffs' applications without regard to the factors listed above in paragraph (1) or the relative desirability of other applicants on the waiting list.¹²⁰

Ultimately, the plaintiffs sought voluntary dismissal, since the defendant's treatment of them throughout the litigation made them question whether they wanted to live in the apartments,¹²¹ but another plaintiff's motion to intervene was granted.¹²²

2. HUD's Adoption of the Burden-Shifting Approach

In 2013, HUD issued an opinion supporting the use of the burden-shifting approach over the Seventh Circuit's four-factor test.¹²³ Then in 2015, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, in a close 5-4 decision, the Supreme Court affirmed disparate impact as a cognizable analysis in FHA claims.¹²⁴ This result should have been unsurprising considering that most circuits had for years recognized disparate impact claims in the fair housing context and that the Court itself had used disparate impact in employment discrimination cases decades earlier. But advocates had been extremely careful leading up to the decision. In the four years prior to *Inclusive Communities*, the Court "granted certiorari in two Fair Housing Cases, and each time, under pressure from civil rights leaders who feared that the Supreme Court might narrow current [FHA] jurisprudence, the cases settled just weeks before oral argument."¹²⁵ Settlements after the Supreme Court grants certiorari are extremely rare.¹²⁶

Though *Inclusive Communities* "ensured survival of one of the most important tools we have to combat discrimination in the housing market," it merely upheld the status quo.¹²⁷ Thus, caution

120. *Bronson*, 724 F. Supp. at 159–60.

121. *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 1990 WL 29366 (S.D.N.Y. 1990).

122. *Glover v. Crestwood Lake Section 1 Holding Corp.*, 746 F. Supp. 301 (S.D.N.Y. 1990).

123. *But see* U.S. DEP'T OF HOUS. AND URB. DEV., *supra* note 103 (discussing HUD's recent decision to seek public comment on appropriate changes to the rule).

124. *Texas Dep't of Hous.*, 135 S. Ct. 2507 (2015).

125. *Schneider*, *supra* note 1, at 542.

126. *Id.*

127. Alan Greenblatt, *Will New Housing Rules Really Reduce Racial Segregation?*, GOVERNING (July 16, 2015), www.governing.com/topics/urban/gov-hud-housing-supreme-court-discrimination.html; Some Chicago-based practitioners say that the balancing test used by the Seventh Circuit prior to *Inclusive Communities*, which took intent into account, is more plaintiff-friendly than the burden-shifting approach, since housing discrimination in Chicago tends to be more readily transparent. Interview with Professor Michael P. Seng (Sept. 30, 2017) (Seng served as Executive Director of the John Marshall

is appropriate. Although the Court in *Inclusive Communities* noted that plaintiffs need not show discriminatory intent, such a showing could bolster a disparate impact claim. The Court also cautioned against “racial preference.”¹²⁸

In addition, HUD issued a rule in 2015 requiring jurisdictions accepting federal housing dollars to take affirmative steps to reduce racial disparities; this is known as the duty to “affirmatively further fair housing” (“AFFH”).¹²⁹ Though the AFFH concept has been written into the FHA since 1968, it had never been enforced.¹³⁰ The AFFH duty required jurisdictions receiving HUD block grants to submit Assessment of Fair Housing (“AFH”) reports detailing the causes of racial segregation in their communities and steps that can be taken to rectify it. Unfortunately, HUD suspended the AFH requirement for most local governments in January 2018.¹³¹ After Texas-based NPOs brought suit,¹³² HUD temporarily withdrew the suspension notice.¹³³ However, the court ultimately granted HUD’s motion to dismiss and denied NPO plaintiffs’ request for preliminary injunction, which sought to order “HUD ‘to (1) rescind [the] May 23, 2018 Notices; (2) reinstate the Assessment Tool for Local Governments’; and (3) take all other necessary steps to ensure prompt implement of the AFFH Rule.’”¹³⁴ The court found plaintiffs lack organizational standing.¹³⁵ Further, it found, even if plaintiffs had organization standing, they failed to establish a likelihood of success on the merits.¹³⁶ Plaintiffs’ motion to amend the judgment and for leave to amend the complaint are pending.¹³⁷

Fair Housing Legal Support Center for more than 25 years. He published numerous articles and booklets on segregation and housing discrimination and has litigated civil rights cases in federal court throughout his career. In addition, he drafted fair housing planning guides for various municipalities. In contrast, other practitioners would like to see the intent component of the test used by the Cook County Human Rights Commission nixed. See *infra* notes 207–208 and accompanying text.

128. *Inclusive Cmty.*, 135 S. Ct. at 2524.

129. Greenblatt, *supra* note 127.

130. *Id.*

131. Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 C.F.R. § 4 (Jan. 5, 2018).

132. Nat’l Fair Hous. Alliance, Tex. Low Income Hous. Info. Serv., and Tex. Appleseed v. Ben Carson, Sec. of HUD, and U.S. Dep’t of HUD, 18-CV-01076-BAH (D.C. Dist. 2018).

133. Affirmatively Furthering Fair Housing: Withdrawal of Notice Extending the Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 C.F.R. § 23928 (May 23, 2018).

134. Nat’l Fair Hous. Alliance, Tex. Low Income Hous. Info. Serv., and Tex. Appleseed v. Ben Carson, Sec. of HUD, and U.S. Dep’t of HUD, 18-CV-01076-BAH (D.C. Dist. 2018), Memorandum Opinion (Aug. 17, 2018), www.clearinghouse.net/chDocs/public/FH-DC-0018-0006.pdf.

135. *Id.* at 31.

136. *Id.*

137. Nat’l Fair Hous. Alliance, Tex. Low Income Hous. Info. Serv., and Tex.

D. Other Efforts to Mitigate Housing Discrimination

1. Mitigation Efforts in Illinois: Adoption of IHRA

In 1979, the Illinois legislature approved the Illinois Human Rights Act (“IHRA”), which was closely modeled after the FHA¹³⁸ and enforced by the Illinois Department of Human Rights.¹³⁹ The statute and the Illinois Human Rights Commission (“IHRC”) it created replaced a previous regime of fair housing enforcement that was severely understaffed.¹⁴⁰ At the time of the IHRA’s passage, many other states and municipalities had similar legislation.¹⁴¹ An assistant to Governor Thompson approached Attorney F. Willis Caruso to request that he draft legislation that would provide Illinois with substantial equivalency status.¹⁴² The legislation received bipartisan support and passed both chambers with little debate.¹⁴³ Republicans looked favorably upon the State exerting local control over fair housing enforcement, the Governor wanted to secure HUD funding, and Democrats had no reason to oppose HUD’s recommendations.¹⁴⁴

The IHRA prohibits “unlawful discrimination” in real estate transactions and other areas.¹⁴⁵ Amended in 1988 by a committee of leading fair housing experts, the IHRA reflected changes also made to the FHA in the same year, such as the inclusion of disability and familial status.¹⁴⁶ In addition to including the same classes protected under the FHA, the IHRA covers discrimination because of a person’s marital status, order of protection status, military status, sexual orientation (including “gender-related identity”), pregnancy, or unfavorable discharge from military

Appleseed v. Ben Carson, Sec. of HUD, and U.S. Dep’t of HUD, 18-CV-01076-BAH (D.C. Dist. 2018), Docket www.clearinghouse.net/chDoc/public/FH-DC-0018-9000.pdf.

138. Electronic communication with F. Willis Caruso (February 28, 2018). Compare 775 ILL. COMP. STAT. 5 (2018) with 42 U.S.C. §§ 3601–3619 (2012).

139. 775 ILL. COMP. STAT. 5/1-101 et seq. (2018).

140. Electronic communication with F. Willis Caruso, *supra* note 134.

141. *Id.*

142. *Id.* Since 2002, the Illinois Department of Human Rights has enjoyed substantial equivalency status with HUD through the Fair Housing Assistance Program (“FHAP”), which means that complaints brought to HUD are referred to the Illinois Department of Human Rights for investigation. HUD reimburses state and local agencies deemed to have fair housing legislation substantially equivalent to the FHA. 24 C.F.R. §§ 115.200-.212 (2008) (criteria for determining adequacy of state law); U.S. DEP’T OF HOUS. AND URB. DEV., Fair Housing Assistance Program (FHAP) www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP. (last visited July 13, 2018).

143. Electronic communication with F. Willis Caruso, *supra* note 134.

144. *Id.*

145. 775 ILL. COMP. STAT. 5/1-101 et seq. (2018).

146. Interview with F. Willis Caruso, *supra* note 58.

service.¹⁴⁷ Also like the FHA, the language has been construed to permit suits under a disparate impact theory of liability.¹⁴⁸

Though the Illinois Human Rights Commission (“IHRC”) has yet to see a disparate impact challenge to the rent-to-income ratio requirement, the employment context provides useful disparate impact precedent, in which the same burden-shifting analysis applies.¹⁴⁹ In *Board of Trustees of Southern Illinois University v. Knight*, a Black applicant applying for a position as Police Officer Learner sued the respondent University for denying him the position due to his arrest and conviction record.¹⁵⁰ The court affirmed the IHRC’s finding that the university had discriminated on the basis of race.¹⁵¹ The complainant showed that the employment practice, although facially neutral, had a “significant discriminatory impact” on the minority group to which he belonged.¹⁵² The appellate court noted that Illinois courts have long recognized that arrest-record hiring criteria have an inherently discriminatory impact upon Black job applicants.¹⁵³ The court further emphasized the university had not shown that it had a business necessity,¹⁵⁴ since the applicant’s conviction was for an incident five years prior and the defendant had not shown that the conviction was reasonably related to the plaintiff’s “present ability to perform acceptably on the job.”¹⁵⁵

Damages, attorneys fees, and costs and are all recoverable under the IHRA,¹⁵⁶ but the Commission remains so severely underfunded that procedural concerns are rampant.¹⁵⁷ Some practitioners suggest seeking to revoke the IHRC’s substantial equivalency status, but such efforts are not likely to succeed, since the Commission has such bipartisan support and the state receives HUD funds in exchange for its services.¹⁵⁸ Furthermore, suits to

147. 775 ILL. COMP. STAT. 5/1-102 (2018).

148. In the Matter of Denise Jones and Chicago Board of Education, 1996 WL 208179 (Ill. Hum. Rts. Com. 1996).

149. See, e.g., Matter of: Soldano and Gab Business Services, Inc., 1992 WL 722047 (Ill. Hum. Rts. Com. 1992).

150. See *Board of Trustees of Southern Illinois University v. Knight*, 163 Ill. App. 3d 289, 290 (5th Cir. 1987) (upholding IHRC’s decision finding defendant university had committed a civil rights violation).

151. *Id.* at 300.

152. *Id.* at 294.

153. *Id.* at 295.

154. In the absence of binding Illinois standards on business necessity, the court noted the strictness of the doctrine as construed in federal precedent and that “business necessity is not synonymous with managerial convenience.” *Id.* at 294–95.

155. *Board of Trustees*, 163 Ill. App. 3d at 296.

156. 775 ILL. COMP. STAT. 5/8A-104 (2018).

157. See, e.g., *Lemon v. Tucker*, 695 F. Supp. 963, 968 (N.D. Ill. 1988) (finding no due process violation where plaintiff challenged that the “alternate more informal procedure” instituted by the IHRC due to cost concerns).

158. Interview with F. Willis Caruso, *supra* note 58; IDHR Fair Housing Division Partnership, www2.illinois.gov/dhr/FilingCharge/Pages/FH_

such an effect are difficult, to say the least, in light of *Dandridge v. Williams*.¹⁵⁹

2. *Mitigation Efforts in Cook County: Adoption of CCHRO*

Proposed in 1991, the Cook County City Council proposed the Cook County Human Rights Ordinance (“CCHRO”) with the intention of “assur[ing] full and equal opportunity to all residents of the County to obtain fair and adequate housing for themselves and their families in Cook County without discrimination against them because of their . . . source of income.”¹⁶⁰ The CCHRO applies only in municipalities within Cook County that do not have a comparable fair housing ordinance in place.¹⁶¹ Like under the FHA, “[a] written complaint may be filed by a party alleging that he or she was injured (“complainant”) by a violation of [the] Ordinance, or a complaint may be issued by the Commission.”¹⁶² This means that nonprofit organizations (“NPOs”) can bring suit for CCHRO violations, too.¹⁶³ NPOs can file a complaint alleging that the discriminatory actions of respondent diverted organizational resources away from their missions, for example.¹⁶⁴

When the CCHRO was proposed, the Rules Committee heard

Partners.aspx (last visited July 16, 2018).

159. *Dandridge v. Williams*, 397 U.S. 471 (1970) (state regulation limiting AFDC welfare grants for large families upheld in face of Equal Protection Clause challenge, because it is sufficient that “some aid is provided to all eligible families and eligible children.”); *But see* *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1132 (W.D. Wash. 2013) (funds allocated by city officials to public defender system at such a “paltry level” so as to constitute Sixth Amendment violation).

160. Human Rights and Anti-Discrimination Ordinance: Preamble (proposed Feb. 4, 1991) (codified at CCHRO 93-0-13). In Cook County, 84 percent of voucher-holder heads of households are Black. University of Chicago, *Not Welcome*, *supra* note 15, at xi.

161. Interview with F. Willis Caruso, *supra* note 58; South Holland, Illinois, a town within Cook County, has a fair housing ordinance that was passed in 1995 and prohibits discrimination based upon the following: race, color, religion, sex, physical or mental disability, familial status, marital status, national origin, or age. Ch. 8.5, Article III Fair Housing, Div. II (8.5-51) library.municode.com/il/south_holland/codes/code_of_ordinances?nodeId=CO_CH8.5HO (last visited July 13, 2018). However, South Holland residents experiencing source of income discrimination can bring suit before the CCHRC, as can other residents of Cook County municipalities with less comprehensive ordinances. *Daniels v. Waypoint Homes & Starwood Waypoint Residential Trust*, 2015-H-003 (2015).

162. CCHRO 93-0-13 XB1(a) (1993).

163. *But see*, *Hope Fair Housing v. Market Place Homes*, 2016-H-002 (2016) (finding that the NPO complainant had no organizational standing, since it failed to show that the \$16,260.41 in resources and 63.5 hours of staff time it spent on investigating respondent’s properties caused resources to be diverted from some other use so as to constitute an actual injury to HOPE).

164. *Id.*

testimony from various opponents and proponents.¹⁶⁵ Most expressed opinions on Amendment 1.¹⁶⁶ Landlords, realtors, and mortgagors favored the Amendment¹⁶⁷ while legal aid attorneys and tenants opposed it.¹⁶⁸ The Amendment read as follows:

Notwithstanding anything to the contrary contained in this Ordinance, nothing contained in this Article V shall require any person who does not participate in the federal Section 8 housing assistance program [42 U.S.C. 1437f] to accept any subsidy, payment assistance, voucher, or contribution under or in connection with any such program or to lease or rent to any tenant or prospective tenant who is relying on such a subsidy, payment assistance, contribution, or voucher for payment of part of rent for such place of accommodation.¹⁶⁹

The CCHRO was adopted in 1993 with the Amendment in tow.¹⁷⁰ The position of the Board on this issue lasted for 20 years, but on May 8, 2013, the Cook County Board of Commissioners voted to end the exclusion of HCV holders from the source of income protections in the CCHRO.¹⁷¹ Though rent-to-income ratios are permissible in Cook County, landlords may only apply the ratio requirement to the share of rent the tenant is responsible for.¹⁷² However, the penalty for violating the CCHRO is not to exceed \$500

165. Human Rights and Anti-Discrimination Ordinance: Preamble (proposed Feb. 4, 1991) (codified at CCHRO 93-0-13).

166. *Id.*

167. *See, e.g.*, Testimony of North Shore Board of Realtors President Susan Cooney, Cook County Board of Commissioners Rules Committee Hearing *in re* CCHRO No. 93-O-13 (Mar. 16, 1993) (purporting to support fair housing, while advocating for Amendment 1, citing the “confusion and concern” among private landlords that would result in its absence).

168. *See, e.g.*, Testimony of Stephen Stern Expert of LAF, Cook County Board of Commissioners Rules Committee Hearing *in re* CCHRO No. 93-O-13 (Mar. 16, 1993) (appearing to respond to Susan Cooney’s testimony--defending the ordinance as written, with a definition of source of income inclusive of HCV holders, since the prohibition on discrimination does not impose affirmative duty on landlords to accept HCV holders); Testimony of LaDonna McKinney Section 8 Certificate Holder, Cook County Board of Commissioners Rules Committee Hearing *in re* CCHRO No. 93-O-13 (Mar. 16, 1993) (recalling a six-month housing search, during which she was repeatedly skirted or told that the landlord would not accept her subsidy).

169. Amendment #1, Sponsored by Commissioner Herbert T. Schumann, Jr. (Mar. 16, 1993).

170. Cook County Board of Commissioners: Rules Committee Hearing *in re* CCHRO No. 93-O-13 (Mar. 16, 1993).

171. LAWYERS’ COMMITTEE FOR BETTER HOUSING, *Source of Income Protections Extended Throughout Cook County* (May 14, 2013), www.lcbh.org/news/source-income-protections-extended-throughout-cook-county.

172. Letter from Ranjit Hakim, Executive Director of the Cook County Department of Ethics and Human Rights to the Assistant Director of Government Affairs, ILL. ASSOC. OF REALTORS, (Oct. 23, 2013), www.illinoisrealtors.org/wp-content/uploads/2018/01/HumanRightCommissionletter_10232013.pdf.

per offense and this amount has remained unchanged since 1993.¹⁷³ Furthermore, the likelihood that a complaint will be brought is slim,¹⁷⁴ leaving little incentive for landlord compliance.

The CCHRO prohibits “mak[ing] any distinction, discrimination, or restriction in the price, terms, conditions, or privileges of any real estate transaction, including the decision to engage in . . . any real estate transaction on the basis of unlawful discrimination.”¹⁷⁵ Unlawful discrimination includes discrimination based on source of income.¹⁷⁶

The Commission adopted a hybrid test that modified the burden-shifting framework. To establish a prima facie case of housing discrimination, a plaintiff must show:

1. She is a member of a group protected by the Human Rights Ordinance and respondent had reason to know this;
2. She attempted to and was qualified to rent the property at issue;
3. Respondent denied her the opportunity to rent the property; and
4. Some strongly probative evidence raises the inference that respondent had a discriminatory motive to do so.¹⁷⁷

The fourth element may be satisfied by a showing that after plaintiff was denied the property, it remained available to rent.¹⁷⁸ But a plaintiff can also present other evidence to suggest discriminatory intent such as suspicious timing, derogatory statements about members of the protected class, or generally unfavorable treatment of other potential applicants within the protected class.¹⁷⁹

Complainant can submit direct evidence of discrimination, if available, but may also produce indirect evidence.¹⁸⁰ In *Daniels v. Waypoint Homes & Starwood Waypoint Residential Trust*, complainant alleged that respondent told her its property was unavailable to Section 8 HCV recipients.¹⁸¹ Respondent admitted to this for the first six months of the investigation, but later changed its position.¹⁸² However, the Commission found sufficient evidence of source of income discrimination to merit further proceedings on the charge.¹⁸³

173. Landlords may also be required to pay actual damages though, as reasonably determined by the Commission, for injury or loss suffered. Sec. 42-34 Comm'n on Human Rights (c) Remedies.

174. White, *supra* note 19 and accompanying text.

175. CCHRO 93-0-13, § 42-38(b)(1) (1993).

176. *Id.*

177. *Daniels v. Waypoint Homes & Starwood, Waypoint Residential Trust*, CCHRC No. 2015-H-003, at p. 11.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Daniels*, 2015-H-003, at pg. 11

183. *Id.*

3. Mitigation Efforts in Chicago: Adoption of CFHO

In an effort to mitigate these forms of housing discrimination, the Chicago Commission on Human Relations (“Chicago Commission”) adopted the CFHO in September of 1963.¹⁸⁴ At the time of its adoption, the CFHO prohibited discrimination on the basis of race, color, religion, national origin, or ancestry in the sale, rental, or financing of residential property in the city.¹⁸⁵ The Chicago Realtors Board challenged the constitutionality of the CFHO in 1967, but the Illinois Supreme Court upheld the ordinance.¹⁸⁶ The Chicago Commission has been “consistently interpreting ‘source of income’ to include Section 8 vouchers since 1995.”¹⁸⁷

The contemporary ordinance states the following:¹⁸⁸

Section 5-08-030 of the CFHO provides:

It shall be an unfair housing practice and unlawful for any owner, lessee, sublessee, assignee, managing agent, or other person, firm or corporation having the right to sell, rent, lease or sublease any housing accommodation, within the City of Chicago, or any agent of these, or any real estate broker licensed as such:

A. To make any distinction, discrimination or restriction against any person in the price, terms, conditions or privileges or any kind relating to the sale, rental, lease or occupancy of any real estate used for residential purposes in the City of Chicago or in the furnishing of any facilities or services in connection therewith, predicated upon the race, color, sex, gender identity, age, religion, disability, national origin, ancestry, marital status, parental status, military discharge status or source of income of the prospective or actual buyer or tenant thereof.¹⁸⁹

Chicago tenants commonly cite source of income discrimination as a contemporary barrier to integration.¹⁹⁰ Although, source of income discrimination is expressly prohibited by the CFHO, complainants must still make a disparate impact argument to challenge the rent-to-income ratio requirement, since the policy is neutral on its face.¹⁹¹ The following statistics may be

184. Interview with F. Willis Caruso, *supra* note 58; CFHO 5-8-010 et seq.

185. Chicago Real Estate Bd. v. City of Chicago, 36 Ill. 2d 530 (1967).

186. *Id.*

187. See Godinez v. Sullivan-Lackey, 352 Ill. App. 3d 87, 92 (Ill. App. Ct. 2004) (affirming Chicago Commission’s determination that Housing Choice Vouchers are a protected “source of income” under the CFHO).

188. CFHO 5-8-010.

189. *Id.*

190. Bechteler, *supra* note 4.

191. See *e.g.*, Grays v. Chicago Commission on Human Relations, 2017 IL App (1st) 161808-U, ¶ 4 (2017) (appealing Commission’s finding of no substantial evidence of discrimination in disparate impact challenge to the rent-to-income ratio where Commission raised business necessity defense *sua*

helpful to complainants in meeting the threshold burden in a disparate impact challenge: in Chicago, 87 percent of voucher-holder heads of households are Black, 81 percent of households are headed by women, and 40 percent of households have at least one member with a disability.¹⁹²

Under the CFHO, a complainant challenging rent-to-income ratios under a disparate impact analysis must establish a *prima facie* case of housing discrimination.¹⁹³ To do so, the complainant must show that: (a) She is a member of a protected class; (b) She was qualified to rent the housing in question; (c) The respondent took an adverse action against her; and (d) Others outside of her protected class were treated more favorably.¹⁹⁴ To determine whether the complainant was otherwise qualified for the housing, the Commission typically looks to evidence such as rent burden worksheets and Chicago Housing Authority “Exception Rents” Determinations.¹⁹⁵

A case from the CCHR recently went up on appeal. In *Grays v. Chicago Commission on Human Relations*, the CCHR dismissed complainant’s case, finding that complainant was not qualified to rent the apartment, citing the fact that the property’s utility package exceeded complainant’s income.¹⁹⁶ The CCHR denied complainant’s request for review, finding that it did not commit material error by when it dismissed the complaint because complainant appeared to have insufficient income. The plaintiff filed a petition for certiorari in the circuit court of Cook County.¹⁹⁷ The circuit court affirmed the CCHR’s determination that no substantial evidence of housing discrimination was present.¹⁹⁸ The case was ultimately reversed and remanded by the appellate court, however, because the CCHR raised the business necessity defense on behalf of the respondents *sua sponte*.¹⁹⁹ The court of appeals found that the CCHR erred as a matter of law by “act[ing] as an adversary, rather than an impartial arbiter.”²⁰⁰

Complainants before the CCHR may recover out-of-pocket losses, emotional distress, punitive damages, and injunctive relief, as well as reasonable attorneys’ fees and costs.²⁰¹

sponte).

192. University of Chicago, Not Welcome, *supra* note 15, at xi.

193. Nibbs v. Waterton Assocs. LLC, CCHR No. 14-H-61 (May 11, 2017).

194. *Id.*

195. See e.g., Williams v. Twin Towers, LLC and The Habitat Company, LLC, CCHR 11-H-40 (November 2012).

196. Grays v. 8 East Ninth LLC, CCHR 13-H-01 (December 2013).

197. Grays v. CCHR and 8 East Ninth LLC, 2017 IL App (1st) 161808-U (2017).

198. *Id.*

199. *Id.*

200. *Id.*

201. Brown v. Nguyen and Nguyen, 15-H-07 (June 8, 2017).

III. ANALYSIS: LEGISLATION, LITIGATION AND BEYOND

Although legislation like the CCHRO and CFHO provide additional venues through which litigants can seek redress, access to these venues and landlord compliance remain serious issues. The situation remains dire in the nation's largest metropolitan areas, especially those with large Black populations.²⁰² And because the number of all-White neighborhoods declined since passage of the FHA, housing advocates must argue—against personal neighborhood-level perceptions—that segregation still exists and why it is harmful.²⁰³ Therefore, sustaining a disparate impact challenge is often a difficult task. So difficult, in fact, that some say “[racial residential segregation] is not likely to abate through increased fair housing enforcement actions.”²⁰⁴ Thus, this section of the Comment will focus on steps that can be taken to address segregation, considering a myriad of approaches to encourage litigation and bolster discrimination claims.

A. *Proposals at the Local-Level*

There are a number of steps that can be taken at the local-level independent of—or as a supplement to—litigation and legislation in an attempt to ward off source-of-income housing discrimination, some of which are currently in-use in Chicago. A few examples of worthwhile efforts follow.

1. *Utilize Anti-Retaliation Provision of City of Chicago Residential Landlord and Tenant Ordinance*

The CFHO is lacking in one major area; it does not have an anti-retaliation provision. However, the City of Chicago Residential Landlord and Tenant Ordinance prohibits retaliatory behavior by landlords against tenants exercising “any right or remedy provided by law.”²⁰⁵ Practitioners note the risk of retaliation experienced by tenants exercising their rights. Utilizing anti-retaliation provisions should help to deter such behavior.

2. *Expand Chicago Commission on Human Relations’ Capacity*

202. Nancy A. Denton, *Half Empty or Half Full: Segregation and Segregated Neighborhoods 30 Years After the Fair Housing Act*, 4 CITYSCAPE: J. POL’Y DEV. AND RES. 3, 114–17 (1999), www.huduser.gov/portal/Periodicals/CITYSCPE/VOL4NUM3/denton.pdf.

203. *Id.*

204. See Stacy E. Seicshnaydre, *ARTICLE: The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 974 (2012).

205. Chi. Mun. Code § 5-12-150.

The Chicago Commission on Human Relations enabling ordinance provides that the investigation period shall be 180 days.²⁰⁶ However, this is a mere suggestion. Where impracticable, the enabling ordinance permits the CCHR to take much longer. Of course, the length of time depends on the individual case. But the CCHR is underfunded and understaffed. Such a lengthy period of investigation is likely to deter litigants, since they are not entitled to a hearing without a “substantial finding of discrimination.”

3. *Remove Intent Requirement from CCHRO Test*

The CCHRC should follow the lead of HUD and the Supreme Court and remove the intent requirement from its *prima facie* test.²⁰⁷ Some practitioners think it “unnecessarily inhibits” the filing of complaints.²⁰⁸

4. *Make Use of An Anti-Retaliation Provision of CCHRO*

Fortunately, the CCHRO includes an anti-retaliation provision.²⁰⁹ Practitioners should make use of the provision and consider bringing complaints before the Cook County Commission on Human Rights, especially when the risk of retaliation is present.

5. *Use the Affirmatively Furthering Fair Housing Mandate*

Advocates should construe the AFFH mandate as requiring local jurisdictions to adopt ordinances prohibiting source-of-income discrimination. Local administrative venues are especially important, since many litigants cannot afford to bring suit in federal court. In federal court, filing fees continue to increase while damages and fines imposed on defendants remain relatively stagnant.²¹⁰ In contrast, complaints filed at the local and county-

206. Chi. Mun. Code § 2-120-510(f).

207. Interview with F. Willis Caruso, *supra* note 58; Personal Communication with Patricia Fron, Executive Director of the Chicago Fair Housing Alliance (Mar. 8, 2018). Previously, Patricia Fron worked with the Lawyers' Committee for Better Housing in Chicago. Fron has worked in the housing field for the past eight years. Her areas of expertise include fair housing, policy, and advocacy.

208. Phone call with Patricia Fron, *supra* note 207.

209. CCHRO 93-0-13.

210. Interview with Kelli Dudley, DePaul University College of Law Professor, housing law attorney, and Director of the Resistance Legal Clinic (February 7, 2018). Kelli Dudley was a 2015 recipient of the DePaul University ENGAGE Award. Dudley has practiced law privately for over fifteen years, providing vigorous defenses to foreclosure actions, litigating fair housing matters, filing affirmative lawsuits against lenders, and assisting tenants facing forcible entry and detainer actions. As a result of her advocacy, some foreclosure attorneys obtained a gag order that prevented her from working on a foreclosure case for approximately sixteen months. *Fenton v. Dudley*, 761 F.

levels are typically free of charge.

6. Fair Housing Testing

Fair Housing Testing (“FHT”) is a method that involves “covert investigation” by trained individuals posing as prospective tenants.²¹¹ The Supreme Court upheld the admissibility of this method in *Havens Realty Corporation v. Coleman*.²¹² Most often undertaken by Fair Housing Enforcement Organizations (“FHOs”), the U.S. Department of Justice and state and local government agencies utilize the FHT approach in the investigation of discrimination claims.²¹³

Data similar to that collected through housing testing was used in the aforementioned *Brown v. Tam Khuong An Nguyen and Liz Nguyen*, a case before the Chicago Commission on Human Relations.²¹⁴ Some practitioners argue that use of the results of a fair housing test are the only way to prove discrimination in the courtroom.²¹⁵ However, the findings can also be used to seek solutions outside the courtroom such as those found in demand letters.²¹⁶ The downside to fair housing testing is that it is quite resource intensive.

7. Non-Profit Organizations Should Take Border-Line Cases, Not Just Clear Winners

Non-profit organizations (“NPOs”) are under considerable pressure to demonstrate success to their funders.²¹⁷ Often, this

3d 770 (7th Cir. 2014). Dudley also published a law review article. Kelli Dudley, *The Last Thing We Do, Let's Scare All the Lawyers: How Fair Housing Violators Are Intimidating Fair Housing Advocates Instead of Defending Cases and Why It Is Illegal*, 8 DePaul J. for Soc. Just. 71 (2014) www.via.library.depaul.edu/jsj/vol8/iss1/5. Dudley's article has been cited in an Ohio case and she has received calls and notes about the article from around the country.

211. U.S. DEP'T OF HOUS. AND URB. DEV., *Fair Housing Enforcement Organizations Use Testing to Expose Discrimination*, (Spring/Summer 2014) www.huduser.gov/portal/periodicals/em/spring14/highlight3.html [hereinafter FHOs Use Testing].

212. *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982); Linda Greenhouse, *High Court Upholds the Use of 'Testers' in Inquiries on Housing Bias*, N.Y. TIMES, (Feb. 25, 1982) www.nytimes.com/1982/02/25/us/high-court-upholds-the-use-of-testers-in-inquiries-on-housing-bias.html.

213. FHOs Use Testing, *supra* note 209.

214. CCHR No. 15-H-07, (Comm'n on Hum. Relations 2017).

215. Interview with Chris White, *supra* note 19.

216. *Id.*

217. Interview with F. Willis Caruso, *supra* note 58; For possible implications of this model, see INCITE! WOMEN OF COLOR AGAINST VIOLENCE, *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NONPROFIT INDUSTRIAL COMPLEX* (2007) (critiquing NPO incorporation and its tendency to stifle social change work).

pressure results in a very selective intake process.²¹⁸ Notably, organizations that receive federal Legal Services Corporation (“LSC”) funding are subject to various restrictions.²¹⁹ NPOs therefore tend to accept clients with strong cases. However, the cases with the most potential to produce meaningful change are often the ones that have less certain odds and “push the envelope” in some way.²²⁰ NPOs should seek to diversify their funding so as to experience less pressure from individual funders who may not be keen to support impact litigation efforts.²²¹

8. *Housing Mobility Programs*

Some advocates praise housing mobility programs as having the potential to address segregation.²²² Not only do these programs assist tenants in relocating to “opportunity areas,” they provide counseling to assist clients in obtaining other income sources such as Supplemental Nutrition Assistance Program (“SNAP”) benefits, day care subsidies, medical insurance, and more.²²³ Mobility programs also offer comprehensive services including counseling and housing search assistance.²²⁴ The ability to relocate is especially important, because relocating to an “opportunity area” can help a HCV holder and their family gain access to more opportunities which may help break the cycle of poverty. However, some advocates think the program should be administered by independent NPOs instead of local Public Housing Authorities (“PHAs”), since PHAs are prone to the same bureaucratic inefficiency and protectionism that plague many welfare agencies.²²⁵

Section 8 assures tenants can pay the rent, but many tenants have bad credit. As source of income protections increase, landlords are more likely to rely on other measures such as credit scores to eliminate tenants they see as undesirable.²²⁶ Because most low-income clients have bad credit, credit scores are the next big barrier for Section 8 HCV recipients.²²⁷ But if mobility programs guarantee

218. Interview with F. Willis Caruso, *supra* note 58.

219. LSC Restrictions and Other Funding Sources (June 5, 2017), www.lsc.gov/lsc-restrictions-and-funding-sources; in addition to the restrictions imposed, the future of LSC funding is uncertain. Matt Ford, *What Will Happen to Americans Who Can't Afford an Attorney?*, ATLANTIC (Mar. 19, 2017), www.theatlantic.com/politics/archive/2017/03/legal-services-corporation/520083/.

220. *Id.*

221. *Id.*

222. Phone call with Jerry Levy, *supra* note 15.

223. Phone call with Jerry Levy, *supra* note 59.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* See also Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 SUFFOLK UNIV. L. REV. 935 (2013)

rent, landlords will be unable to argue that business necessity requires them to take into consideration the credit scores of prospective tenants.²²⁸ The mobility program can revoke the rent guarantee at the next lease renewal if the tenant repeatedly defaults or does not have good cause for the default.²²⁹

9. Outreach to Landlords and Tenants

Some landlords inadvertently discriminate due to ignorance of the law,²³⁰ and some tenants experience discrimination but do not identify it as such.²³¹ In both situations, trainings and targeted advertising could help to ensure (a) that landlords know how to comply with fair housing laws and about the benefits of participating in the Section 8 program²³² and (b) that tenants are aware of the insidious forms discrimination can take and the resources available to them in the event that they experience discrimination.²³³

However, trainings are not a perfect solution. If a violator still believes that following the law is too expensive or distasteful, these methods might not induce compliance.²³⁴ Nevertheless, trainings²³⁵ and advertisements can have normative effects.²³⁶

(discussing how “current credit-scoring systems have a disparate impact on people and communities of color”).

228. Phone call with Jerry Levy, *supra* note 59.

229. *Id.*

230. Phone call with Michelle Gilbert (Sept. 28, 2017). Michelle Gilbert is a supervisory attorney in the Housing Practice Group at LAF (formerly, Legal Assistance Foundation) and has been representing low income tenants in housing policy matters for nearly 30 years. Gilbert was lead counsel in *Pickett v. Hous. Auth. of Cook County*, 15-CV-00749, 2017 WL 4281054 (N.D. Ill. Sept. 27, 2017), which was the first decision to establish clearly that Housing Choice Voucher holders whose vouchers have expired have due process rights.

231. Email communication with Jerry Levy, October 25, 2018.

232. Benefits of participating in Section 8 for landlords include guaranteed payment of rent, property tax abatement, and the possibility of double HAP payments. When a tenant is ready to vacate the apartment in order to begin a lease elsewhere, she can leave her current apartment on the 15th of the month, for example, and her current landlord will still receive a full month's worth of rent. Her new landlord will receive a HAP payment for the same time period, though perhaps pro-rated. Phone call with Jerry Levy, *supra* note 59; *Leasing with HCV*, CHICAGO HOUS. AUTH., www.thecha.org/landlords/leasing-with-hcv/ (last visited June 12, 2018).

233. White, *supra* note 19.

234. WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 68 (5th ed. 2014).

235. *Id.*

236. Lawyers' Committee for Better Housing, *No Time for Justice: A Study of Chicago's Eviction Court*, 5 (2003) (explaining that “[a]dvertising in targeted public venues with toll-free numbers and public service web sites has been effective in the public health field and could be effective for tenants' rights.”).

10. Outreach to Attorneys: Expand the Private Bar

Though some mechanisms are in place to assist *pro se* complainants,²³⁷ complainants have better outcomes when they are represented.²³⁸ Attorneys should be educated so that they are aware that they can collect attorney fees for representing clients in housing discrimination cases.

11. Increased Penalties for Violations

Often, landlords are repeat offenders of fair housing law.²³⁹ Because fair housing enforcement organizations (“FHEOs”) frequently notice the same landlords mentioned during client intake interviews, it is not unusual for housing tests to be conducted at the same locations.²⁴⁰ But housing testing and litigation is time consuming and expensive. Ideally, landlords could be deterred from discriminating to begin with. The \$500 per offense fine imposed by the CCHRO has remained unchanged since 1993.²⁴¹ Not enough to deter violations, the fine should be increased substantially and landlords’ rental licenses should be suspended after repeat violations. Such a steep penalty would more effectively deter future violations but may be met by fierce opposition from interest groups.²⁴²

Although attorney’s fees are recoverable under both the CFHO and CCHRO, many complainants are likely to proceed *pro se*,²⁴³ so attorney’s fees alone cannot be expected to serve as a deterrent.

12. Efforts to Lessen Burden on Landlords in Entering HCV Contract

Steps have already been taken to lessen the burden on landlords entering in HCV contracts for the first time. For example, there is a pilot program in Chicago where landlords receive a payment that amounts to a near-month’s-worth of rent; the funds are meant to offset the costs of the vacancy period during which

237. The Cook County Human Rights Commission will help complainants prepare complaints, for example. COOK COUNTY GOV’T, FILE A COMPLAINT FOR UNLAWFUL DISCRIMINATION OR HARASSMENT, www.cookcountyil.gov/service/complaint-filing-and-investigation (last visited June 12, 2018).

238. Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 885 (2016).

239. Email communication with Jerry Levy, October 25, 2018.

240. *Id.*

241. See Comm’n on Human Rights, *supra* note 169 and accompanying text.

242. See, e.g., *infra* notes 165–170 and accompanying text.

243. In fact, 80 percent of low-income clients in Illinois with meritorious cases will not secure legal counsel. Ed Finkel, *Civil Practice: The Pro Se Revolution*, 105 ILL. BAR J. 10, 22 (Oct. 2017).

buildings undergo quality inspection.²⁴⁴ But some practitioners think these kinds of payments are not a good idea, since they attract the wrong kinds of landlords.²⁴⁵ The desirable kinds of landlords are primarily concerned with getting good tenants and getting their rent, not with getting bonus checks.²⁴⁶

Instead, Section 8 HQI inspections should be done immediately. The PHA or mobility program should inspect within 24 hours.²⁴⁷ At that point, landlords can be given a reasonable amount of time to make repairs, so this process should not be burdensome. In contrast and akin to the private market, tenants wait to sign the lease until after requested repairs are made.²⁴⁸

B. *Proposals at the State-Level*

At the state-level, there are a number of measures that can be taken in an attempt to lessen the frequency and impact of source-of-income discrimination such as adopting state-wide source of income protections, extending the search time for voucher holders, and expanding enforcement capacity by fully funding the Illinois Department of Human Rights.

1. *Add Source of Income Protection to IHRA*

This would enable complainants appearing before the IHRC to make disparate impact claims as to source of income *and* race in order to challenge landlords' use of rent-to-income ratio requirements.

2. *Extend Housing Search Time for Voucher Holders*

Some remain on the waitlist for an HCV for years, only to be turned away time and again by landlords after securing the voucher.²⁴⁹ In recognition of these significant barriers voucher-holders face in finding a landlord to accept their vouchers, Chicago-based organizations such as LAF have successfully advocated to lengthen the housing search time for voucher-holders.²⁵⁰ Under federal law, HCV holders only have 60 days to find an apartment before their voucher is given to someone else. In Chicago, the CHA

244. CHICAGO HOUS. AUTH., Proposed FY2018 Moving to Work Annual Plan, p. 9 (2017).

245. Phone call with Jerry Levy, *supra* note 59.

246. *Id.*

247. *Id.*

248. *Id.*

249. Poverty, Politics, and Profit, *supra* note 59; Lolly Bowean, *CHA Voucher Deadline Costs Hundreds a Home: 'In a Blink, All Hope Was Snatched From Me,'* CHICAGO TRIB. (Feb. 25, 2016), www.chicagotribune.com/news/ct-housing-voucher-deadlines-met-20160224-story.html.

250. Phone call with Michelle Gilbert, *supra* note 230.

has extended the deadline to 120 days, but the State of Illinois has yet to take a position on the issue.²⁵¹

3. *Expand Illinois Attorney General's Civil Rights Bureau to Include Housing Division*

Because enforcement of anti-discrimination laws by HUD is notoriously weak,²⁵² advocates in Illinois should argue for expansion of the Attorney General's Civil Rights Bureau to include a Housing Division in order to encourage prosecution of offending landlords.²⁵³ Furthermore, the Bureau's expansion should include the establishment of local offices located in counties throughout the state.²⁵⁴

4. *Advocate for more funding for IHRC*

Like at the city- and county-levels, the insufficiently-funded and poorly-staffed IHRC is inundated with complaints. The complaint process is inefficient and potential complainants may shy away from initiating proceedings, since they are not likely to see any relief granted for quite some time. Expanding the IHRC's capacity would make the complaint process less intimidating and more appealing for potential complainants.²⁵⁵

5. *Illinois Should Challenge the Zoning Laws of Municipalities*

Ideally, these changes will lead to increased racial integration of communities and the filling of vacant units.²⁵⁶ Ultimately, municipalities will run out of multifamily dwellings. The Illinois Attorney General should challenge zoning laws of municipalities that prohibit the construction of multifamily dwellings.²⁵⁷

251. Poverty, Politics, and Profit, *supra* note 59. See 24 C.F.R. § 982.303 (discussing federal voucher terms including extension policy).

252. Some practitioners say that HUD only acts when forced to by consent decrees, and sometimes even consent decrees are not successful in compelling HUD to enforce. *Anatomy of the Demise of a Civil Rights Consent Decree*, ANTI-DISCRIMINATION CTR., (May 6, 2014) www.antibiaslaw.com/sites/default/files/Cheating_On_Every_Level.pdf; see also, U.S. ex rel. Anti-Discrimination Center for Metro New York v. Westchester County, N.Y., 668 F. Supp. 2d 548 (S.D. N.Y. 2009). Furthermore, they say, HUD caused the discrimination, so HUD is not likely to remedy it. Phone call with Jerry Levy, *supra* note 59.

253. ILL. ATT'Y GEN., DEFENDING YOUR RIGHTS: CIVIL RIGHTS, www.illinoisattorneygeneral.gov/rights/index.html (last visited June 12, 2018).

254. Phone call with Jerry Levy, *supra* note 59.

255. Interview with F. Willis Caruso, *supra* note 58.

256. Phone call with Jerry Levy, *supra* note 59.

257. Recall, municipalities can contribute significantly to the perpetuation of segregation. See, e.g., U.S. ex rel. Anti-Discrimination Center for Metro New York v. Westchester County, N.Y., 668 F. Supp. 2d 548 (S.D. N.Y. 2009) (finding that Westchester County made false claims to the United States government

C. Proposals at the Federal-Level

At the federal-level, steps can be taken to encourage landlord participation in the Section 8 program and advocate utilization of the FHA. A few worthwhile efforts include utilizing the anti-retaliation provision of the FHA and expanding the Family Self-Sufficiency Program.

1. Increased Utilization of Anti-Retaliation Provisions of FHA

Fair housing advocates and testers are often the targets of retaliation.²⁵⁸ Practitioners note that complaints to HUD based on retaliation are on the rise.²⁵⁹ In 2010, 719 complaints of retaliation were filed with HUD, and in 2013 there were 840.²⁶⁰ Yet, the provision is underutilized.²⁶¹

The possibility of retaliation and threats should not be taken lightly. In *Metropolitan Housing Development Corp v. Village of Arlington Heights*, a high-profile case, the attorney of record and his family were threatened by the Ku Klux Klan.²⁶² A Klan member wire tapped his phone and followed his child to school.²⁶³ Unfortunately, incidents such as these were not rare.²⁶⁴ Such threats occurred several times throughout his career when he took on high profile cases.²⁶⁵

Anti-retaliation suits are often successful.²⁶⁶ Thus, advocates should make better use of the protection so that the legal community is not deterred from bringing suits against violators.

2. Expand Self-Sufficiency Program

The Family Self-Sufficiency (“FSS”) Program “enables HUD-

that it was affirmatively furthering fair housing in violation of the False Claims Act).

258. Kelli Dudley, *The Last Thing We Do, Let's Scare All the Lawyers: How Fair Housing Violators Are Intimidating Fair Housing Advocates Instead of Defending Cases and Why It Is Illegal*, 8 DEPAUL J. FOR SOC. JUST. 71 (2016). Unfortunately, more civil rights attorneys are held in contempt of court than those from any other practice area. Interview with F. Willis Caruso, *supra* note 58.

259. Dudley, *supra* note 256, at 72.

260. *Id.* at 78.

261. *Id.* at 87.

262. Interview with F. Willis Caruso, *supra* note 58. Advocates can also bring suit under 42 U.S.C. § 1985 for conspiracy to interfere with civil rights.

263. *Id.*

264. *Id.*

265. Advocates can also bring suit under 42 U.S.C. § 1985 for conspiracy to interfere with civil rights. *Id.*

266. Dudley, *supra* note 258, at 87.

assisted families to increase their earned income,²⁶⁷ an important aspect of the Section 8.²⁶⁸ Expanding FSS benefits to all Section 8 recipients would further undermine landlords' business necessity argument, because the program provides protections to tenants experiencing family emergencies.²⁶⁹

3. *Maintain Viable Rent Exceptions*

Initially calculated by metropolitan areas,²⁷⁰ Fair Market Rents ("FMRs") determine payment standard amounts for HCVs.²⁷¹ Often difficult to obtain, underutilized rent exceptions proved FMRs inaccurate, because FMRs covered such large geographic areas.²⁷² HUD recently passed a modification so that FMRs are now based on ZIP codes.²⁷³ But ZIP codes can span several neighborhoods that have disparate costs of living.²⁷⁴ Accuracy could be further improved by calculating rent exceptions at the neighborhood-level, allowing HCV recipients to receive more accurate rent exceptions for areas they wish to move to.²⁷⁵

4. *Reinstate HUD Requirement that Local Governments Submit Assessment of Fair Housing Reports*

HUD recently suspended the requirement that local governments submit Assessment of Fair Housing ("ASF") reports.²⁷⁶ These reporting requirements encouraged cities to take proactive

267. U.S. DEP'T OF HOUS. AND URB. DEV., FAMILY SELF-SUFFICIENCY (FSS) PROGRAM, www.hud.gov/program_offices/public_indian_housing/programs/hcv/fss [hereinafter FSS Program] (last visited June 12, 2018).

268. Phone call with Jerry Levy, *supra* note 59; *Evaluation of the Compass Family Self-Sufficiency (FSS) Programs Administered in Partnership with Public Housing Agencies in Lynn and Cambridge, Massachusetts* ABT ASSOC. (Sept. 13, 2017) www.abtassociates.com/compassFSS (finding rental assistance alone for HCV holders does not promote earnings and employment, but participation in the FSS program was associated with significant gains in annual household earnings). According to HUD, the FSS program "reduce[s] [families'] dependency on welfare assistance and rental subsidies." FSS Program, *supra* note 256. Thus, the FSS program should be attractive to both sides of the isle.

269. Phone call with Jerry Levy, *supra* note 59.

270. *Id.*

271. U.S. DEP'T HOUS. & URB.DEV., OFF. OF POL'Y DEV. AND RES., FAIR MARKET RENTS, www.huduser.gov/portal/datasets/fmr.html (last visited June 12, 2018).

272. Phone call with Jerry Levy, *supra* note 59.

273. U.S. DEP'T HOUS. & URB.DEV., OFF. OF POL'Y DEV. AND RES., SMALL AREA FAIR MARKET RENTS www.huduser.gov/portal/datasets/fmr/smallarea/index.html (last visited July 30, 2018).

274. Phone call with Jerry Levy, *supra* note 59.

275. *Id.*

276. *HUD Suspends Assessment of Fair Housing Submissions until after October, 2020*, NAT'L LOW INCOME HOUS. COALITION, (Jan. 8, 2018), www.nlihc.org/article/hud-suspends-assessment-fair-housing-submissions-until-after-october-2020.

steps to promote fair housing, but advocates worry that these efforts will “grind to a halt” in the wake of the rule suspension.²⁷⁷

IV. IMPACT

At the local-level, I suggest utilizing anti-retaliation provisions designed to encourage more frequent reporting of discriminatory behavior of landlords. Next, I suggest increasing landlord participation in the Section 8 HCV program. Also, I propose expanding the number and capacity of venues available to those experiencing discrimination. Finally, I suggest strengthening discrimination suits through the use of fair housing testing and by preempting the business necessity argument of landlords.

I suggest that changes made at the state-level should be aimed at increasing fair housing enforcement by expanding the Illinois Human Rights Commission. Measures like adding a Civil Rights Bureau to the Office of the Illinois Attorney General would greatly improve the efficiency and scope of enforcement. Meanwhile, expanding housing search times and challenging zoning laws of municipalities would assist HCV holders in finding housing. Also, by recognizing the barriers faced in the housing search and by increasing the multifamily housing stock available to HCV holders, agents would be better able to assist those in need.

Finally, at the federal-level, I suggest that agencies discourage retaliatory behavior of landlords and increase landlord participation in the HCV program through expansion of the FSS Program. Expanding the FSS Program would also serve to undermine landlords’ business necessity argument. Moreover, maintaining viable rent exceptions would aid in increasing HCV holders’ mobility while reinstating the HUD requirement that local governments submit ASF reports may encourage municipalities to reconsider zoning laws and take other proactive steps. If the above proposals are adopted and successfully reduce residential racial segregation in Illinois, the State is likely to see decreased racial disparity in educational attainment and achievement and employment and earnings.²⁷⁸ Decreased prejudice is likely to result as well, since interracial contact is shown to lessen tensions.²⁷⁹

277. Kriston Capps, *The Trump Administration Just Derailed a Key Obama Era Rule on Housing Segregation*, CITYLAB (Jan. 4, 2018), www.citylab.com/equity/2018/01/the-trump-administration-derailed-a-key-obama-rule-on-housing-segregation/549746/.

278. YINGER, *supra* note 7, at 137. See also Brittaney Jewel Bethea, *Effects of segregation negatively impact health* (Nov. 6, 2013), www.source.wustl.edu/2013/11/effects-of-segregation-negatively-impact-health/; Phil Tegeler and Michael Hilton, *Disrupting the Reciprocal Relationship Between Housing and School Segregation*, JOINT CTR. FOR HOUS. STUD. OF HARVARD U. (2017), www.jchs.harvard.edu/sites/default/files/a_shared_future_disrupting_reciprocal_relationship.pdf

279. *Id.*

Finally, reduced segregation will result in improved health outcomes and a reduction in criminal victimization and criminal activity.²⁸⁰

School segregation is closely linked to racial residential segregation, since children must typically attend a school within their district.²⁸¹ So the resilience of housing segregation has meant that, although *Brown v. Board of Education* was decided more than 50 years ago, public schools for minorities are still “separate and unequal.”²⁸² and schools with 90 percent minority students are comprised primarily of students from low-income families.²⁸³ Impoverished students and their families have fewer resources and experience stress not felt by their wealthier counterparts.²⁸⁴ Thus, schools with higher concentrations of low-income students expend time and resources addressing these issues, often to the detriment of educational services.²⁸⁵ Though the gap in educational attainment between Whites and Blacks has closed steadily over time, a significant gap remains.²⁸⁶ Racial and ethnic disparities in achievement also persist; in 1990, Black scored 10.1 percent lower than Whites in reading, 6.8 percent lower in math, and 15.9 percent lower in science.²⁸⁷

The type of interracial contact among children to result from reduced school segregation is likely to lead to reduced prejudice among Whites.²⁸⁸ In a fourteen-year period during which desegregation orders were implemented in the South, the share of southern Whites who said they would not “have any objection to sending [their] children to a school where half of the children are black” rose from 20 to 66 percent.²⁸⁹

Integrated schools and the reduced educational disparities likely to result will also help to close racial gaps in employment and earnings, since those with a high school diploma experience joblessness at a lower rate.²⁹⁰ An increase in per capita income for members of minority groups is also likely to result, since per capita income disparities between Black and Whites are largely accounted

280. *Id.*

281. YINGER, *supra* note 7, at 142.

282. *Id.* at 138.

283. And more than 50 percent of Black students attend schools that are at least 90 percent minority in Illinois. *Id.* at 139–140.

284. YINGER, *supra* note 7, at 140.

285. *Id.* at 140–41.

286. See Emanuella Grinburg, *The Hidden Costs of Segregation*, CNN (Mar. 29, 2017), www.cnn.com/2017/03/28/us/urban-institute-cost-of-segregation-study/index.html (detailing a study showing “less segregated *regions* had higher average incomes and educational attainment”) (emphasis added).

287. YINGER, *supra* note 7, at 137–38.

288. I do not mean to imply that segregation should be reduced as a benefit to White folks. In the long history of the civil rights movements, “integration has been a tactic, not a goal.” Lawson, *supra* note 20.

289. YINGER, *supra* note 7, at 145–46.

290. YINGER, *supra* note 7, at 146–54.

for by differences in years of schooling, test score achievement, and work experiences.²⁹¹

The persistence of residential racial segregation through the years has also meant a persistence in disparate health outcomes.²⁹² Neighborhood segregation is linked to poor health outcomes generally, and segregated neighborhoods are more likely to experience hospital closures.²⁹³ Furthermore, segregated communities are disproportionately affected by violent crime.²⁹⁴

Thus, a reduction in segregation will lead to improved communities, enhanced quality of life for residents, and more expeditious spending of tax dollars, since societal harms will be reduced.

V. CONCLUSION

Ta-Nehisi Coates said of segregation in Chicago, “If you sought to advantage one group of Americans and disadvantage another, you could scarcely choose a more graceful method than housing discrimination.”²⁹⁵ Although laws protect against these forms of discrimination, they are rarely well-enforced, due in large-part to a lack of political will. But as Chief Justice Warren said, “[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be.”²⁹⁶ It is crucial that elected officials and adjudicative bodies take steps to remedy housing segregation, regardless of their constituency's prejudice.

291. *Id.* at 146–47.

292. Dolores Acevedo-Garcia et al., *Future Directions in Residential Segregation and Health Research: A Multilevel Approach*, 92 AM. J. PUB. HEALTH 2, 215–221 (2003).

293. Newkirk II, *supra* note 26.

294. U.S. DEP'T HOUS. & URB.DEV., OFF. OF POL'Y DEV. AND RES., NEIGHBORHOODS AND VIOLENT CRIME (Summer 2016), www.huduser.gov/portal/periodicals/em/summer16/highlight2.html.

295. Cited in Whet Moser, *Housing Discrimination in America Was Perfected in Chicago*, CHICAGO MAG, (May 5, 2014) www.chicagogmag.com/city-life/May-2014/The-Long-Shadow-of-Housing-Discrimination-in-Chicago/.

296. See *Lucas v. Forty-Fourth General Assembly of State of Colo.*, 377 U.S. 713, 736-37 (1964) (invalidating state legislative apportionment plan under the Equal Protection Clause).